

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

In the Matter of)	
)	
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
)	

**COMMENTS OF AT&T SERVICES, INC.,
ON NOTICE OF PROPOSED RULEMAKING**

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EXECUTIVE SUMMARY

The Commission should not adopt the proposals set out in its Notice of Proposed Rulemaking.¹ Those proposals would disrupt the ongoing TDM-to-IP transition by imposing unnecessary and unworkable obligations on carriers, requiring voluminous new regulatory filings, increasing costs, and decreasing incentives for investment and innovation. And they would do so without providing any corresponding benefit to the public. Moreover, many of the Commission's proposals are at odds with the governing statutes and the Commission's longstanding interpretation and application of those laws. Those proposals are bad law and bad policy. The Commission should reject them.

Backup Power Proposal. Consumers are well accustomed to self-provisioning CPE backup power, including for voice services that are not line-powered. Relying on customers to monitor their backup power supplies (with proper instructions from the service provider) is the most sensible approach in light of the technological and marketplace realities. Therefore, the Commission should reject the proposal to impose standardized backup-power rules that would obligate carriers to monitor and ensure a specific backup power supply for CPE. Instead, the Commission should focus its efforts on promoting consumer education and on working with IP-based service providers to develop industry best practices. The Commission also should refine its proposed definition of "fixed wireless service" and should define "minimally essential communications" to include voice calls, but should not limit that term to 911 calls.

Network Modification Proposal. The record does not support the Commission's proposal to impose new obligations on ILECs retiring copper. The current rules are working. Those rules already address several of the Commission's cited concerns, such as the retirement

¹ Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, Notice No. FCC 14-185 (rel. Nov. 25, 2014) ("Notice").

of copper feeder and the maintenance of copper loops provided to CLECs as UNEs.

Additionally, there is no merit to some competitors' suggestions of inappropriate behavior on the part of ILECs. The Commission's proposals would create extensive and onerous requirements on ILECs for which there is no need or justification. The Commission's proposed rule regarding retail-level notifications, meanwhile, suffers from two serious flaws: the Commission has no legal authority to adopt it, and the rule is indecipherably ambiguous and fails to convey to carriers how they are supposed to comply with it. The Commission should promote market-based solutions, such as sales of retired copper facilities to CLECs, rather than adopting unnecessary and unlawful regulations.

Adequate Substitute Proposal. The Commission should not, as it proposes, adopt a detailed multi-factor test for when "adequate substitutes" exist for services that carriers propose to discontinue. Such a test would improperly tip the balance of the § 214 inquiry and would create enormous work for both carriers and the Commission. Moreover, it would be unlawful. The Commission has no authority under § 214 to regulate technical details of services, let alone the compatibility of those services with particular products supplied by third parties. The Commission also should not use § 214 to address issues (like 911 service and disabled access) that are properly dealt with on an industry-wide basis through uniform standards.

Wholesale "Rebuttal Presumption" Proposal. The Commission should not adopt a rebuttable presumption that every discontinuance of a service to wholesale customers necessarily results in a discontinuance or impairment of service to end-user customers. There is no basis for presuming this to be true; all evidence suggests that it rarely will. And the Commission's longstanding precedent (affirmed by the federal courts) makes clear that § 214 is meant to protect end-users, not to regulate the rates and terms of intercarrier service arrangements. In

effect, the Commission proposes to rewrite the statute to cover not only discontinuance of service to “a community or part of a community” but also to “a wholesale carrier customer.” The Commission has no authority to do so. And, even if it did, the proposed rebuttal presumption would drown the Commission in a flood of unnecessary § 214 applications and would hopelessly slow the TDM-to-IP transition.

Wholesale “Equivalent Access” Proposal. Finally, the Commission has neither authority nor reason to adopt its proposed presumption to condition § 214 approval on ILECs’ commitment to provide “equivalent access” to wholesale customers when discontinuing legacy services in favor of next-generation services. Again, § 214 is not designed to protect carriers but to protect the public. Nor is it a tool for regulating the rates and terms of carrier-to-carrier services. The Communications Act addresses carrier-to-carrier obligations in other provisions; the Commission should address wholesale access issues under those provisions if it does so at all. Finally, the Commission’s proposal reflects a fundamentally flawed view of the technology transition and the nature of innovation and competition. Using *any* statute to subject this transition to conditions meant to protect select competitors from the consequences of actual competition would set the wrong policy for the interests of the public.

INTRODUCTION

It is beyond question that the ongoing transformation of the nation’s communications networks from outdated legacy facilities to next-generation technologies and services is vitally important and promises to deliver significant benefits to consumers and the American public. As the Commission recognized in the *National Broadband Plan*, the transition from a circuit-switched network to an IP-based platform over which voice, data, and video services

converge “creates extraordinary opportunities to improve American life and benefit consumers.”² Last year, the Commission remarked that the transformation is “already underway,” has “brought new and improved communications services to the marketplace,” and will “dramatically reduce network costs, allowing providers to serve customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices.”³

Recognizing these benefits, the Commission has repeatedly committed to facilitating the IP transition.⁴ The Commission’s Technology Advisory Council has recommended that the TDM-based PSTN be retired by 2018.⁵ In the last decade, the Commission has rightly adopted a pro-competitive, market-based approach that is consistent with that goal and with the stated intent to facilitate the TDM-to-IP transition and bring about the resulting consumer benefits.⁶ And this approach is working. As discussed in these Comments,⁷ carriers have invested substantial resources in deploying next-generation facilities, upgrading the quality of their service offerings, and introducing innovative new features and functions to consumers. Consumers have responded by overwhelmingly adopting these new technologies. Retail POTS subscriptions have declined dramatically as customers abandon legacy voice services in favor of

² FCC, *Connecting America: The National Broadband Plan* at 49 (2010).

³ Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, *Technology Transitions et al.*, 29 FCC Rcd 1433, ¶ 2 (2014) (“Technology Trials Order”).

⁴ See, e.g., Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶¶ 783, 1335 (2011); Notice of Proposed Rulemaking, Order and Notice of Inquiry, *Numbering Policies for Modern Communications et al.*, Notice No. FCC 13-51, ¶ 54 (rel. Apr. 18, 2013).

⁵ See Technology Advisory Council, *Status of Recommendations*, at 11, 15-16 (June 29, 2011), available at <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

⁶ See *infra* pp. 23-24.

⁷ See *infra* pp. 25-26.

new and better alternatives such as interconnected VoIP and wireless.⁸ In short, the IP transition is running smoothly.

In its recent Notice of Proposed Rulemaking,⁹ however, the Commission proposes to erect significant new obstacles that threaten to stop this innovative train in its tracks. The proposals outlined in the Notice would impose burdensome notice and filing requirements on carriers, increasing the cost and decreasing the pace of the IP transition. They would insert the Commission into the smallest technical details of next-generation products and services, rather than allowing consumer choice and industry innovation to drive those decisions. And they would unlawfully and unwisely alter the Commission's regulatory regime to benefit not *competition* but rather select *competitors* – competitors who are not keeping up.

Many of the Commission's proposals are motivated by the laudable goal of protecting consumers. But the Commission cannot meet that goal if it ignores the evidence of actual consumer behavior and preferences. Several proposals set out in the Notice suffer from this flaw. For example, the Commission proposes to adopt standards requiring providers to guarantee a certain amount of battery life for services that lack the line power provided by traditional POTS over copper. But millions of consumers have already adopted alternative voice services that lack this guarantee, and the Commission cites no evidence suggesting that these consumers have been unable to arrange for their own backup power – just as consumers are accustomed to doing for numerous household devices, from computers to cordless or mobile phones. Similarly, the Commission proposes to impose new retail-level notification requirements on ILECs retiring copper from their networks, ostensibly out of concerns about customers being confused about their options or encountering pressure from carriers to switch

⁸ See *infra* pp. 11-12.

⁹ Notice ¶¶ 36-37.

services. But there is no record evidence to support those concerns. And the Commission's proposed solution is more likely to introduce the kind of consumer confusion it is intended to avoid. Where there is no need for regulation to protect consumers, the Commission should refrain from imposing it. In other cases – such as preserving 911 reliability or ensuring accessibility for disabled consumers – the Commission should exercise its authority as it has always done: through direct, neutral, and generally applicable rules and standards. The Commission should not, as it proposes to do, impose such important requirements through the piecemeal and uneven application of § 214 certifications.

The Commission likewise should not (and cannot) use § 214 as a means to protect select carriers who would prefer to maintain the entitlements they have enjoyed with respect to the legacy network even as the justification for those entitlements disappears along with that network. Section 214 is not designed to protect carriers. It is designed to ensure the continued availability of telecommunications services to the using public. Section 214 certainly cannot be used to do indirectly what the Commission cannot do directly. If the Commission wants to give competitive carriers access to incumbents' networks on particular terms, it can use the authority Congress has given it to accomplish that goal – or it cannot do so at all.

Innovation means change. The transition that is underway will change the services that end-user customers have previously used, and those changes will not be universally popular. It will also change the way that carriers must act in order to compete, and carriers who fail to keep up with the changing marketplace will not thrive. But those changes are part of a larger transition that will bring enormous benefits to the American public. As the Commission has noted, “[t]he lives of millions of Americans could be improved by the direct and spillover effects

of the technology transitions, including innovations that cannot even be imagined today.”¹⁰

Those currently unimaginable innovations can become a reality. But they will not happen anytime soon if they are obstructed by the kind of backward-looking proposals described in the Notice. AT&T urges the Commission not to adopt those proposals.

I. The Commission Should Not Adopt CPE Backup Power Requirements that Will Be Unworkable for Carriers and Provide Little Benefit to Consumers

A. Backup Power Methods

The Commission seeks comment on the state of the market for consumer self-provisioned CPE backup power – what solutions are currently available, whether such solutions are deployed at reasonable costs, and how providers are currently supporting CPE backup power across different services and technology platforms.¹¹ In today’s marketplace, consumers are accustomed to obtaining and maintaining self-provisioned CPE backup power. In most homes, multiple consumer devices rely on some form of backup power – devices such as alarm clocks, burglar and fire alarms, medical alert systems, desktop and laptop computers, tablets, cordless phones, wireless handsets, and radios. Each of these devices has its own specific power needs and limitations and, as a result, there are many different methods of addressing backup power.¹²

A survey of IP-based voice services indicates that communications providers do not commonly include backup power as part of the purchase price of the voice service’s CPE (such as modems or residential gateways (“RGs”)). Some providers, but not all, make some level of

¹⁰ Technology Trials Order ¶ 2.

¹¹ Notice ¶¶ 36-37.

¹² For example, a ceiling-mounted fire alarm detector may use a primary, non-rechargeable battery (typically nine volt) for backup power; a burglar-alarm system may rely on a secondary, rechargeable lead-acid battery; and a cordless phone might use an internal secondary rechargeable lithium-ion battery. See “List of battery types,” Wikipedia, *available at* http://en.wikipedia.org/wiki/List_of_battery_types (last accessed Feb. 3, 2015).

backup power available for purchase.¹³ Prices for new and replacement backup-power batteries can range from around \$15 to around \$60 or more, depending on the manufacturer, model, features, and anticipated talk and standby times.¹⁴

For example, AT&T's U-verse[®] Voice, an IP-based voice service, requires commercial power in the home to operate. When the U-verse service is provisioned using an RG, customers can plug in a small desktop backup-power device that supplies four hours of talk time.¹⁵ U-verse Voice customers must monitor and maintain the backup power supply, including replacing

¹³ Charter Communications' Spectrum Voice: an optional backup battery at an additional cost, *available at* <https://www.charter.com/browse/phone-service/phone#Family-Safety-Features> (last accessed Feb. 3, 2015); Comcast XFINITY Voice: backup batteries for modem are available for purchase, *available at* <http://customer.comcast.com/help-and-support/phone/troubleshooting-battery-issues-with-digital-voice>; Cox Digital Telephone (Premier): backup battery available for purchase, *available at* http://www.cox.com/residential/support/phone/article.cox?articleId=bafbc350-2a0d-11e3-6735-000000000000&sc_id=cr_dm_z_z_battery_vanity (last accessed Feb. 3, 2015); Cablevision Optimum Voice: backup battery available for purchase, *available at* <http://www.optimum.com/home-phone-service/customize/battery-backup.jsp>; Time Warner Cable Home Phone Unlimited Nationwide: does not include backup power, *available at* <http://www.timewarnercable.com/en/support/phone/topics/phone-power-backup.html> (last accessed Feb. 3, 2015); Verizon FiOS Digital Voice (Freedom Phone Plan): the backup battery was included in the price of the initial equipment, but we understand that Verizon may be moving or may have already moved to making the backup battery a separate charge, *see* Consumer Reports, *Verizon To Eliminate Free Backup Batteries for New Residential Phone Customers* (Dec. 12, 2013), *available at* <http://www.consumerreports.org/cro/news/2013/12/verizon-to-eliminate-free-backup-batteries-for-new-residential-phone-customers/index.htm> (last accessed Feb. 3, 2015). The reported charge for the battery was \$29.99.

¹⁴ A battery manufactured by PORTALAC Model PX12072 retails around \$15. The ARRIS Touchstone TM4, TM5, or TM10 can retail from between around \$35 to \$60. The Belkin REV B can retail for \$40, plus shipping. On Amazon.com, a 12-pack of D-cell batteries can run between \$10 and \$16, depending on the brand and type of battery, but would not include the cost of the D-cell cabinet and mechanism needed to plug those batteries into the CPE. *See, e.g.,* Verizon's "PowerReserve Tray," *available at* http://www.verizon.com/support/residential/internet/fiosinternet/troubleshooting/connection+issues/questionsone/128014.htm?CMP=DMC-CVZ_ZZ_ZZ_Z_ZZ_N_Z125# (last accessed Feb. 3, 2015).

¹⁵ *See* <http://www.belkin.com/us/gatewaybattery/> (last accessed Feb. 3, 2015). The capacity of any battery is affected by multiple factors, including battery age, usage patterns, and environmental conditions. Batteries will degrade slowly over time; therefore, even when a battery is designed to provide eight hours of standby time, the battery will not maintain that standard as it ages and will provide less and less standby time over the span of its projected lifetime.

power-supply units, which are commercially available for purchase through links to retail outlets provided on AT&T's U-verse web site.¹⁶

Today, IP-based voice service providers generally do not assume responsibility for monitoring their customers' backup batteries. Rather, providers rely on their customers to monitor the backup battery by educating customers on the necessity of a backup battery during a power outage and providing important information about the backup battery, including how to prolong battery life during power outages, how to determine when a battery needs replacing, how to physically replace the battery, and where to obtain replacements.¹⁷

Relying on customers, rather than service providers, to monitor and maintain battery backup power for CPE makes eminent sense given technological and marketplace changes. As the Commission knows, traditional POTS services relied on central office power to back up CPE and maintain service continuity during commercial power outages. That made sense when the service itself depended on line power to provide a transmission path for voice communications, and CPE to create a closed circuit for that path. Providers thus were in the best position to monitor power, and maintain service continuity through backup-power systems located at a central location, typically an end office, such as diesel-powered generators, battery arrays, or both. Over the past decade, however, consumers have migrated in huge numbers to communications services and technologies that do not rely on line power to provide the service itself (e.g., CMRS and VoIP services provided over fiber-based technologies). Indeed, fewer than 20 percent of households still rely on POTS for voice services, the rest have voted with their feet to switch to services that rely on commercial electricity to power CPE. Given these

¹⁶ See "U-verse Voice service during a power outage," *available at* <https://www.att.com/esupport/article.jsp?sid=KB408090> (last accessed Feb. 3, 2015).

¹⁷ See *id.*

technology and marketplace changes, consumers now are in the best position to monitor and maintain backup power for their CPE, and thus ensure continuity of service during commercial power outages.

Requiring service providers to monitor and maintain backup power for CPE would harm, rather than benefit, consumers. In particular, it would impose enormous burdens on service providers that would significantly raise the cost of the service – both to pay for the monitoring itself and to cover any potential liability issues associated with allegations that the provider was negligent in monitoring. It also could squelch innovation and investment in new services and devices. That is because, once the Commission establishes minimum backup power requirements, service providers inevitably will build systems to meet those requirements, rather than experimenting with new technologies and systems that might better meet their customers’ needs. Rules that establish de facto industry standards thus could delay or derail new devices and technologies that offer consumers cutting-edge features and functionalities they might otherwise desire.

B. Only Minimal Regulation (at Most) Is Needed To Equip Customers of Next-Generation Services With Backup Power Options

In the face of the rapid migration of consumers from traditional line-powered POTS to IP-based services and new network facilities, the Notice seeks to ensure continuity of communications throughout a power outage, including “prolonged outages caused by catastrophic storms or other major disasters.”¹⁸ The Commission asserts that POTS customers have become accustomed to “rely[ing] on the availability of continuous power sufficient to operate basic telephone CPE indefinitely” and worries that new IP-based services will not

¹⁸ Notice ¶ 31.

function without backup power for CPE.¹⁹ The Commission seeks to achieve its continuity goal in a “technology-neutral fashion” by means of a “framework for establishing reasonable expectations regarding provisioning CPE backup power in the event of an outage.”²⁰

As the Commission acknowledged in the Notice, the majority of voice communications consumers have already migrated from traditional TDM services, which provide line-powered service, to wireless and fixed interconnected VoIP, which rely on consumer-provided commercial power. Relying on the Local Competition Report,²¹ the Commission pointed out that, “as of December 30, 2013, there were a total of approximately 47,953,000 interconnected VoIP retail local telephone service connections, comprising over a third of all wireline retail local telephone service connections” – “more than 31,000,000 [of which] were receiving voice service over coaxial cable, which, like fiber, depends on power supplied at the premises.”²² The same report shows that retail switched access lines (POTS), on the other hand, have decreased dramatically from 117,884,000 in December 2010 to 85,280,000 in December, 2013.²³ Simultaneously, because of the convenience and near ubiquity of wireless service, wireless telephony has grown from 285,118,000 subscriptions in December 2010 to 310,698,000

¹⁹ *Id.* ¶¶ 11, 33.

²⁰ *Id.* ¶¶ 3, 32.

²¹ Local Telephone Competition: Status as of December 31, 2013, FCC, Wireline Competition Bureau, Industry Analysis and Technology Division at 3, fig. 2 (Oct. 16, 2014) (“Local Competition Report”).

²² Notice ¶¶ 9, 13. The number of interconnected VoIP retail local telephone service connections as of December 2013 (i.e., 47,953,000) is more than half the number of retail switched access lines ($85,280,000 \div 2 = 42,640,000$). According to the National Cable & Television Association (NCTA) web site, the number of cable company digital-voice subscribers in the United States alone is approximately 28 million. See <https://www.ncta.com/industry-data>.

²³ Local Competition Report at 2, fig. 1.

subscriptions in December 2013.²⁴ Indeed, approximately 41 percent of American households have “cut the cord” entirely and now “rely exclusively on wireless service.”²⁵

These combined figures demonstrate that most Americans have already chosen to rely on communications services that are not line-powered but rather depend on commercial power for their communications needs, usually from the consumer’s premises. And these figures do not even reflect the number of TDM line-powered or IP-based voice-service households that rely on cordless phones, which are also dependent upon commercial power, many of which may not have any backup battery in the base of the set.²⁶

These statistics indicate that consumers are accustomed to taking responsibility for monitoring and maintaining the power that runs their CPE. Indeed, even subscribers of traditional line-powered POTS employ other devices in their homes that are important to their personal and public safety – such as burglar and fire alarms, monitored medical devices, computers, tablets, and radios – which require them to provide, monitor, and maintain backup power. Consumers are cognizant of the need to supply backup power to such critical devices and are capable of providing it.

The Commission should recognize that consumers are already aware of the need for backup power for new IP-based services and are fully capable of making informed decisions on the type and amount of backup power they believe is appropriate for their circumstances. Instead of restricting what providers can offer and locking consumers into backup-power regimes that

²⁴ *Id.*

²⁵ Notice ¶ 9. Based on U.S. Census data, between 2009 and 2013, there were approximately 115,610,216 households in the United States. *See* U.S. Census Bureau, QuickFacts Beta, *available at* <http://www.census.gov/quickfacts/table/PST045214/00> (last accessed Feb. 3, 2015). If 41 percent of these households are wireless-only households, then approximately 47,400,100 American households are wireless-only.

²⁶ “Cordless telephone,” Wikipedia, *available at* http://en.wikipedia.org/wiki/Cordless_telephone (last accessed Feb. 3, 2015).

may be inappropriate for them, the Commission should employ a light regulatory touch that emphasizes consumer choice and education.

This is not to say that the Commission’s concerns about establishing reasonable expectations regarding CPE backup power are unfounded. Rather, these facts simply indicate that the Commission need not impose heavy-handed regulations to try to refashion the marketplace in order to promote the Commission’s core policy goals. Rather, it should focus on educating consumers regarding the need for backup power to maintain continuity of service during power outages, their options for monitoring and maintaining backup power for the services consumers select, and how to prolong battery life during power outages. It also should continue to allow consumers to choose their communications services and the size, cost, and type of backup-power systems, if any, that best meet their needs.

The Commission also should continue to work with the industry to promote best practices and consumer education. As part of the Commission’s examination of this backup power issue for IP-based communications systems, the Commission charged its regulatory advisory committee – the Communications Security, Reliability and Interoperability Council (“CSRIC”) – with the task of reporting on CPE powering best practices. Working Group 10 of CSRIC issued the CSRIC CPE Powering Report, which provides best practices for backup power under various VoIP use cases.²⁷ AT&T recommends that the Commission encourage all IP-based service providers to review and, when appropriate, adopt these backup power best practices, especially those dealing with consumer education. Among the consumer education recommendations, the CSRIC CPE Powering Report recommends the following:

²⁷ CSRIC IV Working Group 10B, *CPE Powering – Best Practices; Final Report – CPE Powering* (Sept. 2014) (“CSRIC CPE Powering Report”).

- Inform consumers of the implications for their voice service during power outages should they choose not to employ a backup-power system, such as a battery pack;
- Offer detailed instructions, along with step-by-step photos, drawings, or videos, of the battery replacement procedure;
- Warn customers that DC power supplies and batteries for network devices and other CPE are not interchangeable;
- Provide information about where customers can purchase replacement batteries, including information on the model numbers and price on the provider’s website; and
- Provide clear instructions to consumers as to the proper disposal or recycling options for used batteries.²⁸

If the Commission nonetheless decides that the record in this proceeding supports the imposition of backup-power standards, it should give providers and equipment manufacturers sufficient time to redesign and replace any affected CPE. The Commission should also allow replacement of already-deployed CPE according to the regular replacement cycle. On average, an eight-hour standby battery typically used to support IP-capable CPE has a useful lifespan of approximately two to four years, meaning that over a relatively short time span the embedded base of backup batteries for most of this equipment can be replaced.²⁹

C. The Commission Should Not Define Covered Services Using the Term “Fixed Wireless Service”

The Commission asks which communications services should be included “within the scope of any CPE backup power requirements [it] might adopt.”³⁰ It proposes that any such requirement should apply to all “facilities-based fixed voice services, such as interconnected

²⁸ See *id.* at 20-23.

²⁹ See, e.g., Verizon, Support, Check the Battery Back-up Unit (BBU) for Power, available at <http://www.verizon.com/support/residential/phone/homephone/general+support/fios+phone/troubleshooting+fios+phone+service/95363.htm> (last accessed Feb. 3, 2015). Obviously, making the new standards applicable on a prospective basis would have no adverse impact on those batteries in the embedded base that meet the standards today.

³⁰ Notice ¶ 33.

VoIP, that are not line-powered by the provider.”³¹ And it inquires how it should define a “‘fixed’ wireless service” for this purpose.³²

In the context of wireless services, the question whether a service is “fixed” is misplaced because CMRS providers already offer wireless services that are designed to be used in conjunction with traditional CPE as replacements for traditional POTS services, but which meet the statutory definition of CMRS services.³³ For example, AT&T Mobility offers Wireless Home Phone service, which allows customers to plug a traditional telephone handset into the RJ11 jack of a small, mobile device and place calls over AT&T Mobility’s wireless spectrum. The Wireless Home Phone device operates like any other mobile wireless device, and is capable of performing cell-to-cell hand-offs and operating while the device is in motion. While providers market, and many consumers purchase, Wireless Home Phone service as a replacement for POTS at their principal residence, the service has been designed and also is marketed as a service that allows a customer to take their home phone service with them – such as by plugging the device into an RV, boat or truck.

Based on discussions with Commission staff, AT&T understands that Wireless Home Phone and comparable services offered by Verizon and Sprint are precisely the sort of wireless services the Commission intends to include in the scope of any battery backup rules, notwithstanding the fact that they are mobile and meet the definition of CMRS. In the context of wireless services, the question whether a POTS replacement service is “fixed” or “mobile” is

³¹ *Id.*

³² *Id.*

³³ 47 U.S.C. § 332(d)(1) (defining “commercial mobile service” as any mobile service, as defined in § 3, that is provided for profit and makes interconnected service available to the public); *id.* § 153(33) (defining “mobile service” to mean, *inter alia*, a radio communications service between mobile stations or receivers and land stations); *id.* § 153(34) (defining “mobile station” to mean a radio communication station “capable of being moved and which ordinarily does move”).

simply irrelevant. Instead, and consistent with the concerns animating the proposed battery backup rules, the Commission should focus on whether a wireless service is designed to function as a replacement for POTS at a customer's principal residence. In particular, it should include within the scope of any CPE backup power rules only those wireless services that are designed to be used in conjunction with traditional telephone handsets as a replacement for POTS services. Such a limitation would exclude more traditional mobile wireless handsets, which consumers readily understand rely on battery power.

D. Minimally Essential Services Should Be Limited to Voice Calls (But Not to 911 Calls Only)

The Commission seeks to guarantee that backup-power systems “afford sufficient power for *minimally essential communications*, including 911 calls and the receipt of emergency alerts and warnings.”³⁴ To this end, the Commission seeks comment on “what services should be considered ‘minimally essential’ for purposes of continuity of power.”³⁵ In AT&T's view, apart from those services provided to the disabled community, only voice calling should be deemed “minimally essential” for backup-power purposes. AT&T's experience suggests that consumers primarily rely on voice calls for emergency assistance, including 911 calls or calls to family or caregivers.

AT&T does not believe it is appropriate to limit the universe of “minimally essential” voice calls to 911 or other emergency services however. Consumers are more likely to make important non-911 voice calls during a power outage, and the Commission should not prejudge the public safety value of those calls by preferring 911 calls. Armed with information on how to prolong battery life during power outages, consumers should be free to decide what voice calls

³⁴ Notice ¶ 34 (emphasis added).

³⁵ *Id.*

they are willing to make or receive. While priority for 911 voice calls has superficial appeal, it would be inappropriate for the Commission to decide for consumers whether a call is critical to their wellbeing or the health and safety of their family, friends, or loved ones. For this reason, *all voice calls*, not just 911 calls, should be deemed minimally essential.

Non-voice services should not be considered minimally essential. Fixed facilities-based IP-service providers, like cable and telephone companies, generally offer customers three basic services in various combinations: Internet access, video, and IP-voice services. Both Internet access and video consume large amounts of power and are capable of quickly draining backup power systems. For this reason, AT&T advises its IP-based service customers that, during a power outage, they should not use Internet services or television or make unnecessary calls.³⁶ Including Internet access and television among minimally essential services would require consumers to purchase large and expensive backup-power systems to maintain non-voice calling services that would not significantly add to consumer safety during an outage.

In addition to voice services, the Commission also seeks comment on whether the receipt of “emergency alerts and warnings” ought also to be included as minimally essential services and whether “CPE [can] be configured to only power on to receive emergency alerts.”³⁷ The Commission does not specify which “emergency alerts and warnings” it has in mind but, under the federal system, there are two primary alert programs: Emergency Alert System (“EAS”) and Wireless Emergency Alert, formerly known as Commercial Mobile Alert System (“WEA”).³⁸ Neither of these programs is appropriately included in the minimally essential services for which

³⁶ See U-verse Voice service during a power outage, *available at* <https://www.att.com/esupport/article.jsp?sid=KB408090> (last accessed Feb. 3, 2014).

³⁷ Notice ¶ 34.

³⁸ See generally; 47 C.F.R. pts. 10-11; see also Notice of Proposed Rulemaking, *Review of the Emergency Alert System*, 19 FCC Rcd 15775, ¶¶ 6-19 (2004); Notice of Proposed Rulemaking, *Commercial Mobile Alert System*, 22 FCC Rcd 21975 (2007).

backup power should be ensured in connection with wireline (or wireline-replacement) voice services.

EAS is provisioned over radios and televisions by providers of broadcast and wireline services, including cable TV (e.g., XFINITY, FiOS) and IPTV services (e.g., U-verse TV). These broadcast alerts are aired without prior announcement, and in order to receive such alerts consumers must keep their IP-based systems, radios, and television sets on and working. Absent a home power generator,³⁹ the power needed to run a television set, for example, would overwhelm any backup-power system most consumers could afford or easily house.

Under the WEA program, wireless alerts are English-language text messages accompanied by both a vibration cadence and common audio attention signal received over CMRS-capable mobile devices that send out Presidential, Imminent Threat, and Child Abduction Emergency (or “Amber”) alerts.⁴⁰ The kinds of wireless services that are typically considered as a potential replacement service for ILEC-provided, residential wireline POTS (e.g., AT&T’s Wireless Home Phone) are not capable of providing the vibration cadence and common audio attention signal and cannot display the WEA text alert message, because these services rely on the common residential home phone (either a standard touch-tone corded or cordless phone), which is plugged into a wireless-enabled base station.⁴¹ Such services thus do not incorporate screens or independent audio capabilities.⁴² What is more, other than Presidential alerts,

³⁹ Backup-power home generators come in a variety of styles and can cost as little as \$900 or more than \$10,000. *See, e.g.*, [http://search.wisesales.com/search?view=grid&w=Home%20Backup%20Generator&utm_source=bing&utm_medium=cpc&utm_campaign=IM%20-%20General%20\(Broad%20Generator\)&utm_term=+Home%20+Backup%20+Generator](http://search.wisesales.com/search?view=grid&w=Home%20Backup%20Generator&utm_source=bing&utm_medium=cpc&utm_campaign=IM%20-%20General%20(Broad%20Generator)&utm_term=+Home%20+Backup%20+Generator) (last accessed Feb. 3, 2015).

⁴⁰ 47 C.F.R. pt. 10.

⁴¹ *See, e.g.*, AT&T Wireless Home Phone – LG, <http://www.att.com/cellphones/lg/wireless-home-phone-lg.html#sku=sku7330518> (last accessed Feb. 3, 2015).

⁴² *See, e.g., id.*

consumers are allowed to opt-out of the WEA system, which would further undermine the value of providing additional backup power for the WEA system.⁴³

Given the practical difficulties of trying to maintain power for Internet access and television during power outages, and the lack of audio and visual alerting capabilities in wireless POTS replacement devices, the Commission should not include emergency alerts and warnings among those services identified as “minimally essential.”

E. Backup Power Duration Standard

The Commission proposes that “providers . . . continue to bear primary responsibility for CPE backup power” and “that [those] providers should assume responsibility for provisioning backup power that is capable of powering their customers’ CPE during the first eight hours of an outage.”⁴⁴ The Commission clarifies that backup power in this context refers to “the availability of standby backup power, not actual talk time.”⁴⁵ The Commission asks for comment on whether its proposal is reasonable. For the reasons described below, AT&T does not believe that the standard as formulated by the Commission is reasonable or that this kind of across-the-board standard is appropriate in light of the variation between different CPE systems and the ongoing development of such systems.

⁴³ Although wireless service that relies on mobile handsets is not a service being contemplated by AT&T as a substitute for residential wireline POTS, we note that, during a power outage, wireless consumers may choose either to power off their handheld devices *unless and until* they decide to make a call, or they may choose to engage the device’s “Airplane Mode” to preserve battery life. Both of these choices would directly impact the subscriber’s ability to receive WEA. Assuming that it was even technically feasible to configure “CPE . . . to only power on to receive emergency alerts,” Notice ¶ 34, considerable standards work and the propagation of new handsets would likely be required to do so, which would delay the efficacy of maintaining backup power for WEA for many years. The cost of such a project is simply unknown.

⁴⁴ Notice ¶ 35.

⁴⁵ *Id.* n.110.

Today, available backup power systems for many VoIP services provide between four and eight hours of battery life.⁴⁶ In AT&T's experience, backup power systems rarely need to provide as much as four hours of battery life because most power outages last less than two hours. To provide backup power for the kind of extraordinary power outages caused by "catastrophic storms or other major disasters" would require large, costly, and potentially dangerous backup-power systems that are beyond the reach (and desire) of most consumers.⁴⁷ Moreover, consumers generally prefer the most convenient and cost-effective means of communications during power outages, which is typically their personal or business wireless service and not their fixed voice service.⁴⁸ In light of these consumer preferences, an eight-hour backup power standard would provide little (if any) value.

In addition, "catastrophic storms and other major disasters" can also cause a loss of wireline facilities in conjunction with the loss of commercial power, making backup power for wireline services useless. These losses can be caused by downed utility poles and/or lines, flooded vaults or other underground or at-ground level facilities, or outside voice plant damaged

⁴⁶ See footnote 15 *supra*. Some sites make clearer than others whether the battery life is measured as "talk time" or "standby time."

⁴⁷ An IEEE report indicated that, excluding major events like a hurricane, the customer average interruption index (CAIDI) was under 240 minutes in 2013 and had stayed relatively flat from 2005 to 2013. This report supports the contention that there would be little to no benefit to consumers in increasing backup battery capacity from four to eight hours. See IEEE, Power & Energy Society, Benchmark Year 2014, Results for 2013 Data (July 29, 2014), available at <http://grouper.ieee.org/groups/td/dist/sd/doc/2014-08-Benchmarking-Results-2013.pdf>. Also, another study showed that 97 percent of power outages affecting telephone central offices in California lasted less than two hours and more than 50 percent of them lasted only seconds. See Reliability Standards for Telecommunications Emergency Backup Power Systems and Emergency Notification Systems, *Final Analysis Report*, CPUC (May 9, 2008), available at <http://docs.cpuc.ca.gov/PUBLISHED/GRAPHICS/84115.PDF>.

⁴⁸ As noted in the CSRIC CPE Powering Report (at 19): "Feedback from consumers, however, illustrates that the need of backup power is evolving, as consumers increasingly rely on their cell phones and other portable devices for emergency communications during a commercial power outage." Because cell phones are portable, they are more easily recharged during sustained outages where utilities, local governments, and providers make recharging stations available or where areas of power (e.g., nearby friends and family or work locations) are still available or when phones can be recharged by means of the consumer's car adapter.

during repair efforts (e.g., a backhoe mishap cutting a distribution cable). For its part, AT&T prepares for just these sorts of events in order to restore wireline service quickly and to provide wireless service facilities to bolster or replace wireline service and outdoor plant. These facilities include specially designed equipment and technology trailers that AT&T quickly deploys to disaster areas to act as virtual network offices and mobile command centers and a fleet of hundreds of Cells on Wheels (“COWs”) and Cells on Light Trucks (“COLTs”) that it deploys to temporarily replace failed cell sites.⁴⁹ The fact that wireline facilities can be disrupted during such events makes wireless service attractive to consumers as a fallback mode of communications, especially when their provider is capable of deploying mobile disaster relief facilities, as AT&T does.

Beyond the flaws in the specific duration of backup power that the Commission proposes to mandate, the Commission’s proposal to require providers to guarantee that duration will be unworkable. The Commission should not obligate providers to guarantee that the batteries they offer their customers will be capable of powering their customers’ CPE “during the first eight hours of an outage,”⁵⁰ because, as batteries begin to age (especially if they have been used), their ability to provide power slowly decreases. In other words, a battery that could provide eight hours of standby time when new might only provide six hours (or four, or two) after a year or two of use. For a provider to make the kind of guarantee the Commission proposes would require constant monitoring and frequent replacement of each customer’s battery backup unit, which would be a significant waste of resources (and a likely annoyance to customers). Rather, should the Commission decide to set a backup-power standard, it should require only that backup batteries be designed and tested to provide a specified amount of standby time for the specific

⁴⁹See Comments of AT&T Inc., PS Docket Nos. 13-75 & 11-60, at 7-9 (May 13, 2013).

⁵⁰Notice ¶ 35.

CPE used to provide the service (e.g., modem, RG – but not cordless phone⁵¹). During the lifespan of the battery, this standby time will invariably decrease, and providers will not be able to guarantee that their batteries will continue to provide the specified amount of standby time for the entire life of the battery.

The CSRIC Working Group 10 report noted, among other things, that, “[e]ven if a VoIP service has a good battery [back]up system, the ability to provide power during outages is usually limited to a few hours.”⁵² And, while it did not recommend a specific minimum duration for backup-power systems, Working Group 10 did offer a compilation of best practices for improving and prolonging the life of backup-power systems for different types of VoIP deployments and identified three areas in which the Commission and industry could take a “more proactive approach to better address the challenges for reliable service across the various VoIP use cases.”⁵³ In light of this report, the Commission should encourage, but not require, providers to adopt these best practices in order to prolong the life of backup-power systems associated with VoIP services and to engage with providers, equipment manufacturers, and other interested parties on the three areas the Working Group 10 highlighted as suitable for a more proactive approach.

One of those three areas highlighted by Working Group 10 was the desire for “commonality or standards in DC power supplies.”⁵⁴ While this may be a worthy goal, it presents multiple hurdles, not the least of which are: (1) differences in features and functions of

⁵¹ The Commission rightly does not propose to require providers to ensure backup power for cordless phones, which consumers have been doing on their own for decades.

⁵² CSRIC CPE Powering Report at 5.

⁵³ *Id.* at 19. Those three areas are: the possible use of D-cell batteries to extend service during long power outages, a study of the use of Power-over-Ethernet and other technologies (e.g., solar powered network devices) as an alternative power supply for CPE devices, and the examination of the technical feasibility of standardized power adapters and interface connectors.

⁵⁴ *Id.* at 20.

IP-driven CPE create different power needs and these needs require custom designed backup-power systems; (2) difficulties associated with sharing intellectual property among providers, manufacturers, and others in the supply chain; and (3) questions raised about the potential liability to those in the supply chain of mixing and matching devices. To this last point, the Commission needs to appreciate that backup-power systems are specific to the CPE they support and are tested and certified in relation to those devices. Manufacturers are reluctant to assume potential liability for fires or other mishaps when their backup-power product is plugged into another manufacturer's device – i.e., a device for which the backup-power product was not designed, tested, or certified to support – or vice versa. If susceptible to resolution, these issues cannot be resolved by IP-based communications providers alone and, in any case, cannot be resolved quickly. The Commission should foster studies of these and other related issues and not try to impose standardization before these issues have been resolved.

II. The Commission Should Not Adopt Its Proposed Changes to the Network Modification Rules

Over a decade ago the Commission, in assessing proposed changes to its unbundling rules, recognized the need to “encourage investment in next-generation network architecture suitable for delivering advanced telecommunications capability throughout the nation.”⁵⁵ In particular, the Commission found that because upgrading telecommunications loop plant to fiber was a “central and critical component of ensuring that deployment of advanced telecommunications capability to all Americans is done on a reasonable and timely basis,” its

⁵⁵ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 19020, ¶ 241 (2003) (“TRO”), *vacated in part and remanded, USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

policies “must encourage such modifications.”⁵⁶ Consistent with that policy objective, and in order to encourage the deployment of next-generation facilities by all providers, the Commission established new rules for fiber-based loops that generally rejected imposing unbundling obligations on the ILECs with respect to packet switched technologies, including fiber loops (particularly in “greenfield” situations) and the packet switched features, functions, and capabilities of hybrid loops.

First, the Commission found that CLECs were not impaired without unbundled access to all-fiber loops and the packet-based and fiber optic portions of hybrid loops, except in the narrow circumstance where an incumbent constructs fiber facilities parallel to or in replacement of its existing copper plant.⁵⁷ In particular, the Commission found that “the substantial revenue opportunities posed by FTTH deployment help ameliorate many of the entry barriers presented by the costs and scale economies,” and that CLECs were actually “leading the overall deployment of FTTH loops after having constructed some two-thirds or more of the FTTH loops throughout the nation.”⁵⁸ Second, and relatedly, the Commission found that mandated unbundling of these next-generation network elements “would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities.”⁵⁹

At the same time, the Commission emphatically rejected calls to impose a blanket prohibition on the ability of the ILECs to retire copper loops as they replaced them with fiber. In

⁵⁶ *Id.* ¶ 243.

⁵⁷ *See id.* ¶¶ 273-77, 288-90.

⁵⁸ *Id.* ¶¶ 274-75.

⁵⁹ *Id.* ¶ 288; *see also id.* ¶ 290 (“[B]y prohibiting access to the packet-based networks of incumbent LECs, we expect that our rules will stimulate competitive LEC deployment of next-generation networks.”).

establishing the current set of network modernization rules, the Commission sought to strike a careful balance between the needs of the various parties. On the one hand, the rules recognize that, in undertaking the massive overhaul of their legacy networks as part of the transition to an all-IP ecosystem, ILECs must have the flexibility to make business and operational decisions about which network facilities to maintain and how and when certain facilities should be retired. On the other hand, the rules recognize the needs of wholesale customers for proper notice of, and time to prepare for, those ILEC network changes that may affect the CLECs' provision of service. Accordingly, the Commission concluded that the rules it originally had adopted in the wake of the 1996 Act, with only minor modifications that essentially involved additional notice requirements in discrete circumstances, served as adequate safeguards for protecting competition and consumers.⁶⁰

The Commission's rationale in adopting these rules proved well-founded. As USTelecom explained in a recent submission to the Commission, competitors have acted on the incentives the Commission established in the *TRO*, and the decision not to unbundle such facilities has unleashed a torrent of investment in broadband by providers of all types, including CLECs and cable companies, who now provide service to millions of customers.⁶¹ And the ILECs, seeking to meet this competition and the demands of their customers, have invested billions to deploy fiber loops. AT&T alone undertook a multi-billion dollar program, known as Project Velocity IP ("Project VIP"), to expand the reach of its IP-based wireless and fiber wireline services to consumers and businesses across the country. That project, which was

⁶⁰ *See id.* ¶ 271.

⁶¹ Reply Comments of the United States Telecom Association at 36-39, *Petition of USTelecom for Forbearance Under 47 U.S.C. §160(c) from Obsolete ILEC Regulatory Obligations that Inhibit Deployment of Next-Generation Networks*, WC Docket No. 14-192 (filed Dec. 22, 2014).

essentially completed in 2014, expanded AT&T's LTE wireless network to cover more than 300 million people nationwide and its wireline IP broadband network to 57 million customer locations within its 21-state footprint, as well as extended fiber to 725,000 business locations.⁶² At the same time, and as indicated in the Notice, some ILECs, seeking to avoid the costs of maintaining duplicate networks, much of which is now stranded investment, have begun the process of retiring those redundant copper facilities, or at least have signaled that such changes may be forthcoming.

The retirement of these copper loops not only is the direct result of decisions that the Commission made in the *TRO*, it was in fact its objective. It is also consistent with the findings of the *National Broadband Plan*, which recognized that “requiring an incumbent to maintain two networks . . . reduce[s] the incentive for incumbents to deploy” next-generation facilities and “siphon[s] investments away from new networks and services.”⁶³ And as they have taken the necessary steps to superintend their networks, the record is clear that the ILECs have complied in all respects with the existing network modification rules. The Notice itself does not suggest otherwise. On the contrary, it is the very fact that the ILECs are meeting their obligations under the rules and notifying the Commission and affected parties of proposed network modification that, inexplicably, is prompting the Commission now to re-assess those rules. Worse, that re-assessment – based on a record that reflects only that the ILECs are complying with the current rules – has led the Commission to consider modifying them in ways that will only impede the critical network transformations that the Commission previously sought to encourage, and upset

⁶² See 4th Quarter Earnings Conference Call: AT&T Investor Update at 4 (Jan. 27, 2015), available at http://www.att.com/Investor/Earnings/4q14/slides_4q14.pdf.

⁶³ FCC, *Connecting America: The National Broadband Plan* at 49 (2010).

ILECs' reasonable investment-backed expectations that their investment in next-generation networks and services would not be subject to mandatory sharing with free-riders.

The Commission should not follow through with its proposed modifications. To be sure, the changes do not go as far as some parties previously had proposed, in that the revisions quite properly do not subject a copper retirement proposal to a CLEC (or Commission) veto.⁶⁴ Nevertheless, the changes that the Commission is contemplating would impose onerous new requirements on the ILECs that, given the lack of any evidence of a market or regulatory failure, are not justified by any identifiable benefit to consumers or competition. These burdens include new notice obligations – among them an unprecedented, ambiguous, and legally suspect requirement to provide direct notice to retail customers – that are unnecessary, costly, and unworkable. Indeed, in the case of the retail customer notice proposal, the proposed new rule is plainly counterproductive, as it is far more likely to engender confusion and frustration among the public than the alleged confusion it is purportedly supposed to remedy.

In short, the Commission should scrap the proposed revisions and permit the ILECs and other participants in the market to continue operating under a set of rules that already are working effectively. It also should refrain from taking any steps that would impede the industry's ability to develop marketplace solutions for issues related to copper retirement, such as by imposing unnecessary regulatory mandates on initiatives like the commercial sale of retired copper facilities.

⁶⁴ As AT&T has described in prior submissions to the Commission, there is no basis in law, policy, or fact supporting a change to the network modification rules that would permit objecting carriers to block such modifications altogether. *See* Comments of AT&T, *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, WC Docket No. 12-353, RM-11358 (filed Mar. 5, 2013); Reply Comments of AT&T (filed Mar. 20, 2013), incorporated herein by reference.

A. The Record Does Not Support the Proposed Revisions to the Existing Rules

In seeking to impose new obligations on the ILECs in the copper retirement process, the Notice is bereft of any demonstration that the network modernization rules under which the industry has been operating for more than a decade are not meeting their objectives. In fact, the evidence is to the contrary. Although the Commission has had a proceeding open for years to consider the issue, there remains *no* record evidence of a problem with the current rules that would justify regulatory intervention in the marketplace.⁶⁵ At most, the record suggests that certain CLECs have adopted business plans designed principally to serve lucrative business customers in highly concentrated areas (where competition is already intense) and that these CLECs, rather than investing in next-generation facilities themselves, would prefer indefinite access to ILECs' facilities at regulated, wholesale rates. The record is devoid of evidence of an actual harm to *consumers* absent copper retirement restrictions, much less a level of harm that would justify any massive revision to the rules to adopt new, intrusive, and burdensome requirements.

To begin with, there is no evidence that the Commission's existing copper retirement rules are inadequate to protect the interests of consumers, or that ILECs are retiring copper for anti-competitive reasons. Under the Commission's current rules, CLECs are entitled to file objections to the timing of proposed copper retirement set forth in ILECs' notices, but not the fact of retirement itself.⁶⁶ The available evidence shows that as ILECs have provided notice of

⁶⁵ See *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (holding that "[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking," and vacating order where there was "zero evidence of actual abuse").

⁶⁶ See *TRO* ¶ 282. By requiring that any oppositions to copper retirement are deemed denied after 90 days unless the Commission acts, *see id.* ¶¶ 281-82; 47 C.F.R. § 51.333, the current rules provide ILECs with a measure of certainty about necessary network modifications.

copper retirements over the years, only a handful of objections have been filed under those existing rules, and those few issues have been resolved by the parties without regulatory mandates.⁶⁷

The Notice nevertheless suggests that revisions are necessary because the current rules do not cover the retirement of certain facilities. In particular, the Notice claims that “our current rules do not encompass the feeder portion of loops.”⁶⁸ This is simply incorrect. As the Commission made clear in the *TRO*, copper feeder has been covered by the network modification rules since they were first adopted in 1996.⁶⁹ In fact, in adopting the minor revisions to those rules in the *TRO* to cover the retirement of copper loops that were being replaced by FTTH/FTTC loops, the Commission took pains to note that those modifications did not apply “to the retirement of copper feeder plant.”⁷⁰ Thus, there is no need for a new rule change to cover the retirement of copper feeder – ILECs already have been obligated to provide disclosure of network modifications involving those facilities for nearly 19 years.

That certainly has been AT&T’s understanding of the rules. Since 2007, AT&T alone has provided network change notices concerning the replacement of copper feeder with digital facilities, such as digital loop carrier or next-generation digital loop carrier, over 250 times.⁷¹ Each of those retirements was described in a notice published, among other places, on a publicly available website, and that described the exact location of the facility being replaced, the reason

⁶⁷ See Comments of USTelecom Association at 3, *Mpower et al. Request to Refresh the Record and Take Expedited Action to Update Copper Retirement Rules*, WC Docket No. 12-353 and RM-11358 (Mar. 5, 2013).

⁶⁸ Notice ¶ 51.

⁶⁹ *TRO* ¶ 281 & n.824 (stating that the existing disclosure requirement “applies to the retirement of both feeder plant and distribution plant”).

⁷⁰ *Id.* ¶ 283 n.829.

⁷¹ Declaration of Richard Hatch ¶ 4 (“Hatch Decl.”) (attached as Ex. A).

for the replacement, the timetable for the replacement, and the steps any affected CLEC would need to take to maintain service. AT&T is unaware of any objections to any of those notices.

Given this record and the actual scope of the Commission's rules, there is no basis for the Commission to revise its existing requirements at all, much less to adopt the expansive and intrusive changes envisioned in the Notice.

B. The Existing Rules Already Address the ILECs' Obligations with Respect to the Maintenance of Copper Loops for Competitive Providers

Citing unsubstantiated allegations that ILECs are permitting copper networks to degrade to force end-user customers to move to fiber and/or IP-based services, the Notice asks whether the Commission should revise its copper retirement rules "to address inadequate maintenance."⁷² There are at least two reasons why the Commission should not undertake any such revisions.

First, the allegations prompting the Commission's concerns not only have been disputed by the ILECs involved, but they also have nothing to do with the copper retirement rules themselves. The object of those rules since their adoption in 1996 has been to ensure that ILECs provide the necessary information regarding modification of their networks that affects "competing service providers' performance or ability to provide service."⁷³ But the allegations cited in the Notice do not point to any impact on CLECs or their service quality. Rather, the claims are that the ILECs' alleged failure to maintain their copper-based networks are adversely affecting service quality to the ILECs' own retail customers.⁷⁴

⁷² Notice ¶ 53.

⁷³ Second Report and Order and Memorandum Opinion and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, ¶ 171 (1996) ("*Second Report and Order*") (emphasis added).

⁷⁴ See Notice ¶ 19.

Thus, the Notice here – as it does elsewhere – improperly conflates the rules governing the ILECs’ discontinuance of services to end-user customers with the rules governing how and under what terms the ILECs provide facilities to competitive providers. The first issue involves the proper scope and application of § 214 of the Act. The latter is properly left to the unbundling and network modifications rules that the Commission adopted to implement § 251. The Commission thus should not undertake any revision to those rules that will confuse those two sources of authority and adversely affect the ongoing network transition.

But even if the Notice’s concerns regarding alleged inadequate maintenance of the ILECs’ copper facilities involved some adverse impact on the CLECs – and again, the Notice does not identify any such effect – there would be no need to revise the rules to address that concern. That is because the existing rules already do so. For example, the rules regarding FTTH/FTTC loops provide that an ILEC that deploys fiber in a brownfield (i.e., overbuild) situation, but does not retire the parallel copper loop, “need not incur any expenses to ensure that the existing copper loop remains capable of transmitting signals” prior to receiving a request from a competitive provider for unbundled access to that copper facility.⁷⁵ However, once the CLEC makes such a request, the ILEC must “restore the copper loop to serviceable condition.”⁷⁶

Similarly, the existing rules provide that an ILEC may not engineer the transmission capabilities of the network in a manner, or engage in any policy, practice, or procedure, “that disrupts or degrades access to a local loop or subloop,” including the TDM capabilities of the hybrid loop, for which a CLEC may obtain or has obtained access under those rules.⁷⁷ The Commission adopted this rule in the *TRO* as a means of enforcing the ILECs’ nondiscrimination

⁷⁵ 47 C.F.R. § 51.319(a)(3)(iii)(B).

⁷⁶ *Id.*

⁷⁷ *See id.* § 51.319(a)(8).

obligations under § 251(c)(3).⁷⁸ Thus, insofar as CLECs have a concern that an ILEC is maintaining the network in a manner that is disrupting or degrading the CLEC's access to a copper loop, the existing rules already provide recourse. There is no need for new rules or other revisions.

It bears noting that this “TDM degradation” rule plainly was not intended to preclude an ILEC from retiring the *entire* TDM network. Indeed, the Commission noted in the *TRO* that the prohibition against disrupting or degrading the TDM capabilities of hybrid loops was intended to prevent ILECs from strategically retiring TDM-based technologies to discriminate against CLECs and thereby disrupt competition. The prohibition was *not* intended to prevent ILECs from removing copper loops from their plant, so long as they complied with the applicable network notification requirements.⁷⁹ The Commission's network modification rules, by requiring only notice (but not approval) for ILECs to retire network facilities, including TDM technology, presume that ILECs have the right to make such changes. This is consistent with the fact that § 251(c)(3) “requires unbundled access only to an incumbent LEC's *existing* network.”⁸⁰ It would be inconsistent with the statute to read the “TDM degradation” rule to preclude the industry-wide transformation to all-IP networks. The rule certainly should not be read to require an ILEC to continue to maintain and make available TDM-based transmission facilities as UNEs solely for the benefit of CLECs and without regard to whether the ILECs would do so for themselves or their retail customers. Indeed, such a requirement would conflict with the Commission's stated goal of facilitating the transition to all-IP broadband networks and services.

⁷⁸ *TRO* ¶ 294.

⁷⁹ *Id.* & n.847.

⁸⁰ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997).

C. There Is No Demonstrated Need for Expanding the Notice Requirements for CLECs Affected by a Network Change

The existing rules governing network modifications impose a robust and comprehensive set of obligations on ILECs to provide competitive providers with notice of such changes as may affect their ability to provide service, including the retirement of copper loops. The rules require an ILEC, subject to certain exceptions, to provide affected carriers with a notice that describes the proposed change, the implementation date, the location, and “the reasonably foreseeable impact of the planned changes.”⁸¹ Subject to certain exceptions, notice must be given at least 12 months before implementation of the planned network change.⁸² Of particular pertinence here, those exceptions permit an ILEC to retire copper loops and subloops for purposes of replacing them with FTTH/FTTC loops on as little as 90 days’ notice, provided that the ILEC complies with certain “short term” notice procedures.⁸³ Those short term procedures essentially require the ILEC to serve a copy of its public notice “upon each telephone exchange service provider that directly interconnects with the incumbent LEC’s network” at least five days before filing a certificate evidencing such service with the Commission.⁸⁴

There is no evidence that these procedures, now in effect for at least a decade and in some cases dating as far back as their original adoption in 1996, have not been working as intended: providing competitive providers with adequate notice of those ILEC network modifications, including copper loop retirements and replacements with FTTH/FTTC loops, that could affect the CLECs’ ability to provide service. Notwithstanding the lack of any demonstrated need, however, the Notice nevertheless proposes to revise the existing rules to

⁸¹ 47 C.F.R. § 51.327(a).

⁸² *Id.* § 51.331(a).

⁸³ *Id.* § 51.333(b)(2).

⁸⁴ *Id.* § 51.333(a)(1).

substantially expand the notice requirement by (1) applying the “short term” notice service procedures – that is, the requirement for direct notice to competitive providers, verified by a certificate of service filed with the Commission – to every planned copper retirement, regardless of type or timing, and (2) requiring the ILEC to describe “changes in prices, terms, or conditions that will accompany the planned changes.”⁸⁵ Neither revision is warranted.

First, requiring ILECs to provide direct notice of proposed network changes involving copper to each information service provider and each telecommunications service provider that directly interconnects with the ILEC’s network – and then to file evidence of that service with the Commission – would impose onerous and unnecessary administrative burdens on the ILECs. There can be no question of the additional work that the ILECs would have to undertake to comply with these service requirements. For example, in the over 250 cases described above in which AT&T retired copper feeder, AT&T met all of its notice obligations through publication to the industry of a notice on a publicly accessible website. Under the new rule, however, AT&T would have to directly notify every provider that was interconnected with its network of that planned feeder replacement – potentially hundreds of direct notices in each instance – whether or not any of those providers actually had any facilities implicated by the proposed retirement. Indeed, in those cases in which AT&T previously retired feeder, most involved facilities on which competitive carriers did not even have any circuits.⁸⁶

Moreover, this additional burden on the ILECs is not balanced by any identifiable benefits that the new rule would confer on the parties that would now be directly receiving the notices. These carriers are all sophisticated industry participants that for years have been operating successfully under the existing rules and the processes the ILECs have implemented to

⁸⁵ Notice ¶ 57.

⁸⁶ See Hatch Decl. ¶ 5.

comply with those rules. The Notice offers no indication that any of those parties believe they would gain anything from receiving a slew of new direct notices of planned copper retirement facilities in which they have no interest.⁸⁷

Exacerbating the additional burden entailed in this service requirement is the new information that the proposed rules would have the ILECs include in their direct notice to each carrier – namely, a description of expected “changes in prices, terms, or conditions” attributable to the proposed network modification.⁸⁸ At the outset, such a requirement has no basis in the statutory underpinning for the network modification rules themselves. The notice requirements imposed by § 251(c)(5) are directed to information involving network changes “necessary for the *transmission and routing* of services” using the ILEC’s network, as well as those involving the “interoperability” of the ILEC’s and competitive providers’ “facilities and networks.”⁸⁹ In defining this requirement as applying to network modifications that will affect a “competing service provider’s performance or ability to provide service,”⁹⁰ the Commission took note of one commenter’s statement that this definition was “necessary for new entrants to receive notice of *technical changes*.”⁹¹

⁸⁷ The Notice purports to rely on two CLEC *ex parte* letters filed regarding AT&T’s TDM-to-IP trials in support of requiring additional information in the network modification process. See Notice ¶ 58 & n.149. But neither excerpt cited in the Notice had anything to do with network modifications, much less proposed the changes to the rules contemplated here. To the contrary, one concerned proposals for service withdrawals under § 214, and the other complained about alleged insufficiencies in AT&T’s treatment of wholesale services in the context of its TDM-to-IP trials.

⁸⁸ *Id.* ¶ 57.

⁸⁹ 47 U.S.C. § 251(c)(5) (emphasis added).

⁹⁰ 47 C.F.R. § 51.325(a)(1).

⁹¹ *Second Report and Order* ¶ 167 (emphasis added; internal quotation marks omitted).

But the additional information that the revised rules would require the ILECs to provide in its notice to each competitive provider is not technical information. It is essentially contractual information involving the services that the CLEC is obtaining from the ILEC. This is far beyond what the statute requires and what properly should (or indeed could) be included in the rules implementing that statute. Here again, the Notice inappropriately conflates issues involving services with those involving facilities. What is worse, it does so in a way that will add to the new burden of direct notification. That is because, rather than permitting the ILECs to continue providing a notice that describes the general effect of the network modification on all industry participants, the ILECs would now be required to provide direct notice to each interconnecting carrier of the specific effect of such a modification on the prices, terms, and conditions of the particular interconnection agreement with that carrier. In other words, the ILECs would have to generate a unique notice for each interconnected carrier, whether or not they had any interest in the facility being retired. This is not a change designed to facilitate the transition to next-generation networks, it is one that will have the effect of impeding it, and it should be rejected.⁹²

D. The Proposed New Notice Requirements for Retail Customers Have No Basis in Law or Sound Policy

The Notice does not stop at unnecessarily and inappropriately expanding the notice requirements imposed on ILECs with respect to competitive providers. Rather, and for the first time in the over 18 years that the rules have been in effect, the Commission now proposes to

⁹² The same holds true for any proposal to increase the minimum time for notices involving copper retirement and replacement by FTTH/FTTC loops from the current 90-day period. *See* Notice ¶ 59. As with all of the other proposed changes to the network modification rules, there has been no showing that the current 90-day period, which has been in effect now for over a decade, is in any way too short or otherwise inadequate. Increasing that period will only encourage delay and undermine ILEC efforts to move quickly in transitioning to IP-enabled facilities.

engraft new requirements on to the rules that would obligate the ILECs to directly notify each retail customer “affected by” a network change.⁹³ There should be no question about AT&T’s commitment to consumer education as part of the transition from legacy TDM networks to the all-IP ecosystem. Indeed, that education process is at the heart of the TDM-to-IP trials AT&T currently is undertaking, under the Commission’s supervision, in Alabama and Florida. But the new retail customer notice requirement proposed in the Notice does not advance the goals of consumer education – if anything, its likely effect would be to undermine legitimate efforts to facilitate customers’ understanding of the transition. Thus, as with the other proposed revisions to the network modification rules, the Commission should not adopt this proposal.

As an initial matter, there is no statutory authority for the proposed revisions. The public notice requirements regarding network modifications are contained in § 251, the provision of the Act that establishes the ILECs’ unique set of obligations with respect to competitive providers. As noted above, the specific duties set forth in § 251(c)(5) involve the ILECs’ notice obligations concerning technical information about network changes necessary “for the transmission and routing of services” using the ILECs’ network or involving its “interoperability” with other providers’ networks and facilities. In fact, in defining the “services” covered by that provision, the Commission described them in the context of the “information services providers” and “telecommunications services providers” who were entitled to notice – it made absolutely no mention of services to retail customers.⁹⁴

On the contrary, the Commission defined the obligations associated with § 251(c)(1) in the commonsense manner in which all industry participants have understood it since the provision and its implementing rules were first adopted in 1996: as a mechanism for ensuring

⁹³ See Notice ¶ 61; *id.* app. A (proposed revision to 47 C.F.R. § 51.332(b)(3)).

⁹⁴ *Second Report and Order* ¶ 176.

that the ILECs provide information about network changes “if it affects *competing service providers*’ performance or ability to provide service.”⁹⁵ The Commission confirmed this understanding in the *TRO* when it adopted the minor modifications to the rule regarding copper loop retirement. As the Commission put it, those modifications were designed “to ensure that incumbent and competitive carriers can work together” to provide CLEC access to loop facilities.⁹⁶

Notice to end-user customers was not contemplated in either the statute or the enabling regulations, and for good reason. Those provisions go to the technical requirements governing access to the ILECs’ wholesale facilities. The concerns purportedly motivating the Commission’s proposed revisions of the network change rules, however, go to the impact on the ILECs’ subscriber retail service. Here again, the Notice conflates the rules governing retail services with those governing intercarrier provision of facilities. Introducing those concerns into the network modification rules does nothing to help the retail customers that the changes ostensibly are aimed at, but rather will only adversely affect the transition to next-generation services.

That problem is compounded by the ambiguity in the proposed rule change itself. Under that provision, the “affected” customers to whom the ILEC would be required to provide direct notice are those “who will need new or modified customer premises equipment or who will be negatively impacted by the planned network change.”⁹⁷ But neither criterion provides meaningful guidance to the ILECs who would be required to implement it. For example, given

⁹⁵ *Id.* ¶ 171 (emphasis added).

⁹⁶ *TRO* ¶ 281.

⁹⁷ Notice app. A (proposed revision to 47 C.F.R. § 51.332(b)(3)(i)).

that the Commission deregulated and detariffed CPE in 1983,⁹⁸ customers generally have been responsible for providing their own telephone equipment for decades. Under these circumstances, how ILECs would even know what specialized equipment customers might be using in their homes or businesses, much less what changes to that equipment might be necessitated by a planned copper retirement, is far from clear. And the Notice does nothing to resolve that basic question.⁹⁹

Nor does the Commission identify what would constitute a “negative[] impact[]” on a customer that would trigger the notice requirement. The fact that the rule change is premised on the assumption that the transition to next-generation networks and services will somehow adversely affect customers is at odds with the Commission’s conclusion that, as a result of the incentives it established in the *TRO*, “consumers will benefit from this race to build next-generation networks and the increased competition in the delivery of broadband services.”¹⁰⁰ This contradiction begs the question whether “negatively impacted” would mean *any* negative impact, no matter how small, or a *net* negative impact calculated by some unarticulated metric of consumer utility. But even putting this contradiction aside, the fact remains that the proposed rule would effectively put the onus on the ILECs to guess at whether a network change will “negatively impact” any retail customers. That burden is unreasonable.

⁹⁸ Report and Order, *Procedures for Implementing the Detariffing of Customer Premises Equipment and Enhanced Services*, 95 F.C.C.2d 1276 (1983).

⁹⁹ The Notice suggests limiting the notice requirement to instances in which a technician requires access to a customer’s premises. *See* Notice ¶ 61. But AT&T, for its part, already provides notice to its customers in those circumstances in accordance with the requirements of 47 C.F.R. § 68.110(b). Accordingly, there is no reason to add such a requirement in the network modification rules.

¹⁰⁰ *TRO* ¶ 272.

The likely result is that the ILECs would simply default to giving notice to every customer, so as to avoid a challenge that they had not complied with the rule. But this approach, of course, is inherently burdensome and likely would be confusing to customers. ILECs would have to incur the additional costs of identifying the retail customers potentially implicated by every proposed copper retirement – including under the new rule, feeder facilities – and providing a direct notice to each such customer.¹⁰¹ Those expenses very well could be topped by the new burdens that would be placed on ILEC call centers and customer service representatives, who likely would be flooded with calls from confused or angry customers wondering what the notice means.¹⁰²

And to what end? Significantly, although the proposed rule change gives customers the right to submit “comments” to the Commission concerning the proposed copper retirement, it limits the right to “object” to those changes to interconnecting LECs. But no matter the substance of the retail customers’ comments, they would have no greater rights to stop a network change than the competitive providers have under the rules. Thus, customers getting the notice

¹⁰¹ The same concerns with burden militate against imposing new requirements on the ILECs to provide notice of every copper retirement to state public utility commissions, state Governors and the Department of Defense (“DoD”). *See* Notice ¶ 79. Interestingly, the Notice itself does not indicate that either the states or DoD have asked for such notices. That may be for good reason. As the pace of the transition quickens, ILECs likely will be undertaking numerous network modifications which, under the proposed new rule, would generate thousands of notices. As a result, even if they fell within the ambit of § 251(c)(5), these entities – which heretofore have not been served with any network modification notices under the federal rules – likely would be inundated with them. The rule change thus would deluge both the ILECs and these governmental entities with paper, with no corresponding benefit.

¹⁰² Even if the Commission does permit the rule to go into effect – which it should not – it should not include any prohibition on “upselling” in the event the customer does contact the ILEC in the wake of the required notification. *See* Notice ¶¶ 71-76. The entire point of this process is to facilitate the transition of customers to next-generation networks and services. The Commission should be encouraging that process, not adopting new rules that would have the effect of impeding it.

of a copper retirement not only would find it “unnecessary or confusing,”¹⁰³ but likely frustrating as well. It is difficult to perceive how this benefits customers, ILECs making network changes, or the IP transition generally. For all of these reasons, the Commission should reject this proposed rule change.

E. The Commission Should Permit the Industry To Develop Commercial Solutions to the Potential Sale of Retired Copper Facilities

As the Notice indicates,¹⁰⁴ AT&T, as part of its efforts to support the transition to an all-IP ecosystem, has put forward a proposal under which copper loops that are retired pursuant to the existing network modification rules would be made available for sale to interested competitive providers that wish to use those facilities to provide service to their end-user customers. The sale is not intended as a profit-making endeavor; retired loops would essentially be offered as-is and at salvage value, with the purchaser assuming all responsibility for the maintenance of those facilities on a going-forward basis. Importantly, each such sale would be completed on commercial terms negotiated between the parties.

AT&T is gratified that the Commission considers this concept to be a “win-win” for ILECs, competitive providers, and competition generally.¹⁰⁵ AT&T also supports Commission efforts to encourage industry efforts such as these that are intended to facilitate the transition to next-generation networks and services. To truly boost those efforts, however, the Commission must resist the temptation to subject sales or auctions of retired copper facilities to some form of regulation. The transition to all-IP networks is already proving to be a complicated process, and the best mechanism for expeditiously resolving issues as they arise is to permit industry

¹⁰³ *Id.* ¶ 62.

¹⁰⁴ *Id.* ¶ 86.

¹⁰⁵ *Id.* ¶ 87.

participants to develop and apply market-based solutions. Micromanagement of that process – including the imposition of rules on the commercial sale of facilities that properly have been retired in compliance with the Commission’s rules – likely would derail the possibility of such solutions.

III. The Commission Should Not Adopt Criteria for Judging Adequate Alternative Services that Would Turn § 214 into a Sweeping Regulatory Platform that Congress Never Intended

In its effort to define carriers’ responsibilities under § 214 when discontinuing legacy services, the Commission first seeks comment “on what constitutes an adequate substitute for a retail service being discontinued, reduced, or impaired.”¹⁰⁶ The Commission proposes to establish specific criteria to evaluate “replacement technologies when a carrier files an application to discontinue a retail service pursuant to section 214(a).”¹⁰⁷ Although the Commission suggests that it desires “technology-neutral criteria” and “do[es] not wish to impose any technology mandates,”¹⁰⁸ the kind of extensive, detailed criteria on which the Commission’s proposal focuses would do exactly that. Moreover, adopting such criteria would turn a straightforward part of the § 214(a) inquiry – whether alternative communications services will be available to a particular end-user community following discontinuance – into a complicated examination of the specific features and functions of replacement or alternative services, as well as the uses to which those services may be put and the equipment with which they may be used. And it would improperly convert § 214(a)’s relatively narrow mandate to ensure continuity of service into a broad-based tool to regulate the details of (certain) carriers’ service offerings. The Commission’s proposed approach would be unwise in any circumstances; it is particularly so

¹⁰⁶ *Id.* ¶ 92.

¹⁰⁷ *Id.* ¶ 93.

¹⁰⁸ *Id.* ¶ 94.

when the effect would be to hinder the deployment of next-generation services – which are expected to significantly improve the features, functionality, and quality of service available to consumers – in the name of maintaining “adequate” service options.

The Commission should not adopt the kinds of criteria described in the Notice but should maintain the existing straightforward and narrow “adequate substitute” inquiry for § 214(a) discontinuance applications.

A. The Commission’s Proposal Would Distort the Role of the “Adequate Substitute” Factor in Every § 214(a) Analysis

To begin with, it is important to keep in mind the context of the “adequate substitute” inquiry within the § 214 certification process. The statute directs the Commission to determine whether a proposed discontinuance of service will adversely affect the “public convenience and necessity.”¹⁰⁹ In applying that standard, the Commission “considers a number of factors in balancing the interests of the carrier and the affected user community.”¹¹⁰ The relevant factors include:

(1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations.^[111]

Thus the issue on which the Commission seeks comment – the adequacy of alternative services – is one-third of one factor in a five-factor test. Yet the Commission suggests expanding this single issue into a set of as many as ten detailed criteria that alternative available services would

¹⁰⁹ 47 U.S.C. § 214(a).

¹¹⁰ Order, *Verizon Tel. Cos.*, 18 FCC Rcd 22737, ¶ 8 (2003).

¹¹¹ *Id.*; see also Memorandum Opinion and Order, *Southwestern Bell Tel. Co. Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 To Cease Providing Dark Fiber Service*, 8 FCC Rcd 2589, ¶ 54 (1993).

have to satisfy in order to be deemed “adequate.” Moreover, the Commission would amplify this one part of the inquiry – part of the interests of the “affected user community” – without a corresponding development of the other side of the scale, the interests of the carrier. The Commission should not lose sight of the fact that § 214(a) demands a balanced approach.¹¹²

Nor should the Commission ignore the purpose of § 214(a)’s discontinuance provision, which is to prevent particular communities from being deprived of critical links to the larger public communications infrastructure.¹¹³ While AT&T recognizes the importance and scale of the IP transition, the Commission has not identified any reason why that transition, unlike the numerous changes to and discontinuances of services that the Commission has considered for the last seven decades, requires a new and complicated set of criteria for judging whether alternative consumer services are adequate.

The Commission states that it does not want to “wad[e] through a complicated morass of applications.”¹¹⁴ But it will be difficult to avoid that outcome if the Commission requires carriers to show how their own proposed replacement services, alone or in combination with the alternatives available from competitors, satisfy a new and burdensome checklist of criteria.

¹¹² See, e.g., Memorandum Opinion and Order, *Inquiry into Problems of Public Coast Radiotelegraph Stations*, 67 F.C.C.2d 790, ¶ 11 (1978) (“It is clear that the application of [the public convenience and necessity] standard presents the Commission with a delicate task of balancing the legitimate interests of both the carriers (and their investors) and the user community.”).

¹¹³ See, e.g., Memorandum Opinion and Order, *Lincoln Cnty. Tel. Sys., Inc.*, 81 F.C.C.2d 328, ¶¶ 11-12 (1980) (citing the legislative history and observing that the purpose of § 214’s discontinuance provision was to prevent a loss of telegraph service to critical wartime institutions resulting from, for example, merging telegraph companies closing particular stations); Memorandum Opinion and Order, *Western Union Tel. Co.*, 74 F.C.C.2d 293, ¶¶ 6-7 & n.4 (1979) (same).

¹¹⁴ Notice ¶ 5.

B. The Commission May Not Micromanage the Technical Details of the IP Transition Through the § 214 Process

The Commission also has not explained how a standardized set of criteria describing numerous technical requirements for alternative services could possibly be “technology-neutral” or sufficiently flexible to deal with the many diverse factual settings in which discontinuance applications will arise. This is particularly true in light of the Declaratory Ruling¹¹⁵ that the Commission issued simultaneously with the Notice, which establishes a new “functional” test that will expand the scope of § 214 to cover service changes that do not amount to an actual discontinuance of the service provided by the carrier but that may alter the uses to which certain customers might put that service.¹¹⁶ If carriers are now required to show an “adequate substitute” for any consumer-perceived “functions” of legacy services, the § 214 inquiry will become unimaginably wide-ranging and cannot help but be technology-specific.

Section 214 does not give the Commission authority to regulate the technological details of carriers’ services and networks. It certainly does not give the Commission authority to mandate that the nation’s telecommunications infrastructure remain tied to legacy technologies. That is clear from the statute itself, which exempts from the § 214 process any “changes in plant, operation, or equipment . . . which will not impair the adequacy or quality of service provided.”¹¹⁷ Plainly, Congress did not intend for § 214 to give the Commission general oversight authority concerning the technological details of carriers’ networks and services. At

¹¹⁵ Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-185 (Nov. 25, 2014) (“Declaratory Ruling”).

¹¹⁶ See Reply of AT&T Services, Inc., in Support of Petition for Reconsideration of United States Telecom Association at 6-8, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 et al. (filed Jan. 30, 2015).

¹¹⁷ 47 U.S.C. § 214(a).

times, the Commission appears to accept that fact, professing a desire to avoid “technology mandates.”¹¹⁸ But the Commission nonetheless proposes to adopt such mandates, suggesting that it might be appropriate to “apply specific technical standards” to call functionality such as caller ID or to impose “minimum performance threshold[s]” for services.¹¹⁹ Worse, the Commission even contemplates applying such technical standards to the non-call functions that third parties – not the carriers providing the services – want to be able to use in conjunction with telecommunications services and facilities. The Commission has gone far afield when it believes it might be appropriate to refuse carriers permission to replace outdated legacy services with new, feature-rich IP-based services because of an incompatibility with certain fax machines.

Indeed, the Commission has historically (and correctly) rejected arguments that § 214 certification can be denied on such grounds. The fact that a customer may “no longer be able to use [certain] equipment it had been using” with services being discontinued does not even require a § 214 application;¹²⁰ it certainly cannot justify denying such an application. Equipment or services sold by third-party vendors and simply connected to a telecommunications network are not “services” that are provided by the telecommunications carrier. It therefore makes no sense to look to such equipment and services in asking whether there are adequate substitutes for the telecommunications service itself. That is not the purpose of § 214.

The Commission asks “whether consumers expect, or should be entitled to expect, the same or equivalent functionalities from new services, or whether there are benefits from new services (e.g., more choice, lower cost, better features) that would compensate for any

¹¹⁸ Notice ¶ 94.

¹¹⁹ *Id.* ¶¶ 97-98.

¹²⁰ *Western Union Tel. Co.* ¶ 9.

differences.”¹²¹ AT&T strongly believes that the benefits from the IP transition will outweigh any differences in features or compatibility that may result. It is inevitable that some features of the legacy system will be lost and some compatibility will be disrupted; that is an inevitable consequence of technological innovation. But the marketplace will adapt to serve the demands of the public using new technologies, just as it has in the past when technology has evolved.¹²² The Commission should not delay the benefits of the IP transition in order to preserve every aspect of the status quo. Nor should it use the § 214 process to require incumbents alone to continue offering uneconomic legacy services that the vast majority of consumers have abandoned.

C. Section 214 Is Not an Appropriate Mechanism To Regulate Critical Issues That Should Be Handled on an Industry-Wide Basis

Finally, the Commission should not use the “adequate substitute” inquiry as a means to address policy issues that should be (and are being) dealt with on a uniform, industry-wide basis. Unlike the proposed criteria for evaluating technical details of services or compatibility with particular equipment – issues that should be left to market forces – some of the Commission’s proposed criteria for judging “adequate substitutes” deal with regulatory issues that the Commission should address directly, not through the § 214 back door. For example, AT&T agrees that ensuring the availability and reliability of 911 service is of vital importance to public safety. Similarly, AT&T shares concerns about meeting the communications needs of consumers with disabilities and ensuring the accessibility of next-generation networks and

¹²¹ Notice ¶ 94.

¹²² In response to concerns expressed by the alarm monitoring industry regarding the potential impact of the IP transition on companies’ ability to continue providing alarm services to their customers, AT&T worked with ADT to better understand the industry’s concerns. From this consultation, AT&T developed a statement of principles that it intends to apply during the transition to address those concerns.

services. As AT&T has previously explained to the Commission, it is working and will continue to work with the disabled community during and after the TDM-to-IP transition to understand how best to meet the needs of the community and to leverage the increased capabilities of an all-IP network to develop and deliver better and more robust assistive technology solutions than the legacy TDM network allows.¹²³

But § 214 is not the right regulatory tool for addressing those important issues. Section 214 certifications are isolated proceedings involving specific carriers, specific services, and specific geographic areas. Establishing § 214 criteria related to 911 service and accessibility issues would only impose a separate (and presumably additional) burden on existing carriers proposing to discontinue legacy services. This kind of piecemeal regulation is not only inappropriate, it is unnecessary. With respect to ensuring access for disabled consumers, there already are generally applicable laws and regulations governing service providers and equipment manufacturers alike.¹²⁴ With respect to 911 service, the Commission long ago extended 911 and/or E911 obligations to interconnected VoIP and wireless providers.¹²⁵ And the Commission is conducting a separate proceeding specifically to address the transition to IP-based networks and Next Generation 911.¹²⁶ That proceeding is the proper place to establish uniform and generally applicable standards for 911 service in next-generation networks.

¹²³ See, e.g., Comments of AT&T at 31-33, *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, GN Docket No. 13-5 (filed July 18, 2013).

¹²⁴ See, e.g., 47 U.S.C. §§ 255, 617-620; 47 C.F.R. §§ 6.5(c), 6.9, 7.9, 14.20(a)(4), (5).

¹²⁵ See, e.g., First Report and Order and Notice of Proposed Rulemaking, *IP Enabled Services*, 20 FCC Rcd 10245, ¶¶ 6-10 (2005); Report and Order and Notice of Proposed Rulemaking, *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, ¶¶ 8-9 (1996).

¹²⁶ See Policy Statement and Notice of Proposed Rulemaking, *911 Governance and Accountability; Improving 911 Reliability*, PS Docket Nos. 14-193 and 13-75 (FCC rel. Nov. 21, 2014).

At the same time it seeks comment on whether to establish new and additional § 214 criteria for things that should be regulated in their own right, the Commission seems to recognize (at least implicitly) the flaw in this proposal. The Commission asks whether it is “sufficient that a provider demonstrate that a substitute retail service available to its customers will offer 911 capabilities that comport with Commission rules.”¹²⁷ The question answers itself. If a next-generation service does not comply with applicable law, the Commission can and should address that violation directly. It should not do so indirectly through the § 214 process. And it certainly should not impose greater obligations in the § 214 context than the ones that apply across the board to all similarly situated service providers. If those generally applicable rules need improvement, the Commission can undertake to improve them. It should not rely on § 214 to solve the problem.

IV. The Commission Should Not Adopt a Rebuttable Presumption That Discontinuing Particular Wholesale Services Will Discontinue End-User Service

Just as § 214 is not intended (and should not be used) as a general-purpose tool to regulate the features and functions of retail services, so too would it be an unwarranted and unlawful distortion of § 214 to expand that statute to broadly regulate the provision of wholesale services. In seeking comment regarding the scope of its § 214(a) discontinuance authority in the context of wholesale service,¹²⁸ the Commission states that it “do[es] not propose to change course from [Commission] precedent,” which holds that “a carrier need not seek Commission approval when discontinuing service to carrier customers if there is no discontinuance, reduction,

¹²⁷ Notice ¶ 100.

¹²⁸ *See id.* ¶¶ 102-105.

or impairment of service to retail end-users.”¹²⁹ But nearly in the same breath, the Commission proposes to adopt a presumption that would effectively reverse that rule.

The Commission, without any evidence, speculates that “[w]here an incumbent LEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with this service, this can also be expected to affect the competitive LECs’ retail customers.”¹³⁰ Proceeding from this faulty premise, the Commission proposes to adopt “a rebuttable presumption that where a carrier seeks to discontinue, reduce, or impair a wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community such that approval is necessary pursuant to section 214(a).”¹³¹ The Commission should not adopt that presumption.

A. The Proposed Presumption Would Constitute an Improper and Unjustified Departure from Long-Standing Commission Precedent

The presumption the Commission proposes would constitute an unjustified departure from its precedent applying § 214(a) in the context of carrier-to-carrier services.¹³² The Commission has long recognized that, for purposes of § 214(a), “there are some important differences between” carrier-to-carrier relationships and “the more usual type involving a carrier and its non-carrier customer.”¹³³ Due to these “important differences,” the Commission has always sharply distinguished between “the ultimate impact on the community served” and

¹²⁹ *Id.* ¶ 102 (citing *Western Union Tel. Co.* ¶ 7 and *Lincoln Cnty. Tel. Sys.* ¶¶ 13-14, 22).

¹³⁰ *Id.*

¹³¹ *Id.* ¶ 103.

¹³² *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (agency changing positions must “display awareness that it is changing position” and “show that there are good reasons for the new policy”).

¹³³ *Western Union Tel. Co.* ¶ 7.

“any technical or financial impact on the carrier itself.”¹³⁴ Under § 214, “the primary focus should be on . . . the using public,” while effects on carriers “are more appropriately considered in a proceeding involving Section 201(a).”¹³⁵

Because the interests of carriers do not necessarily correspond to the interests of their end-user customers, the Commission has said it “must distinguish those situations in which a change in a carrier’s service offerings to another carrier will result in actual discontinuance, reduction, or impairment to the latter carrier’s customers as opposed to a discontinuance, reduction or impairment of service to only the carrier itself.”¹³⁶ The Commission’s proposed rebuttable presumption would erase this long-recognized distinction by assuming in every case that discontinuing a wholesale service to a carrier customer is tantamount to discontinuing or impairing service to end-user customers and thus presumptively requires a § 214 application.

Furthermore, the Commission’s proposed departure from precedent lacks any factual basis. The Commission cites no evidence to suggest that the presumption accords with real-world experience. Instead, the Commission relies only on an unfounded “expect[ation]” to support its proposed presumption,¹³⁷ leaving interested parties to guess at the basis for the presumption.¹³⁸

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*; see also Memorandum Opinion and Order, *Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131, ¶ 29 (2002); *Lincoln Cnty. Tel. Sys.* ¶¶ 11-14, 22.

¹³⁷ See Notice ¶ 102.

¹³⁸ *Cf., e.g., United States Lines, Inc. v. Federal Maritime Comm’n*, 584 F.2d 519, 540 (D.C. Cir. 1978) (notice-and-comment requirements “rest on the fundamental proposition that the right to comment or the opportunity to be heard on questions relating to the public interest is of little significance when one is not apprised of the issues and positions to which argument is relevant”).

In fact, the Commission’s expectation is contrary to the reality of contemporary telecommunications markets. The Telecommunications Act of 1996, for nearly 20 years, has opened local markets to facilities-based competition; in the event an incumbent carrier discontinues a wholesale service to a competitive carrier, the competitive carrier can purchase or provide for itself a substitute. To cite just one example, as AT&T has previously stated, wholesale carrier-customers will have the opportunity to obtain bare copper loops and utilize their own electronics to provide high-capacity services to their end-user customers.¹³⁹

Just as important, given the prevalence of alternative local providers – including the incumbent local provider – it will rarely be true that discontinuance of a wholesale service will deprive a community of end-users or any part thereof of adequate replacement or alternative services.¹⁴⁰ For this reason, the Commission is wrong to presume that in every case where a competitive carrier “relie[s] upon” a wholesale service as the least expensive or most convenient means to provide a retail service, that discontinuance of that wholesale service will automatically discontinue, reduce, or impair service to end-users.¹⁴¹ Circumstances where discontinuance of a wholesale service will deprive a community of retail service would be the rare exception to the norm of retail-service continuity. Without supporting evidence, presuming that retail discontinuance will result from wholesale discontinuance is unwarranted.¹⁴²

¹³⁹ See AT&T Wire Center Trial Proposal at 29; see also Reply Comments of AT&T Services, Inc. at 46, GN Docket Nos. 13-5 & 12-353 (Apr. 10, 2014) (“AT&T anticipates that any such retired [copper] loops would be offered through public notice to the industry for purchase by interested providers basically at salvage value.”).

¹⁴⁰ See, e.g., Order on Remand and Memorandum Opinion & Order, *High-Cost Universal Service Support*, 25 FCC Rcd 4072, ¶ 22 (2010) (noting “the growth of a vibrantly competitive telecommunications marketplace”).

¹⁴¹ See Notice ¶ 102.

¹⁴² See, e.g., *Motor Vehicle Mfrs. Ass’n of U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

B. The Presumption Would Invite Anti-Competitive Abuse

The Commission's proposed presumption would also provide an unwarranted opportunity for incumbents' competitors to abuse the § 214 process to challenge changes in service that have little impact on end-user customers and therefore, pursuant to the Commission's precedent, would be "inappropriate" for adjudication under § 214.¹⁴³ For example, it may usually be the case that an incumbent's decision to discontinue a given service to a wholesale carrier will raise that wholesale carrier's costs of providing retail service, but both the Commission and the D.C. Circuit have held that such a "rate increase" does "not in fact discontinue, reduce, or impair any service at all."¹⁴⁴

The holding in *Aeronautical Radio* also demonstrates why a carrier's decision to eliminate individual rate options for a term discount plan does not implicate § 214(a) unless and until doing so eliminates service (and any adequate substitutes) altogether. In *Aeronautical Radio*, the D.C. Circuit addressed a scenario strikingly similar to the term-discount-plan scenario on which the Commission has sought comment here.¹⁴⁵ AT&T had initially offered TELPAK, a bulk-discount telephone service, but later filed tariff revisions to terminate TELPAK.¹⁴⁶ The Commission and the D.C. Circuit agreed that terminating the bulk-discount offering did not implicate § 214(a), even though doing so "eliminate[d] a rate discount, thereby effectuating a rate increase," because "[a]ll the services which had been offered under the TELPAK tariff were

¹⁴³ *Western Union Tel. Co.* ¶ 6.

¹⁴⁴ *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980); accord Memorandum Opinion and Order, *American Tel. & Tel. Co., Long Lines Dep't*, 64 F.C.C.2d 959, ¶ 18 (1977) ("A change in rates has never been held to be a discontinuance, reduction or impairment of service to a community requiring prior Commission authorization.").

¹⁴⁵ See Notice ¶ 104.

¹⁴⁶ See *Aeronautical Radio*, 642 F.2d at 1224-26.

still available.”¹⁴⁷ This same conclusion necessarily extends to term-discount plans because it is premised on a fundamental distinction between the provision of service and the rates charged for service; a service is not “discontinue[d], reduce[d], or impair[ed],” i.e., made worse or less valuable, merely because it costs more.

C. The Proposed Presumption Is Inconsistent with the Statute

The Commission’s proposed presumption also finds no support in the text or history of § 214. At the outset, the presumption would circumvent Congress’s judgment that § 214 approval is required only when a carrier proposes to discontinue service “*to a community, or part of a community.*”¹⁴⁸ The Commission’s presumption would essentially re-write the statute to make discontinuance of service to a wholesale carrier an additional trigger for filing a § 214 application.

As to history, Congress has never expressed any desire to protect or promote the interests of competitive carriers through § 214(a). Congress added the “discontinue, reduce, or impair” portion of § 214(a) during World War II, when telephone service was still provided to communities on a monopoly basis. Congress’s primary aim in doing so was to prevent mergers of telegraph companies – which were to be allowed for the first time under the same statute that amended § 214 – from disrupting communications service to critical military and industrial facilities.¹⁴⁹ The prospect of a critical communication link being disrupted in wartime is not on par with the speculative and attenuated consequences that might befall end-users of wholesale carriers if those carriers lose one source of an input to their service. Even where end-user

¹⁴⁷ *Id.* at 1233.

¹⁴⁸ 47 U.S.C. § 214(a) (emphasis added).

¹⁴⁹ *See, e.g.*, H.R. Rep. No. 78-69, at 10 (1943); S. Rep. No. 78-13, at 4 (1943).

choices might be reduced, there is neither textual nor historical support for interpreting § 214(a) to equate the robustness of retail competition with the availability of retail service.

D. The Proposed Presumption Would Be Contrary to the Public Interest

The Commission’s rebuttable presumption would also impose enormous costs, to the detriment of the public. Stretching the scope of § 214 presumptively to cover every discontinuance of legacy wholesale services would multiply § 214 applications and tax the resources of both carriers and the Commission, particularly as the technology transition accelerates.¹⁵⁰ The Commission’s presumption would create interminable gridlock, as incumbent carriers would be forced to justify virtually every step of the transition to the Commission through a § 214 proceeding. As Commissioner Pai noted, this “isn’t a speedy process,” because the Commission “sometimes sits on these [§ 214] requests for months or even years.”¹⁵¹ Such a delay is unacceptable not only because it would indefinitely strand incumbents’ resources while the Commission rules on each individual application, but also because it would set in motion rippling adverse effects on the deployment of next-generation services that will ultimately harm consumers.

Compounding this procedural burden, the Commission’s suggested standard for the case-by-case adjudication necessary to rebut the presumption would require incumbents to prove a negative to obtain each approval – namely, that “discontinuance, reduction, or impairment of the wholesale service would not discontinue, reduce, or impair service to a community or part of a

¹⁵⁰ *Cf. Aeronautical Radio*, 642 F.2d at 1233 (noting that, if “virtually every rate increase might be argued to be a discontinuance of ‘service’ requiring a prior finding of convenience and necessity by the Commission,” the “attendant burdens would be enormous”).

¹⁵¹ Declaratory Ruling at 72 (statement of Commissioner Pai, dissenting).

community.”¹⁵² But the entities in the best position to demonstrate the end-user effects, if any, of discontinuing a wholesale service are the wholesale customers who claim that some retail service will be discontinued, reduced, or impaired. The Commission’s proposal would turn the § 214 process on its head by requiring incumbents to determine what retail services their *competitors* provide, in order to show that those retail services will remain available. If a competitive carrier believes that an incumbent’s discontinuance of a wholesale service will cut a community off from a particular retail service, then the competitive carrier should bear the burden of showing it.

It would likewise be inappropriate for the Commission to require incumbent carriers to file certifications rebutting the presumption or to maintain a record of the facts and analysis they relied on to determine the presumption was rebutted.¹⁵³ Imposing a certification or record-keeping requirement to rebut the proposed presumption would not only be burdensome and inefficient for the same reasons the presumption itself is, but such a requirement would also eliminate whatever streamlining benefits an incumbent would otherwise receive from not having to file a § 214 application. Both options would present incumbents with the cumbersome task of proving the absence of end-user service impact. Moreover, any possible benefits to an incumbent of a certification or recordkeeping requirement would pale in comparison to the regulatory uncertainty inherent in such a procedure.

In sum, the rebuttable presumption proposed by the Commission’s Notice is contrary to Commission precedent, unsupported by the facts, beyond the scope of the Commission’s

¹⁵² Notice ¶ 103. Under the Commission’s proposal, incumbents would also have the option of proving a second, equally flummoxing negative proposition: that “discontinuance, reduction, or impairment of the wholesale service would not impair the adequacy or quality of service provided to end users by either the incumbent LEC or competitive LECs in the market.” *Id.*

¹⁵³ *See id.*

statutory authority, and irreconcilably inefficient and burdensome. The Commission should not allow its desire to protect consumers to blind it to these obvious pitfalls.

V. The Commission Cannot and Should Not Require Wholesale Access Through § 214(a) Proceedings

The Commission also seeks comment on its tentative conclusion that it “should require incumbent LECs that seek section 214 authority to discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers to commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions.”¹⁵⁴

The Commission’s proposed approach is unlawful and misguided, threatening to deter innovation and hamper competition, all for the benefit of a small group of competitors, not competition.

A. The Combination of Broad § 214 Filing Obligations and Blanket Conditions Requiring Provision of Replacement Wholesale Services Would Unlawfully Expand § 214 and Unjustifiably Interfere with Innovation, to the Detriment of Consumers and U.S. Competitiveness

1. The Proposed Conditions Are Unlawful

To the extent the Commission concludes that § 214(a) presumptively applies to discontinuance of wholesale service, the possibility of imposing a replacement-service mandate transforms § 214 from a provision designed to ensure continuity of retail service to a competitor-protection provision. Not only would such a rule violate the Commission’s own precedent, but it would also exceed the Commission’s statutory authority. Moreover, such a course would be terrible policy.

First, as explained above, the Commission has repeatedly made clear that § 214 simply does not address wholesale services *per se*; rather, it reaches the discontinuance of wholesale

¹⁵⁴ Notice ¶ 110.

services only to the extent that such discontinuance leads directly to the discontinuance (or reduction or impairment) of retail services to a community or part of a community.¹⁵⁵ The combined effect of a broad presumption that § 214 applies to the discontinuance of wholesale services and a sweeping replacement-services mandate would be to force incumbent carriers to provide services to retail competitors in circumstances where the obligation is unneeded to protect retail customers' access to service. Such expansive regulation does nothing to address the statutory concern of § 214, and therefore violates the statute.

Second, the effort to turn § 214 into a wholesale access provision cannot be squared with the structure of the Communications Act, which specifically addresses carrier-to-carrier obligations in other provisions. Sections 201-205 and 251 expressly address the obligations of carriers in general and incumbent carriers in particular vis-à-vis other carriers. Accordingly, it would impermissibly distort the statute to read § 214 as imposing obligations in this area that are inconsistent with those imposed under those provisions.¹⁵⁶ More particularly, if an incumbent carrier *lacks* any obligation to provide wholesale service under those provisions, such an obligation cannot be imposed under § 214.¹⁵⁷

¹⁵⁵ See *supra* Part IV.

¹⁵⁶ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 156 (2000) (where Congress “has created a distinct scheme to regulate” an activity, agency is “preclude[d]” from doing so through other means); see also First Report and Order, *Establishment of Policies & Procedures for Consideration of Application to Provide Specialized Common Carrier Services*, 29 F.C.C.2d 870, ¶ 40 (1971) (“In the event that adverse consequences to the public should develop, the Commission can take such action on the relevant tariff filings as may be necessary” because “a question of this nature is more appropriately considered in connection with tariffs rather than upon [§ 214 proceedings].”).

¹⁵⁷ See, e.g., *National Fuel Gas Supply Corp. v. FERC*, 909 F.2d 1519, 1522 (D.C. Cir. 1990) (“The Commission may not, however, when it lacks the power to promote the public interest directly, do so indirectly by attaching a condition to a certificate that is, in unconditional form, already in the public convenience and necessity.”); see also *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151, 201 (D.C. Cir. 1995) (“[E]ven if the Commission could consider relevant

Third, and relatedly, the proper place for the Commission to address incumbents' wholesale obligations is in the dockets where the Commission is directly considering those very questions. The Notice suggests that the Commission's rule would merely "maintain established rules . . . that provide for wholesale access to critical inputs,"¹⁵⁸ but that is not so. On the contrary, if existing law imposed the obligations that the Commission proposes in the Notice, there would be no need for a rulemaking. The Commission proposes to create a new wholesale service obligation intended to shield less innovative competitors from the consequences of technological progress. That is no part of the purpose of § 214.

Fourth, the Commission's suggestion that it can establish price and other terms of service as a blanket condition on discontinuance authority¹⁵⁹ underscores the impropriety of the Commission's proposed approach. As explained above,¹⁶⁰ the Commission has no authority under § 214 to regulate price and terms of carrier-to-carrier service, which are a matter to be addressed under other provisions of the Communications Act.

2. *The Proposed Presumption Is Unlawful*

Even apart from the substantive unlawfulness of using § 214 to regulate prices and terms of carrier-to-carrier services, the Commission's proposal is procedurally flawed as well. The Commission cannot lawfully adopt *any* presumption concerning appropriate conditions on § 214 certifications. Section 214(c) authorizes the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity

criteria in determining whether a franchising authority can afford to regulate, it could not use those criteria to accomplish indirectly what § 542(i) directly proscribes.").

¹⁵⁸ Notice ¶ 110.

¹⁵⁹ See Notice ¶ 111.

¹⁶⁰ See *supra* Part IV.

may require”;¹⁶¹ that provision requires the Commission to consider each individual application and find the “facts which lead it to reach its conclusion of public benefit,” including the “balance [of] equities and opportunities among the various carriers.”¹⁶² It would be improper for the Commission to prejudge this application-specific balancing of interests by adopting a general rule for all § 214(a) applications involving legacy services; the dynamics of competition, and thus the balancing of interests, will vary by geography, type of service, subscriber base, and other factors.

Furthermore, as a matter of policy, there is no reason to believe that a one-size-fits-all mandate would appropriately address the variety of market circumstances that may be present in those communities facing the loss of access to a class of retail telecommunications services. For example, an incumbent carrier may be able to show that the availability of inter-modal alternatives means that discontinuance of service will not adversely affect the public interest.¹⁶³ Or the incumbent carrier may propose alternative service arrangements different from those that the Commission proposes in its presumption that will preserve retail service access.

More generally, the supposed advantage of a presumption – the avoidance of case-by-case evaluation of potential conditions¹⁶⁴ – is no advantage at all when the number of § 214 filings is small – as, under a lawful interpretation of § 214, it would be. On the contrary, whenever the discontinuance of a wholesale service would result in a true discontinuance or

¹⁶¹ 47 U.S.C. § 214(c).

¹⁶² *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776-77 (D.C. Cir. 1974); *see also MCI Telecomms. Corp. v. FCC*, 561 F.2d 365, 379 (D.C. Cir. 1977) (FCC must make “affirmative determination” regarding public convenience and necessity under § 214(c)).

¹⁶³ *See United States Telecom Ass’n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) (overturning Commission mandate that failed to take account of the state of competition in the market, including intermodal competition).

¹⁶⁴ *See* Notice ¶ 111.

impairment of retail service to a community or part of a community, the focus of the carrier's § 214 filing will be to show why discontinuance is nevertheless in the public interest – usually because of the availability of, or the proposal to provide, alternative retail or wholesale services. Permitting carriers to address each circumstance as it may arise not only ensures that the proposed solution actually responds to any potential public interest concern, but it also encourages innovative solutions that the Commission cannot anticipate. Furthermore, carriers always have an incentive to negotiate with interested parties in advance of § 214 filings, to attempt to address legitimate concerns and head off opposition that would delay implementation. And, to the extent the proposed discontinuance (along with any proposed measures to ensure continued access) fail to protect the public interest, the Commission can reasonably devote sufficient resources to address case-specific circumstances.

3. Placing Competitor-Protective Conditions on Technology Transition Would Be a Policy Disaster

Adopting rules to protect CLECs from the consequences of technological progress runs directly counter to sound regulatory policy.

We stress at the outset that the alleged concern here – that wholesale customers will be left high and dry in the absence of a regulatory wholesale-service-continuity mandate – is without any foundation. AT&T values its wholesale customers – including competitor-customers – and it offers wholesale services in markets that are often highly competitive and where AT&T can win and keep customers only by providing the best value services available. That will not change; to the contrary, continued innovation will lead to more competition at the retail and the wholesale level, not less. The suggestion that innovation is somehow an excuse to eliminate competitors is implausible and entirely wrong-headed.

At the same time, the notion that technological innovation must be a rising tide that lifts each individual competitor's boat is wrong. Innovation – technological progress – contributes significantly more to consumer welfare than static price competition.¹⁶⁵ Yet many innovations will harm *competitors*, either because consumers consider the new product as superior (in price, quality, convenience, features) to what was available before or because new technology renders the competitor's product or service obsolete. Nevertheless, sound regulatory policy – like sound antitrust policy – would never risk jeopardizing valuable innovation for the sake of preserving static competition.¹⁶⁶

Thus the Commission's starting point – the statement that “[t]echnology transitions must not harm or undermine competition”¹⁶⁷ – is perhaps tenable only if the Commission was being merely descriptive, that is, stating the tautology that technology transition cannot be treated as harm to competition. Taken as it was apparently intended – as a statement that competitors should be shielded from the competitive consequences of technological progress – the statement reflects a deeply misguided regulatory attitude. No one has questioned or can question that the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation.¹⁶⁸ Innovative companies will take advantage of that transition and the opportunities it creates; other companies will be left behind

¹⁶⁵ See 2B Phillip E. Areeda, et al., *Antitrust Law* ¶ 407a, at 34 & n.1 (3d ed. 2007).

¹⁶⁶ See, e.g., Alan Devlin & Michael Jacobs, *Anticompetitive Innovation and the Quality of Invention*, 27 *Berkeley Tech. L.J.* 1, 3 (2012) (“That the law should promote innovation is an unquestioned precept of modern public policy” because “the vast majority [of economists] have long agreed that the economic benefits flowing from invention dwarf those from all other sources of economic advancement combined.”).

¹⁶⁷ Notice ¶ 110.

¹⁶⁸ See, e.g., *id.* ¶ 7 (noting “[t]he network investment that is leading to these technology transitions has many benefits,” including “dramatically reduc[ing] network costs,” the “development of new and innovative services, devices, and applications,” and “improvements to existing product offerings and lower prices.”); see also *supra* p. 4, nn. 2-5.

and will fail. But any steps that the Commission takes to discourage transition – including by imposing effectively punitive regulatory requirements as a condition of that transition – will do the nation a profound disservice.

Furthermore, the Commission should be deeply suspicious of the motives of those competitive carriers that insist on the imposition of heightened access obligations as the price of permission to innovate. As noted, AT&T has every expectation that innovation in wholesale services will be a critical aspect of its own move to all-IP networks. (Indeed, with the ever-increasing capability of CPE, the distinction between wholesale and retail service will itself become increasingly blurred.) AT&T has a strong incentive to meet customer demand, including wholesale customer demand, or it will lose out to competitors able to do so. But competitive carriers understand that a Commission-imposed minimum service requirement can only help them and competitively harm AT&T. That is not fair; more important, because the harm is imposed only when AT&T engages in pro-consumer innovation, the proposed requirements are a significant tax on innovation that will hurt consumers and U.S. competitiveness.

Although the Commission pays brief lip service to broad concepts like “innovation, investment, economic growth for the nation, and competitive prices and services for consumers,”¹⁶⁹ the Notice reflects no effort to give appropriate weight to the public interests put in jeopardy by regulatory requirements that delay, even slightly, progress towards the IP transition. Instead, the Commission focuses on the self-serving pleas of CLECs concerned about “competitive disadvantages” they will face if the IP transition is allowed to proceed unimpeded.¹⁷⁰ The Commission should not confuse the viability of competitors with the

¹⁶⁹ Notice ¶ 110.

¹⁷⁰ See *id.* ¶ 107 (citing *Ex Parte* Letter from Eric Einhorn, Windstream Communications, Inc., *et al.*, to Jonathan Sallet, General Counsel, FCC (Apr. 28, 2014)).

robustness of competition, nor should the Commission equate the business interests of CLECs with the public interest.¹⁷¹

B. The Commission’s Existing Rules – and Existing Contracts and Tariffs – Adequately Address Notice and Termination Issues

In addition to equivalent wholesale access, the Commission seeks comment on how best to notify CLECs and how to treat early termination penalties in long-term tariffs when wholesale services are discontinued.¹⁷² As to notice, the Commission need not revise its rules to further accommodate CLECs’ ability to move their customers to alternative services. Each incumbent is already required to provide public notice of any network change that “[w]ill affect a competing service provider’s . . . ability to provide service” at the “point at which [it] makes a definite decision to implement,” and in any event no later than a year before implementation.¹⁷³ It would be impossible to provide definitive notice any earlier than that. Therefore, the Commission has no need to revise its rules to provide additional or different notice.

With respect to early termination fees, there is no reason to believe that effective contracts and tariffs do not adequately address any issues that may arise in cases where impending service changes affect parties’ existing business relationships. Nor is there any reason to believe that any disputes that may arise will not be resolved through negotiation without resort to the Commission’s oversight. An effort to craft anticipatory rules in the absence of information about particular disputes offers no advantage over case-by-case adjudication

¹⁷¹ *United States v. FCC*, 652 F.2d 72, 104 (D.C. Cir. 1980) (en banc) (“[T]he Commission’s overriding responsibility is not to foster the maximum level of competition in the industry it oversees, but to promote the public interest.”); *see also PocketPhone Broad. Serv., Inc. v. FCC*, 538 F.2d 447, 451 (D.C. Cir. 1976) (“[T]he Commission must not assume that competition is desirable for its own sake, but must consider all the factors bearing on the public convenience and necessity.”).

¹⁷² *See* Notice ¶ 113.

¹⁷³ *See* 47 C.F.R. §§ 51.325, 51.331.

should any such adjudication become necessary. In short, the Commission need not address any rules in this area.

CONCLUSION

The Commission should not adopt the proposals described in the Notice. It should reject unnecessary and unworkable backup power standards and focus instead on consumer education and industry development efforts. It should reject equally unnecessary modifications to the existing network notification rules. And it should reject each of the proposals concerning § 214 that would distort that statute into a sweeping regulatory tool to preserve particular competitive interests and inhibit the evolution of the next-generation networks that will benefit the public at large.

Respectfully submitted,

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