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competitive alternatives are available. Detailed criteria that would effectively require that the exact same service be available in order to discontinue a retail service would contravene the Commission's interpretation of Section 214(a), be overly burdensome, and halt the IP transition.

1. A SECTION 214(A) RETAIL SERVICE DISCONTINUANCE APPLICATION SHOULD BE GRANTED UNLESS IT CAN BE SHOWN THAT THERE ARE NO REASONABLE SUBSTITUTES AVAILABLE.

Consistent with the purpose of Section 214(a) and the Commission's traditional application thereof, discontinuance of a retail service should be granted if there are any reasonable substitute services available from any source, via any technology or platform. The discontinuing carrier should be considered only one possible source of replacement services. Moreover, as discussed above, the possible impact of discontinuance on resellers and other carriers using the discontinued service as an input is irrelevant under applicable precedent, except insofar as end users will be left with no retail options.⁵⁷

Under Commission precedent, discontinuance will be granted "when service alternatives are likely to exist,"⁵⁸ "even though some customer dislocations might" result.⁵⁹ Reasonable alternatives from any source have been held to be adequate substitutes for a discontinued service, justifying grant of a Section 214(a) application.⁶⁰ That reasonable alternative services may be more "administratively burdensome and costly" than the discontinued service does not weigh heavily against discontinuance if they are still affordable.⁶¹

⁵⁷ See *NPRM* ¶ 102 & n.198; *Western Union*, 74 F.C.C.2d at 296 ¶ 7.

⁵⁸ *First Competitive Carrier Order*, 85 F.C.C.2d at 43 ¶ 128.

⁵⁹ *Id.* at 49 ¶ 147.

⁶⁰ See, e.g., *Rhythms Links Inc. Section 63.71 Application to Discontinue Domestic Telecommunications Services*, 16 FCC Rcd 17024, 17027 ¶ 8 (CCB 2001); *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 13225, 13229-33 ¶¶ 8-16 & n.27 (IB 1999) ("*AT&T High Seas Order*"), *recon. denied*, 16 FCC Rcd 13636 (IB 2001).

⁶¹ *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22751-52 ¶¶ 27-29.

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Commission precedent makes clear that discontinuances are permissible so long as reasonably comparable retail services are available to consumers, even if the alternatives are not functionally identical and/or are offered at higher prices. In the *Verizon Copper Discontinuance Order*, the Wireline Competition Bureau found that, because “almost all of the . . . services previously available over copper . . . are also available over fiber,” there is minimal, if any, need for the discontinued services or facilities.⁶² Likewise, the Commission also affirmed the grant of AT&T’s request to discontinue its Terrestrial Television Service (“TTS”) to certain locations and universal TTS connectivity between the remaining served locations partly on the grounds that satellite services provided a “comparable alternative to” TTS and that point-to-point connections constituted an adequate replacement for the universal connectivity that was eliminated.⁶³

Similarly, in the *AT&T High Seas Order*, AT&T was permitted to discontinue its High Seas high frequency radio-telephone service because its customer base was “steadily shrinking” and “reasonable alternative services are available.”⁶⁴ The International Bureau found that, although satellite-based radio telephone services imposed higher costs and offered less robust coverage than AT&T’s High Seas service, those differences did not render satellite-based service “nonviable as a substitute” for the High Seas service, and thus did not preclude approval of AT&T’s request to discontinue those offerings.⁶⁵ The Bureau also found that customers could

⁶² *Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. for Authority to Discontinue Domestic Telecommunications Services*, Order, 28 FCC Rcd 13826, 13830 ¶ 10 (WCB 2013) (emphasis added).

⁶³ *Am. Telephone and Telegraph Co.*, Memorandum Opinion and Order, 8 FCC Rcd 6801, 6802 ¶ 13, 6803 ¶ 16 (1993).

⁶⁴ *AT&T High Seas Order*, 14 FCC Rcd at 13229 ¶ 8.

⁶⁵ *Id.* at 13229-30 ¶¶ 9-11.

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use other types of services, such as cellular service, noting that “[v]iable alternatives to a discontinued service need not be the same type of service.”⁶⁶

Given this precedent, the Commission should impose a strong presumption that discontinuance requests will be granted so long as retail customers have a reasonably comparable service available to them – even if it is not identical, or if it is somewhat more expensive. As demonstrated above, moreover, there are many alternatives to ILEC-provided services, and customers are migrating to those alternatives *en masse*, even absent any ILEC discontinuance. Such service substitutions that consumers have been making point the way to the appropriate approach to service substitution under Section 214(a). Specifically, the Commission should amend Section 63.71 of its rules, which sets out the streamlined procedures governing discontinuance applications.⁶⁷ Today, the vast majority of consumers have voluntarily “discontinued” legacy ILEC wireline services in favor of wireless and VoIP offerings, demonstrating their view that these newer services are reasonable alternatives to the abandoned services. The Commission should recognize this precedent and hold that if an ILEC (or, for that matter, any carrier) seeking to discontinue TDM voice service in a given area can certify that all affected retail customers have access to facilities-based interconnected VoIP, circuit-switched cable, 3G wireless, or TDM voice service, either from the discontinuing carrier or at least one other provider, that application will be subjected to Section 63.71’s streamlined processes. Consumers have demonstrated that all of those services are reasonably interchangeable and that copper-based TDM voice service is the least desirable of all. Section 214(a) should not be

⁶⁶ *Id.* at 13233 ¶ 16 n.27 (emphasis added).

⁶⁷ The Commission normally authorizes discontinuance under a streamlined process in 31 or 60 days, for non-dominant or dominant carriers, respectively, “unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected.” 47 C.F.R. § 63.71(a)(5)(i).

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interpreted to require that a substitute service have all of the characteristics of the undesirable service being discontinued.

2. THE COMMISSION SHOULD NOT PRESCRIBE DETAILED CRITERIA FOR SUBSTITUTE SERVICES.

The Commission accordingly should not prescribe detailed criteria that a service would have to meet in order to be considered a reasonable substitute for a discontinued service. The *NPRM* cites a Public Knowledge filing identifying ten “core technical features of the [PSTN].” Public Knowledge’s list is based on a study that presumes that the goal of the IP transition is to ensure that the “new IP environment delivers the same capabilities, reliability, and other critical aspects of the old technologies” being replaced.⁶⁸ This view is badly mistaken. As described above, Section 214(a) does *not* require that a reasonable substitute be an “exact substitute[] for” the discontinued service.⁶⁹ Consumers have shown themselves to be eager to abandon the supposedly “critical aspects of” TDM wireline voice service for other technologies. They have chosen the mobility and convenience of wireless services and the lower cost, greater capacity and flexibility of VoIP and other IP-enabled features over ILEC legacy services. The study upon which Public Knowledge’s “ten attributes” are based thus is predicated on a fundamentally flawed legal and economic premise – namely, that the Commission’s role in facilitating the IP transition is to perpetuate the specific characteristics (and costs) associated with the legacy PSTN rather than facilitating a shift to the services and features that actual customers demand.

In nearly every case, the “attribute” that Public Knowledge claims is essential has been repudiated by customers, who have voted with their feet and their dollars. For example, the

⁶⁸ CTC Technology & Energy, *A Brief Assessment of Engineering Issues Related to Trial Testing for IP Transition* at 1 (Jan. 13, 2014) (“*CTC Study*”), attached to Letter from Harold Feld, *et al.*, Public Knowledge, to Tom Wheeler, Chairman, FCC, GN Docket No. 12-353 (Jan. 13, 2014) (letter cited in *NPRM* ¶ 94).

⁶⁹ *AT&T High Seas Order*, 14 FCC Rcd at 13229 ¶ 9.

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study states that successor technologies should be required to achieve “the standards of the PSTN in its current state”⁷⁰ – *i.e.*, availability of 99.9 percent.⁷¹ But customers are fleeing from legacy services offering this level of availability. Likewise, Public Knowledge’s study identifies call persistence as “one of the distinguishing attributes of the wireline network, relative to wireless.”⁷² If so, then the overwhelming movement from wired to wireless offerings demonstrates specifically that customers *do not* value persistence enough to pay for it.

Moreover, efforts to build the PSTN “attributes” cited by Public Knowledge into the discontinuance regime would short-circuit ongoing policy debates over just what characteristics should and should not be mandated in a competitive, multi-platform communications environment, and would unfairly target ILECs for special obligations that their competitors do not face. For example, the attribute of “system availability” implicates the backup power issue that is addressed above, and subject to inquiry elsewhere in the *NPRM*.⁷³ Similarly, questions regarding 9-1-1 service are being addressed in other proceedings.⁷⁴ Issues such as these present industry-wide questions, and are properly considered in industry-wide proceedings. Addressing them via the discontinuance process will only ensure that they apply disproportionately to ILECs, which will account for a large portion of the discontinuance applications in the foreseeable future, and not to other providers offering equivalent competing services.

Finally, the Public Knowledge proposal should be rejected because it would be unwieldy and time-consuming. The criteria chosen by the study, if applied to individual discontinuance

⁷⁰ *CTC Study* at 5.

⁷¹ *Id.* at 18-19.

⁷² *Id.* at 24.

⁷³ *See id.* at 18; *NPRM* ¶¶ 31-48.

⁷⁴ *See, e.g., 911 Governance and Accountability*, Policy Statement and Notice of Proposed Rulemaking, 29 FCC Rcd 14208 (2014).

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applications, would require intensive, detailed factual inquiries into call quality, device interoperability, call functionality, cybersecurity and other highly technical issues that would take months to resolve. The discontinuance process should remain streamlined in most cases and should establish a simple, easy to apply presumption for reasonable substitute services.

E. Rate Changes, Including the Elimination of Discount Plans, Should Not Require Section 214 Approval.

The *NPRM* asks whether elimination of a wholesale term discount plan or other pricing mechanism might constitute discontinuance under Section 214(a).⁷⁵ As the Commission acknowledges, this proposal would be a departure from long-established Commission precedent, which holds that a change in rates, such as the elimination of a discount plan, does not require Commission approval under Section 214.⁷⁶ In fact, “[a] change in rates has *never* been held to be a discontinuance, reduction or impairment of service to a community requiring prior Commission authorization.”⁷⁷ And for good reason: The elimination of a term discount option would “not in fact discontinue, reduce, or impair any service at all.”⁷⁸

As the Commission has explained elsewhere, the Section 214(a) discontinuance requirements were never intended primarily to protect against higher rates resulting from a discontinuance. In *Western Union*, where the discontinuance of certain facilities resulted in higher rates for substitute services, the Commission explained that:

[T]he relationship between Sections 201-205 and Section 214(a) of the Act should be put into perspective. The legislative intent

⁷⁵ *NPRM* ¶ 104.

⁷⁶ *Id.* at n.201 (citing *Amer. Tel. and Tel. Co. Long Lines Department, Revisions to Tariff FCC Nos. 258 and 260 (Series 5000) – Termination of TelPak Service, Transmittal No. 12714*, 64 F.C.C.2d 959, 965 (1977) (“*AT&T Tariff Order*”); *Aeronautical Radio v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980)).

⁷⁷ *AT&T Tariff Order*, 64 F.C.C.2d at 965 (emphasis added).

⁷⁸ *Aeronautical Radio*, 642 F.2d at 1233.

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underlying the Communications Act . . . is that rates, terms, and conditions of service are to be established through the tariffing process as governed by Sections 201-205. . . . On the other hand, the notice and discontinuance requirements of Section 214(a) are directed at preventing a loss or impairment of a service offering to a community. . . . Accordingly, use of the Section 214 discontinuance process to challenge changes in rates, terms, and conditions of service would be inappropriate.⁷⁹

Thus, “the fact that a carrier’s tariff action may increase costs or rates does not give rise to any requirement for Section 214(a) certification.”⁸⁰

A departure from this long-standing precedent would represent a radical shift in Commission policy that would needlessly suppress providers’ flexibility to migrate away from legacy services. As the D.C. Circuit has recognized, such a shift would result in “enormous” “attendant burdens” because “virtually every rate increase might be argued to be a discontinuance of ‘service’ requiring a prior finding of convenience and necessity by the Commission.”⁸¹ This kind of painstaking approval process would impose unreasonable and unnecessary constraints where, as here, the Commission has not (and cannot) point to any harm that has resulted from the application of its long-established precedent. Even if the Commission believes that it should inject itself into the discount plans negotiated at arms’ length between sophisticated businesses – which it should not do – the Section 214 discontinuance mechanism is not the appropriate forum for such intervention.

III. THERE IS NO DEMONSTRATED NEED FOR SIGNIFICANT CHANGES TO THE COMMISSION’S COPPER RETIREMENT RULES

In the *NPRM*, the Commission proposes to expand and add more detailed requirements to its copper retirement rules. Specifically, the *NPRM* would broaden the circumstances requiring

⁷⁹ *Western Union*, 74 F.C.C.2d at 295 ¶ 6.

⁸⁰ *Id.* at 297 ¶ 9.

⁸¹ *Aeronautical Radio*, 642 F.2d at 1233.

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notification to affected CLECs, require that additional information be provided to those CLECs, and extend disclosure requirements to affected *retail* customers, as well as states and the Department of Defense. The Commission also seeks comment on facilitating the sale or auction of copper facilities that ILECs intend to retire.

CenturyLink recognizes the importance of meaningful notice to customers affected by proposed modifications to its network, including the retirement of copper facilities. Indeed, CenturyLink already voluntarily fulfills most of the additional requirements proposed in the *NPRM*, either because it has agreed to do so by contract or simply because it makes good business sense. In particular, CenturyLink provides meaningful notice to interconnecting CLECs that will be affected by the retirement of a copper facility in each of the circumstances outlined in the *NPRM*. CenturyLink also informs retail customers that their service is going to be moved to an upgraded facility, if that transition will directly affect them. To do otherwise would potentially harm CenturyLink's relationship with its customers. There is no easier way to lose a retail customer, for example, than to dig up their rose garden (to bury a fiber optic cable) or temporarily disconnect their service (to install enhanced electronics at their home), without giving them advance notice. CenturyLink has a strong interest in avoiding such negative customer experiences, particularly in today's competitive marketplace, where two-thirds of households in its service area have already left its network. CenturyLink also has an obvious interest in notifying its existing and prospective customers of the new and enhanced services that will be made available to them through upgraded facilities.

For all these reasons, CenturyLink has established an effective and timely process for notifying affected wholesale and retail customers of upcoming copper retirements and other changes to their underlying facilities. This process has drawn only occasional requests for

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additional time from interconnecting carriers and virtually universal positive feedback from retail customers, who are typically elated by the prospect of faster broadband speeds and a meaningful alternative to cable competitors. Given its long-standing and effective notification process, CenturyLink sees little need for additional rules in this area.

CenturyLink also is concerned that overly burdensome and intrusive network modification rules could interfere with the transition to next-generation networks and services. In August, CenturyLink announced the launch of gigabit broadband service to 16 cities.⁸² Over time, it hopes to deploy such services in other locations as well. Nevertheless, given the rural character of much of its service territory, CenturyLink's transition to all-fiber networks is likely to be an extended process.

The pace of CenturyLink's deployment of fiber facilities will depend, in part, on the ease with which the company can decommission legacy facilities and services and transition customers to new facilities and services. Over time, as more and more customers leave the legacy copper network, the cost of maintaining that network will eventually exceed the revenues it generates. At that point, it is logical to transition the remaining customers to the fiber network and retire the copper facilities. Rules that significantly delay CenturyLink's ability to retire obsolete copper facilities, or impede CenturyLink's capacity to provision new or enhanced services on the replacement fiber network, will extend the "payback" period (*i.e.*, the number of years it will take CenturyLink to recoup its investment) for fiber deployments, forcing the company to forego some fiber deployments that might otherwise occur. In such cases, CenturyLink may choose to devote more of its limited capital budget in areas with greater

⁸² Mark Hachman, *CenturyLink Brings Gigabit Broadband to 16 Cities: Seattle, Denver, and More*, PC World (Aug. 5, 2014), available at <http://www.pcworld.com/article/2461431/centurylink-brings-gigabit-broadband-to-16-cities-seattle-denver-and-more.html>.

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returns, such as the expansion of data centers for its burgeoning data hosting and cloud service business.

CenturyLink addresses the utility and impact of the Commission’s proposed rules below. Of particular concern are the detailed notification requirements the *NPRM* proposes for affected retail customers, which are both unnecessary and beyond the scope of Section 251(c)(5). Most troubling are proposed rules designed to prevent ILECs from “upselling” new and enhanced services, which would potentially undermine the business case for deployment, discourage consumers from obtaining the benefits of superior service, and run afoul of the First Amendment. The Commission’s rules and enforcement power provide the Commission ample authority to address concerns of misleading marketing techniques, without the need for rules that will dampen broadband investment and adoption.

A. The Copper Retirement Process Is Working Well Today.

In 1996, the Commission adopted rules implementing Section 251(c)(5)’s network disclosure requirements.⁸³ In 2003—now more than a decade ago—the Commission amended those rules to establish notification requirements applicable to ILECs’ retirement of copper loops.⁸⁴ To CenturyLink’s knowledge, these rules are working as intended.

CenturyLink describes below its current wholesale and retail notification processes, which already fulfill many of the additional requirements proposed in the *NPRM*. Last year, CenturyLink issued notices of copper retirement for 68 distribution areas. In response, CenturyLink received no objections. In 2013, CenturyLink received a single request for

⁸³ *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19468-19508 ¶¶ 165-259 (1996) (“*Second Local Competition Order*”) (subsequent history omitted).

⁸⁴ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC 16978, 17146-48 ¶¶ 281-84 (2003) (“*Triennial Review Order*”) (subsequent history omitted).

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additional time to transition four customers, which CenturyLink quickly accommodated. On the retail side, CenturyLink's network upgrades have not generated opposition either.

1. CENTURYLINK'S WHOLESALE NOTIFICATION PROCESS.

Before retiring a copper loop or portion of a loop (including the feeder portion of the loop) in a non-disaster situation,⁸⁵ CenturyLink takes several steps to ensure that wholesale providers directly or potentially affected by the proposed retirement have adequate time to adjust to the upcoming network change. At least 90 days before the retirement date, CenturyLink notifies affected telephone exchange service providers (*i.e.*, those using copper facilities proposed to be retired) of the proposed retirement by email, with detailed information, including the Circuit ID, cable and pair numbers, and impacted addresses.⁸⁶ CenturyLink alerts other CLECs operating in the affected area of the proposed retirement, by email and through CenturyLink's CLEC-facing system, Interconnect Media Access ("IMA") interface.⁸⁷ Finally, CenturyLink files a public notice with the Commission consistent with its copper retirement rules.⁸⁸

2. CENTURYLINK'S RETAIL NOTIFICATION PROCESS.

CenturyLink also provides notice of a network upgrade to affected consumers, *i.e.*, those to whose residence or property we will need access or who will need a new modem or other customer premises equipment ("CPE"). It is important to note that this process is distinct from

⁸⁵ In times of man-made disaster, CenturyLink immediately contacts affected wholesale customers by email, makes appropriate filings at the Commission and replaces damaged facilities as quickly as possible.

⁸⁶ See Exhibit A. The Circuit ID enables the service provider to pinpoint the affected circuit, while the cable and pair numbers specifically identify the facilities being retired.

⁸⁷ CenturyLink generally does not provide notice to information service providers (ISPs) because they do not typically interconnect with CenturyLink's last-mile network.

⁸⁸ CenturyLink does not disable copper loops or subloops or "de facto" retire them. If a loop or subloop becomes inoperable, CenturyLink replaces that facility. See NPRM ¶¶ 52-54.

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the copper retirement process. The transfer of a customer from a copper loop (or subloop) to a fiber-to-the-home (“FTTH”) or fiber-to-the-curb (“FTTC”) loop, for example, does not necessarily result in retirement of the copper loop (or subloop) that previously was used to serve the customer. The copper loop (or subloop) will be disconnected but may well remain in service. Indeed, CenturyLink currently does not retire copper loops (and subloops) in this situation. Regardless of whether the old loop (or subloop) is retired, CenturyLink notifies the customer of the transition if they will be temporarily out of service, if access to the customer’s property is necessary, or if the customer will need new CPE.

CenturyLink uses a multi-step process to provide such notification. For example, in 2012, CenturyLink initiated a 1 gigabit-capable fiber-to-the-premises (“FTTP”) overbuild deployment to 48,000 homes in Omaha. More than six months prior to the deployment, CenturyLink began notifying affected customers of the network upgrade by postcard,⁸⁹ followed by repeated attempts, using various means, to make sure that all affected customers were aware of the upcoming transition. Consistent with its DSL contracts, CenturyLink notified affected consumers at least 30 days in advance of the upgrade.⁹⁰ If access to a customer’s premise was necessary, CenturyLink sent a letter to the consumer asking them to set up an appointment for a service call. If the consumer did not contact CenturyLink, the company followed up with a phone call, and, if the consumer still could not be reached, sent a technician to the customer’s door. In advance of these individualized contacts, CenturyLink left door hangers notifying

⁸⁹ See Exhibit B. CenturyLink also sent letters to CLECs whose end users would be affected by the network upgrade, asking them to notify those end users. See Exhibit C.

⁹⁰ In some cases, no action was required by the consumer—such as when a new piece of electronics needed to be installed on the side of their house—though their service might be briefly interrupted. See Exhibit D. In other circumstances, the consumer could either choose to self-install a new modem, which would be shipped to the service address, or arrange for a CenturyLink technician to install the modem. See Exhibit E.

customers when a technician would be in their neighborhood. Each notification sent to a customer included a link to a website with a “Frequently Asked Questions” section that provided information about the migration process and the services available to the customer over the upgraded network.⁹¹

The CenturyLink group that made these consumer contacts does not sell products, so there was no attempt to “upsell” customers. These personnel essentially assumed that affected customers would retain their existing services on the new fiber facilities. At the same time, CenturyLink of course separately marketed new and enhanced services to consumers who would now be served by a superior network. Indeed, the very reason that CenturyLink decides to overbuild an area such as Omaha – and presumably the reason that *any* provider invests millions of dollars to upgrade its network – is to win new customers and provide new and upgraded services to existing customers, which is essential to recovering the substantial expense of deploying these facilities. In Omaha and other areas, CenturyLink’s experience has been that customers are excited, not dismayed, to learn that it will provide faster broadband speeds and a robust alternative to services provided by cable competitors.

B. The Commission Should Modify Its Proposed Notification Requirements for Interconnecting Competitors.

As noted, burdensome and unnecessary constraints on copper retirement will delay the benefits of the fiber-based networks that are replacing those copper facilities. While the Commission appropriately proposes to maintain the notice-only approach for copper retirement, the viability of that approach is subject to two important caveats.

First, an overly stringent discontinuance process for copper-based services will effectively extend Commission *approval* requirements to the retirement of copper networks. The

⁹¹ See Exhibit F.

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NPRM states that the copper retirement process requires only notice “[s]o long as no service is discontinued in this process (e.g., TDM basic voice)[.]”⁹² This implies that if a copper retirement will result in discontinuance of one or more services, then the ILEC will be required to obtain Commission approval before retiring those facilities. And, more troubling, if the required discontinuance process is overly restrictive, the ILEC may be significantly delayed, or even precluded from, discontinuing the service and retiring the underlying copper network, particularly if the legacy service cannot economically be provided over the fiber network.⁹³

Second, unreasonable changes in the Commission’s copper retirement rules could significantly delay or even halt copper retirement and associated fiber deployment, or discourage customers from transitioning to new, more functional services. CenturyLink highlights below its concerns with particular proposed requirements for notification to wholesale and retail customers, as well as proposed certification and record-retention requirements.

1. ILECS CANNOT ASSESS THE IMPACT OF COPPER RETIREMENT ON A WHOLESALE PROVIDER’S RATES, TERMS AND CONDITIONS.

In the *NPRM*, the Commission proposes to require ILECs to provide to interconnecting competitors a description of the expected impact of a proposed copper retirement, “including but not limited to any changes in prices, terms, or conditions that will accompany the planned changes.”⁹⁴ This is impossible. When it provides a copper facility, such as an unbundled copper loop, to a CLEC, an ILEC does not know what services the CLEC chooses to provide over that

⁹² *NPRM* ¶ 5.

⁹³ Section II of these Comments identifies particular concerns with the Commission’s proposed changes to the discontinuance process. The Commission’s dramatic expansion of the Section 214 discontinuance standard in the Declaratory Ruling appears to raise the prospect that, at least in some cases, a request to discontinue a service may be denied if the ILEC’s replacement service does not include one or more features of the service to be discontinued, regardless of whether those features are listed in the applicable tariff. *See id.* ¶¶ 117-18.

⁹⁴ *Id.* ¶ 57.

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facility, or what replacement service or arrangement would be best for the CLEC when that copper facility is retired. The ILEC thus cannot tell the interconnecting competitor how the prices, terms, and conditions of its service will change. That is something the competitor will have to determine itself.

2. THE COMMISSION SHOULD NOT REQUIRE NOTIFICATION TO ISPs.

The proposed rules attached to the *NPRM* appear to require that notice of proposed copper retirements be provided to each information service provider “that directly interconnects with the incumbent LEC’s network.”⁹⁵ However, ISPs do not typically interconnect with an ILEC’s last-mile network, but rather connect at an aggregation point within the network. They therefore are not directly affected by, and do not need notice of, retirement of copper facilities in the last-mile network.

3. IT WOULD BE UNREASONABLE TO REQUIRE ILECS TO PROVIDE FORECASTS OF COPPER RETIREMENT.

The *NPRM* also asks whether ILECs should be required to provide annual forecasts of expected copper retirements or other network changes.⁹⁶ They should not. An ILEC’s schedule for deploying fiber (and potentially retiring copper facilities) is very competitively sensitive information that, if disclosed, would enable cable providers and other competitors to preempt the ILEC’s market launch with their own network upgrades and retention promotions to blunt the effectiveness of the ILEC’s initiative. Disclosure of this information would thus cause significant competitive harm to ILECs and discourage them from upgrading their networks, thereby reducing choices for end users.

⁹⁵ See *id.*, App. A, Proposed Rule 51.332(b)(2).

⁹⁶ See *id.* ¶ 57.

C. The Commission Should Not Extend Its Copper Retirement Rules to Retail Customers.

While well intentioned, the Commission should reject the *NPRM's* proposal to extend its copper retirement rules to retail customers. Those rules were designed for a different purpose, based on a statutory provision governing interactions between interconnecting carriers. Of most concern, the Commission should not adopt rules to hinder “upselling,” which would delay the IP transition and raise First Amendment concerns.⁹⁷

1. THE COMMISSION’S AUTHORITY TO REQUIRE NOTIFICATION TO CONSUMERS UNDER SECTION 251(c)(5) IS HIGHLY QUESTIONABLE.

Section 251(c)(5) requires ILECs to “provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the interoperability of those facilities or networks.”⁹⁸ In both the *Local Competition Second Report and Order* and the *Triennial Review Order*, the Commission interpreted this provision as requiring notice only to interconnecting competitors.⁹⁹ Thus, before extending Section 251(c)(5) notification requirements to retail customers, the Commission would have to revise its long-standing interpretation of that statutory provision.

⁹⁷ The Commission also should not require ILECs to maintain records of such customer notifications. *See id.* ¶ 64. Such a requirement would be exceedingly burdensome given that the retirement of copper plant in just one area could impact tens of thousands, if not hundreds of thousands, of retail customers.

⁹⁸ 47 U.S.C. § 251(c)(5).

⁹⁹ *See Second Local Competition Order*, 11 FCC Rcd at 19471 ¶ 171 (“Section 251(c)(5) requires that information about network changes must be disclosed if it affects competing service providers’ performance or ability to provide service.”); *Triennial Review Order*, 18 FCC Rcd at 17147 ¶ 281 (notifications of copper retirement “will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities”).

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As the Commission has explained, the purpose of the disclosures required by Section 251(c)(5) is solely to “promote[] open and vigorous competition contemplated by the 1996 Act.”¹⁰⁰ Thus, Section 251(c)(5)’s operative language requires public notice of “changes in the information necessary for the transmission and routing of services” and “changes that would affect the interoperability of [the ILEC’s] facilities or networks”— information that clearly affects interconnecting providers rather than retail customers.¹⁰¹ Further, Section 251(c)(5)’s placement in Section 251, which is titled “Interconnection,” and specifies the duties interconnecting carriers’ owe to each other, further suggests that its reach is limited to interactions between interconnecting carriers. Indeed, the plain language of Section 251(c)(5) and its placement within Section 251 (which addresses interconnection, not retail service) explain why, in initiating its efforts to implement the Act nearly twenty years ago, the Commission *never even contemplated* notice to retail customers.¹⁰² Reliance on Section 251(c)(5) for requirements for ILECs to notify retail customers of copper retirements therefore appears to be highly questionable.

2. THE COMMISSION’S COPPER RETIREMENT RULES ARE ILL-SUITED TO AND UNNECESSARY FOR RETAIL CUSTOMERS.

Given their genesis in the interconnection statute, it is not surprising that the Commission’s copper retirement rules are ill-suited for ensuring that retail customers receive

¹⁰⁰ *Second Local Competition Order*, 11 FCC Rcd at 19471 ¶ 171.

¹⁰¹ *See id.* at 19404, ¶ 17 (“We conclude that ‘information necessary for transmission and routing’ in section 251(c)(5) means any information in the [ILEC’s] possession that affects a competing service provider’s performance or ability to provide either information or telecommunications services. We define ‘interoperability’ as the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.”).

¹⁰² *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Notice of Proposed Rulemaking, 11 FCC Rcd 14171, 14235-37 ¶¶ 189-194 (1996).

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appropriate notice of network upgrades affecting them. Under those rules, an ILEC must provide public notice for any network change that will result in the retirement of a copper loop or subloop and the replacement of such loop or subloop with an FTTH or FTTC loop.¹⁰³ Thus, the transition of a customer's service from a copper loop to a fiber loop does not trigger a disclosure obligation under the current copper retirement rules, unless the copper loop is being removed from service.

It is unclear whether the Commission intends to broaden the scope of the copper retirement rules to cover situations where a copper loop (or subloop) is "replaced" by a FTTH or FTTC loop, but the copper loop (or subloop) remains in service, given the inconsistent definitions of "copper retirement" in the *NPRM* and proposed rules. Under the *NPRM*'s proposed definition,¹⁰⁴ copper retirement would occur only if the copper loop (or subloop) is removed or disabled. In CenturyLink's network this currently does not typically occur when a customer is switched to a brownfield FTTH or FTTC loop. Thus, the ILEC would not be required to disclose this change to an affected retail customer served on that loop or to any affected interconnecting carriers. But the definition of copper retirement in the proposed rules would lead to a different result: if a copper loop (or subloop) was replaced by a FTTH or FTTC loop, the ILEC would have to disclose this network change to both affected retail customers and interconnecting carriers. Whether intentional or not,¹⁰⁵ these differing definitions of copper retirement illustrate the fact that a network change that is material to a retail customer (*i.e.*, the

¹⁰³ See 47 C.F.R. § 51.325

¹⁰⁴ See *NPRM* ¶ 52.

¹⁰⁵ It is possible that the definition in Proposed Rule 51.332 reflects a typographical error, as it mirrors the current definition of copper retirement in 47 C.F.R. § 51.325(a)(4), except that the phrase "the replacement of such loops with fiber-to-the-home loops or fiber-to-the curb loops" is preceded with an "or," rather than an "and."

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transition of service from a copper facility to a fiber facility) is not necessarily material to an interconnecting carrier, and vice versa.

Regulatory mandates to notify affected retail customers of a change in the network facilities used to serve them are also unnecessary. Communications networks have constantly evolved over time, with constant improvements in the facilities and technologies used to serve retail customers. Notably, those countless upgrades have occurred over the decades without a Commission rule requiring ILECs (or competing providers) to notify affected customers.

There is no reason to think such a requirement is needed today. Given the huge capital investment required for fiber overbuilds, and the new and advanced services that can be provided over fiber facilities, ILECs possess strong incentives to notify affected retail customers of a transition from copper to fiber. Intense competition from cable, wireless and CLEC competitors give ILECs further motivation to ensure that their retail customers are adequately informed and educated about network upgrades that might require new or modified CPE or will negatively affect them. As noted, given these considerations and its contractual commitments, CenturyLink already has in place a multi-step process to notify affected retail customers of an upcoming transition from copper to fiber facilities. For all these reasons, the Commission's proposed retail notification requirements are superfluous and unnecessary.

D. Rules Designed to Hinder “Upselling” Will Delay Fiber Deployment and the IP Transition and Run Afoul of the First Amendment.

The *NPRM* proposes that ILECs be required to advise retail customers who might be affected by copper retirements that the customer “will still be able to purchase the existing service(s) to which he or she subscribes with the same functionalities and features as the service

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he or she currently purchases” if that statement is accurate.¹⁰⁶ If the statement would not be accurate, the ILEC would be required “to include a statement identifying any changes to the service(s) and the functionality and features thereof.”¹⁰⁷ The *NPRM* further proposes to require ILECs—but not their competitors—to supply “a neutral statement of the various choices that the ILEC makes available to retail customers affected by the planned network change.”¹⁰⁸ In addition to raising competitive parity concerns, both requirements implicate carriers’ First Amendment rights because the proposals compel content, create a situation where a carrier might be required to speak when it would otherwise choose not to, and likely cannot be demonstrated to be legally sustainable.

Of course, there is no excuse for a provider to misrepresent or otherwise intentionally mislead a consumer into thinking that an existing service will no longer be available when it will be, or that he or she *must* buy an upgraded service or package of services if that is not true. But the Commission’s enforcement process, as well as consumer education efforts that will be undertaken by both the Commission and service providers, are well equipped to address these speculative concerns.

The *NPRM*’s proposals raise significant legal and policy concerns. *First*, the *NPRM*’s communication proposals would apply only to ILECs, placing them at a competitive disadvantage as they try to market new services and functionalities to retail customers who will be migrating from copper to fiber facilities. Even if such compelled communications were sound

¹⁰⁶ *NPRM* ¶ 65 (referring to “Content” of the required message), & App. A, Proposed Rule 51.332(c)(2).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* ¶ 72. This proposal is based on Public Knowledge’s and NASUCA’s concerns that ILECs “*may* take advantage of copper retirements to ‘upsell’ subscribers.” *See id.* ¶ 71 (emphasis added).

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as a matter of law and policy (which CenturyLink does not believe they are), there is no logical basis to suggest that consumers are more likely to be harmed by ILECs than by CLECs or cable and wireless providers with whom ILECs compete on a daily basis.

Second, the “forced speech” inherent in these proposed statements implicates the First Amendment to the Constitution.¹⁰⁹ There is no doubt that the First Amendment applies to the compelled communications proposed in the *NPRM*: it establishes a disclosure mandate and dictates not only the form but also the content of such communication.¹¹⁰ And, as made clear above, given that companies like CenturyLink undoubtedly already make disclosures to customers about their networks and the effect of changes to those networks on customers’ products and services, there already exist “less restrictive approaches” to such government-mandated speech. Indeed, in another context, the Commission has recognized that the First Amendment generally requires that providers be given flexibility in how they communicate with their customers, and that government entities should not be dictating the content of such speech.¹¹¹

¹⁰⁹ While it does not mention the First Amendment by name, the *NPRM* acknowledges its relevance when it seeks comment on whether certain disclosure proposals in the *NPRM* would advance “important government interests,” and whether any other “less restrictive approaches” would accomplish the Commission’s desired goals. *NPRM* ¶¶ 69, 73, 75.

¹¹⁰ See *id.* ¶ 63 (Form), ¶ 65 (content requirement to “state clearly and prominently that a retail customer ‘will still be able to purchase the existing service(s) to which he or she subscribers with the same functionalities and features as the services he or she currently purchases’”), *id.* at ¶ 72 (content requirement that ILECs “supply a neutral statement of the various choices that the LEC makes available to retail customers affected by the planned network change”).

¹¹¹ See *Truth-in-Billing and Billing Format*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 7492, 7530 ¶ 60 (1999) (explaining that proposed labels regarding charges related to federal regulatory actions would be consistent with the First Amendment because “we have not mandated or limited specific language that carriers utilize to describe the nature and purpose of these charges; each carrier may develop its own language to describe these charges in detail”); *id.* at 7532 ¶ 63 (“Our standardized label requirement is even less onerous, requiring carriers to use the labels, but otherwise leaving them free to determine

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Third, the rationale behind the *NPRM*'s proposed government-compelled speech is flawed. The *NPRM* reflects a concern about ILECs possibly trying to “upsell” their customers when they are in the process of modifying their networks or retiring their copper facilities. The *NPRM* contains no discussion, however, of the fact that upselling is not unlawful (despite the fact that the term is almost always used in a pejorative sense). Indeed, customers of service providers are not generally unwitting or uneducated in terms of what communications services or packages promote their economic and personal needs. And they may find that spending additional dollars provides them increased functionality and satisfaction with their purchases. New fiber networks will not only increase customers’ choices, but strengthen the economic foundation of their service provider. Accordingly, government-compelled communications to customers that are crafted to stress some theoretical benefit of maintaining or replicating the *status quo* could undermine the already-tenuous business case for fiber overbuild in many areas. They would also undercut Commission policy seeking to ensure that all Americans have access to a minimum level of broadband service, now defined as 25 Mbps downstream and 3 Mbps upstream.¹¹² It would be inconsistent for the Commission to insist that “25 Mbps downstream is necessary to provide all households the *advanced* services Congress identified: high-quality voice, data, graphics, and video,”¹¹³ while simultaneously chastising providers for urging customers to upgrade to those speeds. Indeed such communications could deny consumers the

how best to describe charges related to federal regulatory action in a truthful and nonmisleading manner.”).

¹¹² See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, FCC 15-10, GN Docket No. 14-126 (rel. Feb. 4, 2015).

¹¹³ *Id.* ¶ 33.

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very benefits that these upgraded networks can deliver to them. There is no basis in fact or law to create this tension.

Under *Central Hudson*,¹¹⁴ regulation of commercial speech will be found compatible with the First Amendment if and only if: (1) there is a substantial government interest, (2) the regulation directly advances that interest, and (3) the proposed regulation is not more extensive than necessary to serve that interest.¹¹⁵ The Supreme Court has made clear that disclosure requirements trigger First Amendment scrutiny every bit as much as prohibitions on speech, opining that the difference between compelled speech and compelled silence is “without constitutional significance, for the First Amendment guarantees ‘freedom of speech,’ a term necessarily comprising the decision of both what to say and what *not* to say.”¹¹⁶ The Court has also rejected any distinction between “compelled statements of opinion” and “compelled statements of ‘fact’” – “either form of compulsion burdens protected speech.”¹¹⁷

Accordingly, government mandates compelling specific speech by specific service providers must pass First Amendment review. The Supreme Court, however, has never upheld the constitutionality of a governmentally-imposed disclosure requirement in the absence of evidence that the regulation was reasonably necessary to address a potential problem.¹¹⁸

¹¹⁴ *Central Hudson Gas & Elec. Corp. v. Public Service Comm’n*, 447 U.S. 557, 566 (1980).

¹¹⁵ Given that the NPRM’s proposals are expressly “content” related, a standard of review more rigorous than that required by *Central Hudson* could be argued as required (*i.e.*, strict scrutiny).

¹¹⁶ *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988).

¹¹⁷ *Id.* at 797-98.

¹¹⁸ In *Riley v. National Fed’n of the Blind of N.C., Inc.*, the Supreme Court invalidated a mandatory disclosure provision that required professional fundraisers to disclose to potential donors the percentage of charitable contributions collected during the preceding year that were actually given to the charities for whom the fundraisers worked, even though certain donors might have an abstract interest in learning such information. In *Ibanez v. Fla. Dept. of Bus. and Professional Regulation*, 512 U.S. 136 (1994), the Court invalidated the punishment of a Certified Financial Planner (CFP) under a state rule requiring CFPs to disclose in their

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In short, mandated information-disclosure requirements are unconstitutional in the absence of a documented governmental justification. “The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, or correct the effects of past deception.”¹¹⁹ But, as noted above, there have been only anecdotal allegations about customers being misinformed that a retirement of copper requires them to switch to more expensive services or packages of services—allegations which the ILECs in question deny. And mandates that ILECs tell customers that they can keep their existing service are likely to be confusing to customers, who might understand such communications to suggest that they *should* do so, even if the customers would be better served by pursuing different options. At least at this point, there is no factual predicate for the proposed mandated disclosures, and a compelled speech requirement would be unconstitutional.¹²⁰

advertisements that CFP status was conferred by an unofficial private organization. The Court explained that the State’s “concern about the possibility of deception in hypothetical cases is not sufficient” and demanded actual evidence of harm. (“Neither the witnesses, nor the Board in its submissions to this Court, offered evidence that any member of the public has been misled” in the absence of the disclosure.). “Given the state of this record -- the failure of the Board to point to any harm that is potentially real, not purely hypothetical -- we are satisfied that the Board’s action is unjustified.” *Id.* at 146. *See also Doe v. Reed*, 561 U.S. 186 (2010) (affirming that disclosure requirements trigger First Amendment scrutiny); *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 250 (2010) (explaining that “[u]njustified or unduly burdensome disclosure requirements offend the First Amendment by chilling protected speech,” although upholding the particular disclosure rules at issue, based on review of the record showing that they were “intended to combat the problem of inherently misleading commercial advertisements”).

¹¹⁹ *National Committee on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977); *see also Entm’t Software Ass’n v. Blagojevich*, 469 F.3d 641, 651-52 (7th Cir. 2006) (applying strict scrutiny to, and striking down, a statutory disclosure requirement).

¹²⁰ Moreover, none of the cases the Commission often relies on to support a government right to compel disclosures by businesses (specifically *Nat’l Elec. Mfrs. Ass’n v. Sorrell*, 272 F.3d 104 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002) and *New York State Restaurant Ass’n v. New York City Bd. of Health*, 556 F.3d 114 (2009)) supports such a government mandate. The issues the Commission is addressing (*i.e.*, copper retirements and service discontinuance) do not rise to the level of “protecting human health and the environment” (*Sorrell*) or public health (*NY State Restaurant Ass’n*). In any event, those cases misread *Zauderer v. Office of Disciplinary Counsel of the Supreme Court*, 471 U.S. 626, 651 (1985) as having created a “rational connection”

IV. RATHER THAN MANDATING BACKUP POWER, THE COMMISSION SHOULD ENDORSE THE CSRIC BEST PRACTICES AND PERMIT SERVICE PROVIDERS TO CRAFT MARKET RESPONSES.

The *NPRM* observes that IP networks generally do not power the CPE that connects to them, in contrast with legacy TDM network architectures, in which electrical power was often supplied to a consumer's CPE through central office connections. Even within a TDM network, though, CPE has long been viewed as distinct from the service provider's network. The Commission unbundled and detariffed CPE in the 1980 *Second Computer Inquiry* decision.¹²¹ In the 35 years since then, the Commission has pursued policies designed to ensure vigorous competition and a wide array of choices in CPE, and users of landline telephone service have looked *not* to their service providers but to third parties for their CPE. Even among customers who remain on legacy copper networks, many rely on cordless telephones with no copper connection to the handset and no backup power.¹²² Indeed, millions of end users in the United States have chosen CPE that will not work during electrical outages if they have not secured

(*Sorrell*, 272 F.3d at 115) or “rational basis” (*New York State Restaurant Ass’n*, 556 F.3d at 134-35) standard when, in fact, the word “rational” does not appear in the opinion. The Supreme Court’s subsequent reliance on *Zauderer* to strike down (under the *Central Hudson* test) a disclaimer requirement in *Ibanez v. Florida Dept. of Business and Professional Regulation* confirms that the Second Circuit erred reading *Zauderer* as establishing a “rational basis” test.

¹²¹ *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, 77 FCC2d 384, 438-47 ¶¶ 140-61 (1980), *recon.*, 84 FCC2d 50 (1980), *further recon.*, 88 FCC2d 512 (1981), *aff’d sub nom. Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

¹²² *NPRM* ¶ 33 (querying how to account for power outages affecting such CPE). *See also* Letter from Thomas Cohen, Counsel for American Cable Association (“ACA”), to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, at 2 n.1 (Nov. 17, 2014) (“*ACA Ex Parte*”) (noting that many residences have only cordless phones that cannot be used during power outages). Whether consumers realize that the battery in the handset of cordless phones only provides power to the handset but not the base station – with the consequence that the phone will not work in the event of a power outage – is questionable. To the best of CenturyLink’s knowledge, there are no point-of-sale disclosures. So if the matter is disclosed, likely it is in the literature provided to the customer, which many consumers would not bother to review.