

**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
)	

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

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INTRODUCTION AND EXECUTIVE SUMMARY

The Comments filed in response to the Commission’s Notice¹ present a stark choice between a policy that seeks to accelerate innovation and a policy that saddles consumers with the costs of sheltering companies that seek to delay the technology transition unless they are permitted to free-ride on incumbents’ investment. For many years, preserving incentives to invest in next-generation networks has been a cornerstone of the Commission’s policy. That policy has worked – investment by incumbent providers and more recent market entrants alike has led to expanded broadband access and greater competition across communications markets. The Commission should refuse to heed those commenters who implicitly argue that it is more important to protect existing competitors than to promote innovation, investment, and genuine competition.

AT&T and other commenters favoring innovation do not ask the Commission to put in place any radical deregulatory program; they simply ask the Commission to adhere to settled interpretations of the scope of the Commission’s statutory authority and established limits on ILECs’ obligations to permit competitors unbundled access to ILECs’ networks. In the absence of evidence that greater regulatory impositions are required to address a significant market failure – which no commenter offers – adding burdensome requirements that will put obstacles in the path of the IP transition would do the public a real disservice. The Commission should stay on the right side of this policy issue, abandon the over-regulatory approach of the Notice, and reject even more burdensome CLEC proposals.

¹ Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 et al., FCC 14-185 (rel. Nov. 25, 2014) (“Notice”).

I. The Commission does not have statutory authority to adopt backup power requirements for Customer Premises Equipment (“CPE”). Even if it did, commenters have provided no evidence to justify a broad and expensive backup power mandate. For many years, the deregulated market for CPE has meant that consumers have been responsible for ensuring that their CPE functions in a power outage; with the proliferation of wireless phones, the number of consumers relying on line-powered CPE has fallen sharply. Yet there is no evidence that this has created significant public safety risks. Given the substantial costs that any backup-power mandate would impose on consumers, the appropriate course is for the Commission to continue to rely on consumer education and market innovation to address any need for backup power. Commenters’ requests that the Commission impose these obligations on service providers and expand those obligations even beyond what the Commission proposed in the Notice are unjustified and would impose substantial costs for no proven benefit.

Commenters’ calls to extend backup power requirements to broadband and wireless networks are beyond the scope of the Notice. Those issues already are being addressed in other proceedings, and there is, again, no evidence that there is any deficiency in carriers’ practices in this regard. Finally, ADT’s call to impose Managed Facilities-Based Voice Network standards as a matter of regulation is unjustified, particularly in the absence of any evidence that voluntary compliance has been lacking.

II. Comments filed in response to the Notice demonstrate that the expansion of network modification notice requirements is beyond the Commission’s statutory authority and contrary to the policy of promoting the deployment of advanced broadband networks. Commenters that support expanded notice requirements not only fail to offer a legal rationale, but they also fail to proffer any evidence that existing network modification rules are inadequate

to protect the legitimate interests of CLECs and customers alike. Contrary to CLECs' claims, rule changes are not needed to facilitate their continued deployment of Ethernet over Copper; any interest in such deployment could not, in any event, justify delaying the deployment of new fiber facilities.

The Commission should also reject commenters' proposals to require approval – or its equivalent – before ILECs should be permitted to retire copper loops. The Commission has consistently refused to give any party veto power over incumbent carriers' efforts to implement more advanced networks, and the interest in promoting investment in next-generation networks is no less urgent today. Any effort to impose additional unbundling obligations – as some commenters propose – as a condition on granting permission for network modifications would violate the statute.

The Commission should also reject commenters' proposal to expand notice obligations by requiring ILECs to provide forecasts of copper retirements; forcing the disclosure of such information is anticompetitive and will discourage fiber deployment. And the best way to promote the potentially beneficial sale of retired copper loops by ILECs is to avoid regulations that would make such sales uneconomic and unduly burdensome.

The Commission should not require notifications to retail customers of network modifications; such mandatory notifications are likely to create, not alleviate, consumer confusion. To the extent carriers do provide customers notification of such changes, they should be free to inform customers about new services made available through the deployment of advanced networks. Such information benefits consumers. Any effort to bar such “upselling” would violate the First Amendment.

III. The Commission should not adopt a checklist of criteria for judging the adequacy of retail substitute services under § 214. The comments supporting that approach – or asking the Commission to impose even more onerous requirements – essentially confirm that it would require unwieldy discontinuance applications and would severely delay the IP transition out of a misguided intent to preserve the technological minutiae of legacy services. Even worse, many of these commenters want to tailor the checklist items to the precise needs of specific industry segments based on third-party applications or services that they use along with the telecommunications service (and which are not offered by the carrier providing that telecommunications service). If the Commission indulges such requests, there is no foreseeable stopping point. Section 214 will become an impassable obstacle on the path to replacing outdated legacy services with next-generation technology. That is not in the public interest.

Nor is it consistent with congressional intent and Commission precedent. Commenters supporting the Commission’s proposal ignore the former and urge the Commission to abandon the latter, without providing any principled basis for doing so. There is none. Nor is there any reason to err further and adopt some of the proposals advanced by commenters, such as the proposal to require § 214 approval for wholesale services even when no retail services will be affected; the Commission did not propose to take such an unlawful course, and it should not accept suggestions to do so.

The Commission should likewise reject certain commenters’ unfounded criticisms of wireless services as replacements for wireline. For example, there is no basis – and certainly none on the current record – to revoke the forbearance from § 214 that has applied to wireless services since 1994. Likewise, the Commission’s treatment of wireless services under an

antitrust analysis has no relevance to the § 214 inquiry. Comments to the contrary are unpersuasive.

Finally, the Commission need not adopt the unlawful and unwise checklist that it proposes to protect consumers in the IP transition. AT&T agrees with commenters who suggest a consumer education campaign; AT&T has already proposed exactly this sort of effort. Ensuring that customers have the resources they need to make informed choices is the right approach. Miring the IP transition in unending § 214 applications is not.

IV. The Commission should not adopt a rebuttable presumption that any discontinuance of a service used by other carriers as a wholesale input will also discontinue, reduce, or impair service to retail users.

First, that presumption would be unlawful. As the Commission has long recognized, § 214 is not designed to protect carrier customers, but the presumption the Commission proposes would attempt to use it that way. Indeed, several commenters ask the Commission to be even more forthcoming about this change and simply hold that § 214 approval is required regardless of any effect on retail end-users. The Commission has cited no basis for departing from its precedent, and the commenters have provided none.

Second, the presumption is unwarranted. Neither the Commission nor the supporting commenters has offered any justification beyond a conclusory assertion that wholesale discontinuance *must* affect retail end-users. If that proposition were true, the numerous comments filed in this proceeding would have unearthed some evidence to support it. They have not. The most that these commenters have shown is that they may encounter some increased costs in providing service. But as the D.C. Circuit has confirmed, that is not enough to implicate § 214.

V. Finally, the Commission cannot use § 214 to require incumbent carriers to guarantee wholesale customers “equivalent access” to replacement services on the same rates, terms, and conditions as the services being discontinued. Section 214 simply does not provide the Commission the authority to do so. None of the commenters endorsing the Commission’s proposal demonstrate otherwise; instead, they cite other statutory grants of authority. To require wholesale access in particular circumstances, the Commission must rely on those other statutes (if anything). Section 214 is not, by virtue of its grant of conditioning authority, an all-purpose regulatory back door for the Commission to impose any obligations it sees fit without adhering to the statutes specifically governing such obligations. Moreover, even if such an application of § 214 were lawful, none of the commenters has shown that it is necessary. There is no evidence of a lack of competition in the markets for next-generation services.

DISCUSSION

I. The Commission Should Not Adopt the Unworkable CPE Backup Power Requirements Proposed in the NPRM

Having declared CPE to be unregulated and severable from Title II common carrier services 35 years ago, the Commission cannot now impose CPE backup power requirements on carriers and other communications service providers. In any event, the ubiquity of wireless phones and the diversity of market-based solutions for battery backup have kept Americans connected, even when the power goes out. The Commission should not attempt a costly and burdensome remedy for a problem that does not exist. This is not to gainsay the critical importance of emergency communications, but the Commission should remain pragmatic about the scope of any potential regulatory solution. CPE battery backup is not a panacea, and the Commission should view it as only one small piece of a broader effort to educate consumers about public safety and disaster preparedness.

A. The Absence of Universal CPE Backup Power Is the Result of Market Forces and Presents No Public Safety Concern

The Commission long ago made the determination that provision of CPE should be separated from the provision of network services, deregulated, and left to market mechanisms.² As a direct consequence, the quality, functionality, and reliability of CPE has been, for decades, outside the scope of the Commission's regulation. The result of that regulatory forbearance has been an explosion of innovation in CPE that the Commission now takes for granted.

Deregulation also means that voice-service providers have for many years been unable to guarantee that customers, including those using line-powered POTS, can place calls when the power goes out.³ It depends on what CPE the customers choose. For example, millions of Americans have chosen to use cordless phones and other CPE that rely on commercial power,⁴ and 41% of Americans rely exclusively on wireless service.⁵ Even as Americans continue to migrate to voice-service and CPE options that may not work during a power outage, no one has made any credible showing that the Commission's long-standing decision *not* to impose backup

² See *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶ 9 (1980) (“We conclude that CPE is a severable commodity from the provision of transmission services and that regulation of CPE under Title II is not required and is no longer warranted.”), *aff'd*, *Computer & Commc'ns Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

³ See Comments of ADTRAN, Inc. (“ADTRAN”) at 14 (“[T]he Commission deregulated and detariffed CPE in the early 1980's, so the incumbent carriers do not have control over the CPE owned or used by their customers.”); Comments of ITTA – The Voice of Mid-Size Communications Companies (“ITTA”) at 21 (“Carriers typically have no role in the market for battery backup equipment.”).

⁴ See, e.g., Comments of the California Public Utilities Commission (“California PUC”) at 4 (noting “widespread use of cordless phones” that “are not self-powered, and fail during a power outage”); Comments of ADTRAN at 18 (citing market data indicating that Americans purchased 7.3 million cordless phones in 2014).

⁵ See Comments of AT&T Services, Inc. (“AT&T”) at 12; see also Comments of ADTRAN at 18 (“[P]ower supplied by the telephone company apparently is not viewed as critical for the large majority of consumers.”).

power requirements for CPE has created any significant public safety issue.⁶ Without any evidence of a significant public-safety problem, there is no need for a broad – and expensive – regulatory solution.

The IP transition is simply one additional step away from a long-vanished world in which consumers could have any color phone they wanted as long as it was black. CPE backup power is currently not in every home because consumers have decided to forgo it, not because the market has failed to offer it.⁷ For most Americans, a fully charged mobile device is all the battery backup they will ever want or need, and market evidence strongly indicates that consumers can be expected to have wireless phones available when power goes out: In 2013, Americans purchased 170 million wireless phones, but only 13.6 million landline phones (three-quarters of which were cordless phones).⁸ In a world in which Americans are cutting the cord and providers have no control over the CPE that their customers choose, providers can educate customers about the need for backup power solutions but should not have to bear a heavy regulatory burden to ensure that those customers have any particular arrangements in place for backup power for that CPE.

Because the Commission has deregulated CPE, it has disclaimed any authority to impose CPE backup power requirements. And, even if it had such authority, the Commission should not use it to impose unworkable and unnecessary requirements on providers and consumers. As the

⁶ See Comments of the Fiber to the Home Council Americas (“FTTH Council”) at 19 (“[I]ndustry efforts to notify consumers about battery backup availability have been effective, and there has been no evidence of consumer harm.”).

⁷ See *id.* at 17 (“[T]he market currently provides adequate emergency communications solutions for consumers.”).

⁸ See Consumer Electronics Association, *Digital America: State of the U.S. Consumer Electronics Industry 1* (2013), available at <http://www.ce.org/News/Publications/Digital-America.aspx>.

Notice acknowledges, the costs of a CPE backup power mandate would ultimately be borne by consumers – either explicitly or implicitly.⁹ Absent a manifest public-safety need, there is no basis to force consumers to pay for something they do not want.

B. The Commission Should Allow Consumers Freedom to Choose Whether and How to Self-Provision CPE Backup Power

AT&T reiterates that relying on customers to monitor their backup power supplies is the most sensible approach in light of technological and marketplace realities.¹⁰ The record shows that there are a variety of backup power options available to consumers,¹¹ and that different groups of consumers (*e.g.*, rural vs. urban) may have vastly different backup-power needs.¹² Thus, the record confirms that any uniform standard will be a poor fit for many. The only “just right” solution is to permit consumers to make their own informed choices about which CPE backup power option, if any, suits their particular circumstances, just as they do for the many other electronic devices they rely on every day. The Commission can facilitate smart choices by educating consumers and working with IP-based service providers to develop industry best practices.

As AT&T stated in its opening comments, backup power systems rarely need to provide as much as four hours of battery life because most power outages last less than two hours.¹³ TCA echoed this fact in its comments, citing data indicating that “95% of commercial power

⁹ See Notice ¶ 35 n.109.

¹⁰ See Comments of AT&T at 7-14.

¹¹ See, *e.g.*, *id.* at 7-10; Comments of Verizon at 17-18; Comments of American Cable Association at 11-12.

¹² See, *e.g.*, Comments of Members of the Rural Broadband Policy Group at 3-4; Comments of Environmental and Energy Study Institute (“EESI”) at 3 (“[I]mpacts of outages will be more severe for rural populations.”).

¹³ See Comments of AT&T at 11.

outages last less than 4 hours.”¹⁴ An eight-hour backup power standard would impose additional costs – adding expense and consuming space – but would be of little marginal value.

Furthermore, requiring days or weeks of CPE backup power to every customer, as some parties propose,¹⁵ would be an enormously burdensome undertaking, if it were feasible at all. Such backup power systems would be bulky, expensive, and potentially hazardous pieces of equipment that consumers would neither want nor need in their homes. Requiring such long-term backup power systems would be engineering for the extreme without any basis for doing so.

Furthermore, although several parties propose to require service providers to bear primary responsibility for providing, maintaining, monitoring, and/or replacing CPE backup power solutions,¹⁶ consumers, who make the choice as to the CPE on which they wish to rely, are in the best position to perform these functions.¹⁷ Giving consumers responsibility for CPE backup power would not “suddenly place the responsibility on consumers”¹⁸ because millions of Americans have already chosen non-line powered services for their primary, and often for their exclusive, means of meeting their communications needs. As a result of these choices,

¹⁴ Comments of TCA at 3 (citing Congressional Research Serv., *Weather Related Power Outages & Electric System Resiliency* 8 (Aug. 28, 2012)).

¹⁵ See, e.g., Comments of the National Association of 911 Administrators at 2; Comments of Members of the Rural Broadband Policy Group at 4; Comments of Public Knowledge *et al.* at 25-27; Comments of EESI at 3.

¹⁶ See, e.g., Comments of Public Knowledge *et al.* at 24-28; Comments of EESI at 3-4; Comments of the Pennsylvania Public Utility Commission at 4-6; Comments of the Michigan Public Service Commission at 2-3 (“Michigan PSC”).

¹⁷ See Comments of AT&T at 10-14.

¹⁸ Comments of Public Knowledge *et al.* at 24.

consumers are already accustomed to taking responsibility for monitoring and maintaining the power that runs their CPE.¹⁹

If service providers were required to provide CPE backup power, the Commission should require only prospective implementation in order to avoid the technological pitfalls of retrofitting prior deployments. It should also permit providers to include CPE backup power as a cost of service, just as many providers currently do for TDM-based CPE battery backup.²⁰ By allowing providers to charge customers transparently for backup power, consumers would have the information they need to shop among competing alternatives for backup power, including the alternative of opting out of backup power altogether. Furthermore, to the extent the Commission places an obligation on voice service providers to ensure battery back-up, it must equally impose that obligation on over-the-top VoIP providers.²¹ Such a uniform requirement is the only way to ensure that any backup power obligation imposed on service providers is competitively neutral.

C. The Commission Should Limit “Minimally Essential Communications” to Voice Calls

As AT&T stated in its opening comments, only voice calling should be deemed “minimally essential” for backup-power purposes.²² Defining “minimally essential communications” this way recognizes that voice calling (including non-911 calls to family, caretakers, or others) is the most common mode of communication in an emergency. It also acknowledges the technological realities of battery power. Broadening the scope of “minimally

¹⁹ See Comments of AT&T at 11-12.

²⁰ See Notice ¶ 35 n.109.

²¹ *But see* Comments of Vonage Holdings Corp. at 4-5; *but see also* Comments of American Cable Association at 13-15.

²² See Comments of AT&T at 16-17.

essential” to services like video and data, as Public Knowledge urges,²³ would place a significant strain on battery backup units and would drain those units more quickly.²⁴ Public Knowledge’s proposal to require at least one week of backup power for “every service that supports the safety of consumers”²⁵ is divorced from the reality of current limitations on battery technology and costs. Common sense and actual consumer behavior support a much more targeted approach.

D. The Commission Should Not Expand the Scope of Its Proposed Backup Power Requirements

Several parties ask the Commission to expand its backup power proposal in two principal ways. Both proposals should be rejected.

First, AARP and AICC urge the Commission to extend backup power requirements to broadband networks, including cell sites and central offices.²⁶ Broadband service providers, however, already engineer their network equipment with batteries and generators that ensure connectivity when commercial power fails.²⁷ Furthermore, the Commission has already comprehensively addressed backup power requirements for wireline broadband networks in the

²³ See Comments of Public Knowledge *et al.* at 21-23.

²⁴ See Comments of APCO at 3 (noting that “multi-media capabilities could become a drain on limited back-up power capabilities for CPE, especially over extended time periods”).

²⁵ Comments of Public Knowledge *et al.* at 19, 22.

²⁶ See Comments of AARP at 11-15; Comments of the Alarm Industry Communications Committee at 4.

²⁷ See, e.g., Comments of Verizon & Verizon Wireless at 3, *Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 11-60, 13-75 (May 13, 2013) (“Almost all of Verizon’s [central offices] are engineered to have on-site, fixed generators with 72-hour fuel reserves as well as battery reserves.”); Comments of AT&T at 8-9, *Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 11-60, 13-75 (May 13, 2013) (“AT&T also invests heavily in batteries and generators [at its central offices] to ensure continuity of service.”).

911 Reliability Order,²⁸ and the Commission is already proposing ways to “improve the resiliency of mobile wireless communications networks during emergencies” in a separate, ongoing proceeding.²⁹ The NPRM provides no appropriate procedural basis to address issues of *network* reliability in this proceeding.

Second, ADT asks the Commission to require telecommunications providers to meet voluntary Managed Facilities-Based Voice Network (“MFVN”) standards.³⁰ ADT says incorporating these industry standards into Commission regulations would “protect customers” despite acknowledging that voluntary MFVN standards “have already proven fruitful” and “benefit millions of customers.”³¹ ADT also says imposing MFVN standards by regulation would provide a “backstop to ensure ongoing compliance,” without offering any evidence of non-compliance.³² In short, ADT offers a solution in search of a problem. ADT’s proposal would also single out “telecommunications providers” for additional regulation while exempting non-telecommunications providers of voice service (*e.g.*, Vonage, Comcast).³³ The Commission should reject this unnecessary and competitively biased proposal.

²⁸ See Report and Order, *Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, 28 FCC Rcd 17476 (2013).

²⁹ Notice of Proposed Rulemaking, *Improving the Resiliency of Mobile Wireless Communications Networks; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, 28 FCC Rcd 14373, ¶ 1 (2013); see also Comments of Sprint Corp. at 8.

³⁰ See Comments of ADT at 3.

³¹ *Id.* at 3, 6.

³² *Id.* at 3.

³³ *Id.* at 7.

II. The Commission’s Proposed Expansion of Network Modification Rules Is Unsupported by the Record and Would Inhibit Deployment of All-Fiber Networks

There is no need or legal basis to expand ILECs’ obligations related to network modifications; the expanded obligations the Commission proposes would undermine its stated “commit[ment] to maintain[] the incentives for providers to deploy fiber.”³⁴ The record amply documents the negative consequences that its proposed changes to the network modification rules would bring.³⁵ At the same time, the comments filed in support of the Commission’s proposal fail to provide the “specific examples and facts” regarding “the consequences” of the Commission’s proposal for “consumers, competition, and public safety” that the Commission sought and without which the sort of innovation-squelching regulations that the Commission seeks to impose cannot begin to be justified.³⁶

The harm posed by the Commission’s proposed rule changes would be exacerbated by the additional changes proposed by CLECs and certain advocacy groups, which urge the Commission to impose even greater burdens on ILECs that would effectively transform the

³⁴ Notice ¶ 15.

³⁵ *See, e.g.*, Comments of Corning Inc. at 3 (“[T]he proposal to require notification when copper networks are retired would impose significant costs on carriers and consumers,” would “inundate consumers with useless information,” and would be “duplicative of other processes already in place”); Comments of CenturyLink at 33 (“[B]urdensome and unnecessary constraints on copper retirement will delay the benefits of the fiber-based networks that are replacing those copper facilities.”); Comments of GVNW Consulting, Inc. at 16 (“A comment process will only serve to make the service discontinuance process longer, more burdensome and thus more expensive for the network provider.”); Comments of ADTRAN at 11 (proposed new requirements “would make it exceedingly difficult for the incumbent carriers to upgrade their facilities, and thereby deter investment in new fiber”); Comments of ITTA at 3 (Commission’s proposals “seem designed to address hypothetical harms that there is no record evidence to support” and “would serve as a disincentive to fiber deployment by incumbent wireline carriers”).

³⁶ Notice ¶ 53.

current notice-based process to an approval process.³⁷ Even worse, these parties seek to rewrite the existing unbundling rules, conditioning future network modifications on the availability of unbundled next-generation network facilities that the Commission determined, more than a decade ago, that CLECs were capable of deploying themselves.

In short, the Commission's proposed changes to the network modification regulations, as well as certain parties' proposed expansion of those changes, are beyond the Commission's statutory authority, are unsupported by any factual basis in the record, and would undermine the technological advancement and consumer benefits that the Commission is attempting to facilitate.

A. There Is No Legal Basis for Proposed Changes to Network Modification Rules

The bulk of the comments supporting the Commission's proposed rule changes, including comments proposing even more burdensome changes, fail to address the Commission's statutory authority to expand ILECs' network modification obligations. This is particularly true of the proposed requirements regarding customer notice and comment regarding network changes. As AT&T described in its opening comments, § 251(c)(5) does not authorize the rule changes that the Commission proposes.³⁸ A variety of parties have voiced their agreement on this point.³⁹

The few parties that attempt to support the Commission's legal authority simply quote §§ 251(c)(5), 201, 202, and 706 of the Act, without offering any further explanation regarding

³⁷ See, e.g., Comments of COMPTTEL at 4; Comments of Birch, Integra, and Level 3 at 29-33; Comments of Public Knowledge *et al.* at 30-32; Comments of Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee") at 8-13.

³⁸ See Comments of AT&T at 37-38.

³⁹ See, e.g., Comments of CenturyLink at 36; Comments of GVNW Consulting at 15; Comments of Corning, Inc. at 17-20; Comments of the U.S. Telecom Association at 7 & n.13.

the connection between the statutory language and the proposed regulations.⁴⁰ The parties offer no such explanation because they cannot; in particular, § 706 – with its focus on promoting the deployment of advanced broadband networks – cuts strongly against regulations that would throw up obstacles to such a transition. In fact, that provision was central to the Commission’s prior decision to reject unbundling obligations for next-generation facilities;⁴¹ it provides no basis to expand network modification obligations here, much less to link those requirements to the adoption of those previously (and correctly) rejected unbundling obligations.

AARP claims that § 214(c) – which confers a right of action on “any party in interest” to seek to enjoin unapproved service discontinuances – supposedly supports the Commission’s proposed retail-customer-notification requirements.⁴² But this argument, like many other comments supporting the Commission’s proposals,⁴³ confuses network modifications and service discontinuances. When a carrier makes physical change in network facilities – as they have done for decades – that will typically leave existing end-user services in place, meaning that § 214 will not be implicated. On the other side of the coin, when a carrier discontinues services to a community of end-users, whether or not as the result of a network modification, the carrier must comply with § 214. Section 214 thus does not address network modifications, and AARP’s reliance on it to support the Commission’s network-modification proposals is misplaced.

⁴⁰ See Comments of Public Knowledge *et al.* at 34; Comments of Birch, Integra, and Level 3 at 33-34; Comments of Full Service Network LP and TruConnect (“TruConnect”) at 11.

⁴¹ See, e.g., 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, ¶ 236 (2003) (“TRO”) (“[O]ur obligation to ensure adequate infrastructure investment incentives pursuant to section 706 supports limitations on the unbundling of fiber-based loops.”), *vacated in part and remanded*, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

⁴² See Comments of AARP at 39-40 (citing 47 U.S.C. § 214(c)).

⁴³ See, e.g., Comments of Utilities Telecom Council at 7-8.

B. There Is No Credible Record Evidence to Support Additional Network-Modification Obligations

Even if the Commission had legal authority to expand the existing notice obligations associated with network modifications, the comments confirm that there is no evidence supporting the need for such an expansion. The current network-modification rules provide customers and CLECs alike with ample and timely notice to prepare for network modifications, and the hoped-for acceleration in copper retirement provides no reason to think this will change. The record confirms there is no regulatory gap that requires the Commission's intervention.⁴⁴ That should be the end of the matter.

Furthermore, none of the supposed problems with the existing network-modification rules provides a basis for the Commission's proposed revisions. At the outset, although some commenters raise concerns about inadequate copper maintenance and repair,⁴⁵ AT&T addressed in its opening comments why rules already in place adequately address ILECs' obligations in that regard.⁴⁶ There is no reason for the Commission to address this issue further by expanding the definition of "copper retirement." As GVNW Consulting succinctly put it, "[t]here is no such thing as a *de facto* retirement."⁴⁷ As for arguments that consumers should have a voice in the network change process,⁴⁸ that suggestion is misguided. Consumers have a right to service in accordance with the terms of carriers' offerings; they have no right to service over a particular

⁴⁴ See, e.g., Comments of FTTH Council at 2 ("[T]he service providers and their vendors are behaving responsibly, providing sufficient customer notice and capabilities, and, consequently, there is no need for the Commission to adopt new regulatory regimes.").

⁴⁵ See, e.g., Comments of Public Knowledge *et al.* at 29-30; Comments of Birch, Integra, and Level 3 at 36; Comments of XO Communications at 10-12.

⁴⁶ See Comments of AT&T at 30-32.

⁴⁷ Comments of GVNW Consulting at 17.

⁴⁸ Comments of Public Knowledge *et al.* at 32-33.

transmission medium. When carriers do discontinue existing services, the § 214 process is available to ensure that consumers are protected. Uncorroborated allegations about improper marketing practices,⁴⁹ however, have little if any relevance to the issues before the Commission in this proceeding.

Furthermore, CLECs' claims that a change in the rules is needed to facilitate their continued deployment of Ethernet over Copper ("EoC") are flawed for several reasons.⁵⁰ First, as AT&T discussed in its opening comments, it has been retiring copper feeder for years while complying with the Commission's notice requirements, without objection from affected CLECs.⁵¹ Second, CLECs' assumption that they are entitled to feeder is at odds with the Commission's prior determination not to require ILECs to unbundle that portion of the loop as a stand-alone UNE.⁵² Third, CLECs ignore their ability to obtain access to copper subloops in order to provide EoC. The existing rules provide CLECs with access to copper distribution plant,⁵³ and that access, along with the ability to obtain access to collocation (as well as poles, conduits and rights of way) necessary to make use of the subloop facilities,⁵⁴ provides CLECs with the capabilities they need to employ EoC. Fourth, CLECs ignore their ability to obtain, at least from AT&T, access to retired copper loops on a commercial basis in order to provide

⁴⁹ *See id.* at 29-31; Comments of California PUC at 16-17.

⁵⁰ *See, e.g.*, Comments of XO Communications at 12-13; Comments of Birch, Integra, and Level 3 at 29-33; *see also* Comments of WorldNet Telecommunications, Inc. at 2-3.

⁵¹ *See* Comments of AT&T at 29-30.

⁵² *See TRO* ¶ 254 ("Unlike our previous subloop unbundling rules, however, the rules we adopt herein do not require incumbent LECs to provide unbundled access to their feeder loop plant as stand-alone UNEs, thereby limiting incumbent LEC subloop unbundling obligations to their distribution loop plant.").

⁵³ *See* 47 C.F.R. § 51.319(b)(1); *TRO* ¶ 254.

⁵⁴ *See, e.g.*, 47 C.F.R. § 51.323(k); *id.* § 51.319(b)(1)(i).

EoC.⁵⁵ Finally, the CLECs' position ultimately amounts to a claim that ILECs should perpetually maintain a redundant network solely for the benefit of a few carriers, which, as AT&T commented, is inconsistent with the Act.⁵⁶

The comments of ADTRAN are instructive with respect to this EoC issue. ADTRAN, whose leadership in developing new capabilities for copper facilities the CLECs acknowledge,⁵⁷ sees no need to revise the network-modification rules to accommodate those capabilities. To the contrary, ADTRAN, while recognizing that “copper loops are not an obsolete technology,” rightly urges the Commission to “resist calls by some competitors to impose more burdensome notification or prior approval requirements.”⁵⁸ To that end, ADTRAN recognizes that the deployment of next-generation fiber facilities should remain the Commission’s focus, and even as it “provid[es] for continuing access to and use of the embedded copper loops . . . the Commission must ensure that it does not do so in a manner that would discourage or delay the deployment of new fiber facilities.”⁵⁹

C. The Commission Should Reject Suggestions to Require Commission Approval of Network Modifications

The Commission correctly observed that “copper retirement should remain a notice-based process” because, as it recognized, “an approval requirement would undesirably harm incentives for fiber deployment” and would “impose a technological mandate.”⁶⁰ Just as AT&T did in its

⁵⁵ See Comments of AT&T at 41; see also Part II.E *infra* (discussing proposed regulation of copper sales).

⁵⁶ See Comments of AT&T at 32.

⁵⁷ See Comments of COMPTTEL at 29.

⁵⁸ Comments of ADTRAN at 4, 10.

⁵⁹ *Id.* at 7.

⁶⁰ Notice ¶ 56.

initial comments,⁶¹ several parties operating under the current rule express strong support for maintaining the existing notice-based process.⁶²

Commenters have also, however, echoed AT&T's concern that the Commission's proposed revisions to network-modification rules – in particular its proposal to subject ILEC copper retirement plans to “comment” by retail customers⁶³ – would “effectively extend Commission *approval* requirements to the retirement of copper networks.”⁶⁴ GVNW Consulting observes that “[a] comment process is designed to inform the regulator as to a decision it will be making,” and that such a process accordingly has no place in the context of copper retirement, because the Commission has no authority to prohibit a network modification.⁶⁵ The mere fact that the Commission “can do more to facilitate participation in this important process”⁶⁶ ignores that a notice-*and-comment* process for copper retirement would quickly devolve into an approval-based process that the Commission has said it does not want and that it does not have any authority to implement.

Many comments go well beyond the Commission's proposal by seeking to condition the deployment of more advanced networks on the establishment of additional unbundling obligations for CLECs. For example, Birch, Integra, and Level 3 propose that the Commission prohibit ILECs from retiring copper loops “that are or could be used to serve business customer

⁶¹ See Comments of AT&T at 27.

⁶² See, e.g., Comments of ADTRAN at 8; Comments of NTCA-The Rural Broadband Association (“NTCA”) at 2; Comments of ITTA at 4.

⁶³ See Notice ¶ 57.

⁶⁴ Comments of CenturyLink at 33; see also Comments of ITTA at 4; Comments of GVNW Consulting at 16 (“While giving lip service to copper retirement as a notice-based process as opposed to an approval process, the Commission proposes to solicit comments, a process which is more appropriate for an approval process.”).

⁶⁵ Comments of GVNW Consulting at 16.

⁶⁶ Notice ¶ 77.

locations” until the Commission either (1) “adopts final rules in the special access rulemaking,” or (2) requires ILECs to “provide competitors with access to substitutes for unbundled copper loops used to provide Ethernet service.”⁶⁷ This proposal would not only significantly deter deployment of advanced networks, to the detriment of consumers and competition, but it would also ignore existing limitations on ILECs’ network unbundling duties.

Other CLECs echo the notion that copper retirement should be used as a vehicle to extract additional unbundling obligations in exchange for Commission approval of network modifications. Comptel, for example, argues that the Commission should revisit its “flawed” analysis from ten years ago that rejected unbundled access to dark fiber loops.⁶⁸ And if it cannot get access to dark fiber loops, Comptel demands access to “a wavelength of an optical fiber’s capacity,” which far exceeds the 64 kbps voice-grade channel CLECs are afforded in some circumstances under the current unbundling rules.⁶⁹ Full Service Network and TruConnect likewise ask that the Commission “reverse its previous precedent and require unbundled access to ILEC dark fiber.”⁷⁰ But none of these proposals could be implemented without a fresh impairment analysis, which the Commission has not proposed to undertake here (and which it could not accomplish on the record of this proceeding). In any event, there is no basis in the

⁶⁷ Comments of Birch, Integra, and Level 3 at 32. This proposal effectively would put a stop to *all* copper retirement, not only because ILECs cannot single out unbundled copper loops that currently are “used to serve business customer locations,” but also because arguably any such facility “could be used” to provide service to a business customer.

⁶⁸ Comments of COMPTTEL at 30-32.

⁶⁹ *Id.* at 33.

⁷⁰ Comments of TruConnect at 7. It is the height of regulatory gall for CLECs such as Level 3 to claim they are impaired without access to the ILECs’ Ethernet-capable facilities when, by virtue of its acquisition of TW Telecom, Level 3 jumped to second place on the nation’s Ethernet “leaderboard,” surpassing Verizon. *See* Sean Buckley, *VSG: Level 3’s tw telecom acquisition helps it surpass Verizon in Ethernet race*, FierceTelecom (Feb. 19, 2015), at <http://www.fiercetelecom.com/story/vsg-level-3s-tw-telecom-acquisition-helps-it-surpass-verizon-ethernet-race/2015-02-19>.

statute for conditioning network modifications on expansion of unbundling obligations that are not justified under the standards of § 251(c)(3).

Some parties misread the Commission’s copper-retirement proposal to require a § 214 application for network modifications.⁷¹ As the Notice acknowledges, however, § 214 does *not* require Commission authorization for network modifications “‘which will not impair the adequacy or quality of service provided.’”⁷² Commenters’ apparent confusion underscores the impropriety of the Commission’s “mixed signals with respect to the issue of copper retirement,”⁷³ including its proposed adoption of a notice-based process that too closely resembles an approval process as under § 214. The Commission should scrap its proposed revisions and continue administering the well-functioning, notice-based process already in place.

D. The Commission Should Reject the Additional Burdensome and Harmful Requirements Proposed by Commenters

Some commenters ask the Commission to adopt a laundry list of additional requirements related to copper retirement that go beyond the Notice’s proposed rule changes. These proposals include expanding notice of network modifications to an even wider universe of parties, providing forecasts of planned network modifications, maintaining a public database of copper availability, and requiring at least one year’s notice of a planned network modification.⁷⁴ As

⁷¹ *See, e.g.*, Comments of Communications Workers of America at 13-14; Comments of APCO at 4 (“Pursuant to Section 214, telecommunications carriers are required to submit applications seeking authority to discontinue service, including copper retirement.”).

⁷² Notice ¶ 5 n.9 (quoting 47 U.S.C. § 214(a)).

⁷³ Comments of ADTRAN at 2.

⁷⁴ *See, e.g.*, Comments of AARP at 29-32 (service-quality reporting); Comments of XO Communications at 8 (“ILECs should be required to provide non-binding forecasts of retirements, maintain a publically available and searchable database of copper availability, and establish a collaborative process with their carrier customers.”); Comments of Birch, Integra, and Level 3 at 37-38 (“[A]n incumbent LEC should be required to provide notifications to competitive carriers at least 12 months in advance of a planned copper retirement.”); Comments

several parties' comments confirm, each of the foregoing suggestions would only exacerbate the already unacceptable drag that the Notice's proposed rules would have on the deployment of new fiber.⁷⁵

The proposal to require forecasts of planned copper retirements also raises serious competitive concerns. Requiring ILECs to publish advanced forecasts of copper retirements would signal to competitors those areas where ILECs are contemplating deployment of next-generation facilities. As CenturyLink points out, “[a]n 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

of TruConnect at 10 (extending notice requirements to “Platform Providers”); Comments of Utilities Telecom Council at 7-8 (extending notice requirement to utilities and critical infrastructure industries) Comments of Rural Broadband Policy Group at 5-6 (extending notice requirements to “local organizations, churches, community centers, and anchor institutions”).

⁷⁵ See, e.g., Comments of CenturyLink at iv (“Overly burdensome network modification rules could interfere with and delay the transition of CenturyLink’s network to gigabit broadband service, forcing it to forego some fiber deployments that might otherwise occur.”); Comments of ADTRAN at 11 (“Just about all of these various requirements would make it exceedingly difficult for the incumbent carriers to upgrade their facilities, and thereby deter investment in new fiber.”); Comments of FTTH Council at 24 (the “staggering array of new notice requirements” would “impose substantial costs on providers, both in terms of providing the required notice and delaying the transition to all-fiber networks”); Comments of Cincinnati Bell Telephone Company at 12 (proposed network-modification rules are “unnecessary and overly burdensome”). Nor is it necessary for the Commission to establish a process for situations where a network is damaged after a natural disaster and the carrier at some point decides that it will permanently replace that network with a new technology. See Public Knowledge et al. Comments at 32. Every disaster situation is unique, and requires something other than the “one-size-fits-all-approach” apparently contemplated by the commenters. As the Wireline Competition Bureau’s 2006 order granting AT&T limited relief from the network modification rules in the wake of Hurricane Katrina demonstrates, the Commission and affected parties are fully capable of tailoring an approach that appropriately addresses the unique circumstances of each such situation as it occurs. See Order, *Petition of AT&T Inc. for Special Temporary Authority and Waiver To Support Disaster Planning and Response*, 21 FCC Rcd 4306, ¶11 (2006).

initiative.”⁷⁶ This result would discourage fiber deployment, “unfairly inhibit competition from ILECs based on outdated notions of their status as dominant voice service providers,” and ultimately harm consumers by depriving them of the benefits of additional fiber-based competition from ILEC.⁷⁷

Also, XO Communications’ proposal to require ILECs to maintain and “frequently” update a “publicly available and searchable database of copper availability” would divert vital resources away from the deployment of new fiber.⁷⁸ In particular, XO proposes requiring ILECs to maintain and disseminate address-specific information regarding the status of copper retirements on an “at least monthly” basis.⁷⁹ This requirement would be in addition to the ILECs’ obligation to provide notice of copper retirement. The only justification XO provides for its patently burdensome proposal, which would be a dramatic departure from the “reasonable public notice” contemplated by statute,⁸⁰ is that such a resource would ease CLECs’ planning burdens. But CLECs seeking to purchase UNEs from AT&T already have access to preorder systems that identify loop availability, and XO has not identified any compelling basis for the ILECs to undertake an additional ongoing obligation to establish and maintain a duplicative, and ostensibly even more detailed, database. In any event, competitive businesses always plan in the face of uncertainty about the plans of competitors, suppliers, and customers. Notification requirements already in place under the statute and the Commission’s rules protect CLECs from unfair surprise; nothing more should be required.

⁷⁶ Comments of CenturyLink at 35.

⁷⁷ Comments of ITTA at 5.

⁷⁸ Comments of XO Communications at 15-16.

⁷⁹ *Id.* at 16.

⁸⁰ 47 U.S.C. § 251(c)(5).

The Ad Hoc Committee proposes that if a copper retirement will require “new or upgraded terminating equipment,” the carrier “should install that terminating equipment on its own side of the network demarcation point . . . and absorb the costs of doing so as part of its network modernization costs.”⁸¹ The Commission should reject this proposal for several reasons. First, the Ad Hoc Committee simply assumes that any changes to customer CPE will be “costly” and that customers will not desire any freedom to select their own upgraded CPE,⁸² but there is no reason to believe either is true. Second, the Ad Hoc Committee acknowledges that the customers it represents are sophisticated purchasers with “volume-buying clout and technological savvy” that require no special protections from the Commission.⁸³ Finally, the Ad Hoc Committee’s proposal is directly at odds with the Commission rules it relies on,⁸⁴ which require only that a provider give “adequate notice in writing” when a change in facilities will require a change in CPE, “to allow the customer an opportunity to maintain uninterrupted service.”⁸⁵ Thus, there is no support for its claim that “past Commission practice” has allocated “the costs of these changes” to carriers, rather than end-users.⁸⁶ The opposite is true.

E. The Commission Should Not Regulate the Sale of Retired Copper

Several parties invite the Commission to regulate the sale of retired copper to various degrees,⁸⁷ but the Commission should reject them as unnecessary and counter-productive. As

⁸¹ Comments of Ad Hoc Committee at 8.

⁸² *See id.*

⁸³ *Id.* at 3.

⁸⁴ *See id.* at 8 n.8 (citing 47 C.F.R. §§ 68.3 *et seq.*)

⁸⁵ 47 C.F.R. § 68.110(b).

⁸⁶ *See* Comments of Ad Hoc Committee at 8.

⁸⁷ *See* Comments of California PUC at 21-22; Comments of National Association of State Utility Consumer Advocates (“NASUCA”) at 21-22; Comments of WorldNet Telecommunications, Inc. at 10-15; Comments of Ad Hoc Committee at 12-13.

AT&T has commented, such sales should remain voluntary and governed by market mechanisms.⁸⁸ Other parties' comments support AT&T's approach. For example, Verizon discusses how selling retired copper "would be easier said than done, due to the intertwined way that copper and fiber facilities often are deployed and the required ongoing engagement from ILECs that might be necessary to make such a sale work," and thus a mandated, regulatory sale would be ill-advised.⁸⁹ Likewise, ADTRAN commented that regulation of copper sales would embrace the "synthetic competition" that the D.C. Circuit "decried in overturning the Commission's earlier unbundling decision" and any price or term regulation would be "arbitrary" and "would likely encourage the companies to lobby the Commission rather than bargain in good faith."⁹⁰

Regulatory oversight, especially rate regulation, in connection with the sale of retired copper would inhibit or derail the prospect for more efficient marketplace solutions. Parties' bare reference to ILECs' "market power" is nonsensical: there is no market in retired copper and, as AT&T has said before, "[t]he sale is not intended as a profit-making endeavor."⁹¹ Such sales will occur to the extent that retired copper offers value to prospective purchasers that they are willing to pay for, and not otherwise. There is no evidence that market-based solutions will harm competition or consumers, and thus no basis for Commission regulation.

⁸⁸ See Comments of AT&T at 41-42.

⁸⁹ Comments of Verizon at 17.

⁹⁰ Comments of ADTRAN at 11-12 (quoting *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 573 (D.C. Cir. 2004)).

⁹¹ Comments of AT&T at 41.

F. The Commission’s Proposed Restrictions on ILEC Marketing Activities Are Unconstitutional and Would Inhibit the Transition to Next-Generation Networks

AT&T agrees with CenturyLink, Corning, and Cincinnati Bell that the Commission’s proposal to restrict ILEC marketing activities would violate the First Amendment.⁹² The Commission’s proposed regulations on “upselling” are “designed to impose a specific, content-based burden on protected expression,” and thus “heightened judicial scrutiny is warranted.”⁹³ The Commission’s proposed regulation could not survive such scrutiny because the Commission cannot show that it “directly advances a substantial governmental interest and that [it] is drawn to achieve that interest.”⁹⁴ Even assuming that preventing “customer confusion”⁹⁵ is a substantial interest, the proposed regulation is not “drawn to achieve that interest” because it broadly prohibits “any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes.”⁹⁶ The proposed rule would silence an entire category of speech – “enourage[ment] . . . to purchase a service” – that need not be either confusing or misleading, and that therefore does not fit the interest supposedly motivating the restriction.

In addition to being unconstitutional, the Commission’s proposed restrictions on “upselling” would inhibit, rather than encourage, the nation’s transition to next-generation technologies. AT&T agrees with CenturyLink that regulations “crafted to stress some theoretical

⁹² See Comments of CenturyLink at 41-44; Comments of Corning Inc. at 18-20; Comments of Cincinnati Bell Telephone Co. at 17-18.

⁹³ *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); see also *id.* at 2665 (heightened scrutiny applies even to restrictions on commercial speech where the law “imposes a burden based on the content of speech and the identity of the speaker”).

⁹⁴ *Id.* at 2667-68.

⁹⁵ See Notice ¶ 71.

⁹⁶ *Id.* at 56 (proposed 47 C.F.R. § 51.332(c)(4)).

benefit of maintaining or replicating the *status quo* could undermine the already-tenuous business case for fiber overbuild in many areas” and “could deny consumers the very benefits that these upgraded networks can deliver to them.”⁹⁷ Furthermore, as ADTRAN points out, the Commission has taken a very different approach in the context of raising consumer awareness about the “the benefits of broadband as a means for solving everyday problems,” and the Commission “should thus be encouraging – not prohibiting – ‘upselling’ by the incumbent carriers.”⁹⁸ There is a high cost to the proposed “upselling” restrictions, with no corresponding benefit.

In this regard, AT&T also wishes to place in context ADT’s assertion that “principles developed by ADT and AT&T” support ADT’s recommendation that “[t]he Commission should [] place restrictions on an ILECs’ use of information gleaned from in-home visits and testing related to any technology transition in order to market the ILECs’ own services.”⁹⁹ The referenced principles, which are attached, reflect AT&T’s readiness to address issues raised by the IP transition and its commitment not to use information “obtained from [a] customer” about that customer’s “existing alarm monitoring service” to “market products and services to that customer that are similar to, or serve the same function, in whole or in part, as alarm monitoring and related products and services.”¹⁰⁰ The principles do, however, permit AT&T to market such products and services “based on information obtained through any other lawful means.”¹⁰¹ AT&T’s principles thus commit AT&T not to unfairly use information about a customer’s

⁹⁷ Comments of CenturyLink at 42-43.

⁹⁸ Comments of ADTRAN at 16 (quoting *National Broadband Plan* at 180).

⁹⁹ Comments of ADT at 4.

¹⁰⁰ See IP Transition and Alarm Monitoring Services Principles ¶ 5(c) (attached hereto as Exhibit A).

¹⁰¹ *Id.*

existing services purchased from third parties to market competing services, while assuring that consumers can benefit from the opportunity to be informed of competitive alternatives based on information obtained through other means. Any broader prohibition against any form of “upselling” would deprive consumers of the benefits of competition, contrary to the goals of the Act.

III. The Commission’s Proposed Test for “Adequate Substitutes” Has No Sound Basis in Fact, Law, or Policy

In the Notice, the Commission proposed to adopt a new set of detailed criteria for judging the adequacy of available alternatives when a carrier seeks to discontinue a legacy service under § 214 as part of the transition to next-generation services.¹⁰² AT&T explained in its opening comments that this approach was contrary to law and threatened to slow the IP transition to a halt while drowning both carriers and the Commission in a sea of complicated § 214 applications addressing the fine technological details of replacement services.¹⁰³ Far from allaying those concerns, the comments supporting the Commission’s proposal in fact confirm AT&T’s predictions. And they do so without even trying to offer a legal basis for the Commission’s proposed approach or the various add-ons that these commenters request. There is no authority for the Commission’s proposed criteria or the commenters’ proposed additions to those criteria. And there is no need for them, either.

A. Supporting Commenters Confirm the Proposal’s Negative Effects

The comments filed in support of the Commission’s proposal to establish a checklist of new criteria for the “adequate substitute” analysis confirm the serious flaws with that approach: namely, that it would (1) improperly insert the Commission into the role of micromanager for

¹⁰² See Notice ¶ 93.

¹⁰³ See Comments of AT&T at 42-49.

next-generation services, (2) require carriers to submit (and the Commission to review) burdensome and voluminous § 214 applications, and (3) significantly delay the deployment of new services and the IP transition generally. The supporting commenters apparently see no problem with these effects – indeed, they seem to welcome them – presumably because they are not the ones who will bear those burdens. But the Commission should make no mistake: its proposal will, to use Commissioner Pai’s words, “frustrate rather than further the IP Transition.”¹⁰⁴

First, these commenters welcome the Commission’s proposal to insert itself into the technology details of services, and even suggest expanding the scope of this micromanagement.¹⁰⁵ One set of commenters, for example, outlines the detailed reports that it wants carriers to submit showing how they have met the Commission’s proposed criteria – both before *and after* the carrier receives discontinuance approval under § 214.¹⁰⁶ This suggestion would, as AT&T has explained, “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.”¹⁰⁷ Certain commenters even propose that a failure to meet one of the items on the proposed checklist would be an adequate basis for denial of an application. A group styling itself the “Public Interest Commenters” asserts that if an alternative service “fails one of [the] criteria for a significant portion of the population or for a particularly vulnerable

¹⁰⁴ Notice at 71 (Statement of Commissioner Pai, concurring).

¹⁰⁵ *See, e.g.*, Comments of AARP at 42 (suggesting that the criteria be evaluated through “specific tests with quantifiable results”); Comments of Ad Hoc Committee at 16 (suggesting that the Commission “read these factors expansively”); Comments of Alarm Industry Communications Committee (“AICC”) at 9 (endorsing the Commission’s list of criteria and suggesting additional measures for gauging “whether the alternative service is functionally equivalent to traditional TDM-based telephone service”).

¹⁰⁶ *See* Comments of Public Knowledge *et al.* at 18-19.

¹⁰⁷ Comments of AT&T at 42.

community,” the Commission should withhold § 214 certification until the problem is remedied.¹⁰⁸ One commenter goes yet further, arguing that “no service should be considered an adequate substitute” unless it preserves compatibility with “the transmission of credit/debit card information and payment processing between point-of-sale (‘PoS’) terminals at retail locations and banks or credit card processors.”¹⁰⁹ In other words, this commenter suggests allowing a single, specific functionality – provided through third-party equipment rather than anything in carriers’ control – to hold up the transition from legacy to next-generation services. Even one such hold-up point would be unwise. Yet the Commission’s proposal, interpreted by its supporters, has no logical stopping place, leading to a result where every feature or functionality of legacy services must be preserved before the IP transition may go forward.

That danger is evident as well in certain commenters’ suggestions that any list of adequate substitute criteria should be tailored to the needs of particular non-telecommunications service sectors. Alarm system providers, for example, want to weight the inquiry heavily toward the specific functionalities of their own services.¹¹⁰ The Utilities Telecom Council, meanwhile, proposes to turn § 214 into a mechanism to ensure continuity of utility services, rather than the communications services that Congress had in mind.¹¹¹ The Utilities Telecom Council suggests that the Commission should mandate functionally equivalent access not only for CLECs but also for utility companies.¹¹² AT&T welcomes the opportunity to work with its utility customers to

¹⁰⁸ Comments of Public Knowledge *et al.* at 9.

¹⁰⁹ Comments of Ad Hoc Committee at 16-17.

¹¹⁰ *See, e.g.*, Comments of AICC at 9-10.

¹¹¹ *See* Comments of the Utilities Telecom Council at 9-11 (suggesting that the Commission assess compatibility with various utility applications and needs when judging the adequacy of substitute services under § 214).

¹¹² *Id.* at 12 (citing the Commission’s proposal to require equivalent wholesale access for CLECs and asserting that it “should adopt a similar requirement when incumbent LECs seek to

ensure a smooth transition and to prevent or minimize disruption to critical utility applications as AT&T upgrades its own services. But the Commission should not regulate the minutiae of that transition by establishing rules that require any new telecommunications service to comply with particular needs of utility customers. Even if it were restricted to utilities, such an approach would be a significant and perhaps insurmountable burden for carriers to meet, as well as an unlawful expansion of the Commission's congressionally delegated authority. Moreover, there is again no limiting principle; if adequate substitute criteria are to include utility-specific needs, it is difficult to see why they should not also include the specific needs of every other industry sector that provides an important service to the public – resulting in an ever-expanding checklist that would convert § 214 certification into an unrecognizable and unworkable process.

Beyond the substantive problems with the Commission's proposal, the supporting commenters also illustrate a key procedural difficulty: the significant delay it would introduce into the transition from legacy to next-generation services. The Commission's proposal on its own would entail such delay, by requiring carriers to compile and submit lengthy § 214 applications for each discontinuance of service.¹¹³ And several commenters propose to exacerbate that delay, suggesting that the Commission expand the existing timeline for § 214 applications¹¹⁴ or require carriers to give a year's advance notice before filing such an

discontinue, reduce, or impair a legacy service that is used by utilities to support the safe, secure and reliable delivery of essential electric, gas and water services to the public at large”).

¹¹³ And, because of the Declaratory Ruling adopted along with the Notice, these applications would be required not only for true cessations of service but for everything meeting the expansive and amorphous new test for discontinuance. *See* AT&T Reply in Support of USTelecom Petition for Reconsideration at 5-8 (explaining how the Declaratory Ruling marks a significant departure from Commission precedent and expands the scope of § 214).

¹¹⁴ *See, e.g.*, Comments of the Wholesale DS-0 Coalition at 11-12; Comments of Granite Telecommunications, LLC at 9.

application.¹¹⁵ These proposals are unnecessary, given the Commission’s ability to extend the default time for consideration of a discontinuance application in the event of well-founded objections or other concerns.¹¹⁶ But, if adopted, they would discourage carriers from filing such applications in the first place and would seriously delay the transition to next-generation IP services. As the Commission has previously found, this kind of delay is not in the public interest.¹¹⁷

All of these comments underscore the bad policy behind the Commission’s proposal to adopt a checklist of criteria for adequate substitutes to legacy retail services. They strongly suggest that this approach would lead to extensive and burdensome requirements for discontinuing carriers. The result, as another commenter has explained, will be to discourage carriers from investing in new technologies and services for fear of “‘regulatory tripwires’ or protracted and expensive [§] 214 proceedings that hamper their ability to plan for investments and rapidly respond to consume[r] demand.”¹¹⁸ Furthermore, although the Notice states that the Commission would like to avoid “wading through a complicated morass of applications” for § 214 discontinuance,¹¹⁹ none of the comments favoring the Commission’s suggested approach proposes anything short of that. In order to avoid unduly complicating and unreasonably delaying the IP transition, the Commission should not adopt its proposed criteria for judging

¹¹⁵ See, e.g., Comments of the Utilities Telecom Council at 8-9.

¹¹⁶ See 47 C.F.R. § 63.71(d).

¹¹⁷ See First Report and Order, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1, ¶ 147 (1980) (noting that “in a competitive marketplace ease of exit is essential” and that “carriers may be discouraged from entering high risk markets for fear that they may not be able to discontinue service in a reasonably short period of time if it proves unprofitable”).

¹¹⁸ Comments of NTCA – The Rural Broadband Association at 10.

¹¹⁹ Notice ¶ 5.

adequate substitutes but should maintain the approach it has always used in evaluating § 214 applications.

B. Supporting Commenters Repeat – and Compound – the Commission’s Errors of Law

AT&T explained why the Commission’s proposed criteria are not only unwise but unlawful.¹²⁰ The commenters who support that proposal offer no basis for finding otherwise. Several commenters support the Commission’s attempt to require that replacement services provide the same compatibility with third-party services and equipment as the services they replace before discontinuance will be permitted.¹²¹ Not one of these commenters, however, even tries to explain how this requirement could be consistent with Commission precedent holding otherwise¹²² or what might justify a departure from that precedent. Commenters also argue that the Commission should consider whether alternative services will cost more when judging whether they are adequate.¹²³ But the Commission has previously held that such price increases are only relevant to adequacy if “the alternative services are priced so high that most users cannot afford to purchase them.”¹²⁴ None of the commenters suggests that any hypothetical price increases would meet that standard, and there is no evidence that they would. Furthermore, many commenters encourage the Commission to do what AT&T explained¹²⁵ it cannot

¹²⁰ See Comments of AT&T at 45-47.

¹²¹ See, e.g., Comments of AARP at 41-42; Comments of Granite Telecommunications, LLC at 6-7; Comments of the Pennsylvania Public Utility Commission at 16; Comments of the Rural Broadband Policy Group at 6-7; Comments of the Wholesale DS-0 Coalition at 9-10.

¹²² See Memorandum Opinion and Order, *Western Union Tel. Co.*, 74 F.C.C.2d 293, ¶ 9 (1979) (“*Western Union Mem. Op.*”).

¹²³ See, e.g., Comments of AARP at 43; Comments of Public Knowledge *et al.* at 9, 12; Comments of the Rural Broadband Policy Group at 6-7; Comments of Sue Wilson at 5-6; Comments of the Utilities Telecom Council at 12-13.

¹²⁴ Order, *Verizon Tel. Cos.*, 18 FCC Rcd 22737, ¶ 27 (2003).

do - regulate indirectly what the Commission has refused (or been unable) to regulate directly. Indeed, the Public Interest Commenters expressly ask the Commission to adopt, for § 214 purposes, certain E911 obligations that the Commission declined to adopt in its recent E911 rulemaking.¹²⁶ But they offer no rationale – let alone an adequate legal justification – for adopting these obligations in the § 214 context when the Commission refused to do so for E911 service more generally.

In addition to repeating these same legal errors that infect the Notice, many commenters compound the problem by introducing additional suggestions that have no basis in the statute, Commission precedent, or court decisions. Some commenters, for example, ask the Commission to determine whether there are adequate alternative *data* services when a carrier discontinues *voice* service.¹²⁷ There is no basis for such a requirement in § 214. The question, as the Commission has always framed it, is whether adequate substitutes exist for the service that is actually being discontinued. If a carrier is not discontinuing data services, it should not be required to prove that adequate data services are available before being allowed to discontinue a different type of service.

Similarly, other commenters confuse the focus of § 214 and suggest that the Commission should analyze whether an adequate substitute exists for any wholesale service that a carrier discontinues.¹²⁸ These commenters ignore the Commission’s acknowledgement that, “[u]nder

¹²⁵ See Comments of AT&T at 49.

¹²⁶ See Comments of Public Knowledge *et al.* at 14.

¹²⁷ See, e.g., Comments of AARP at 41 (suggesting that discontinuance of voice service should not be allowed if no adequate DSL alternatives exist); Comments of Public Knowledge *et al.* at 11-12 (suggesting that discontinuance of wireline voice should not be allowed if communities lack alternatives for Internet access service).

¹²⁸ See, e.g., Comments of NASUCA at 24-25; Comments of the Wholesale DS-0 Coalition at 4.

[its] precedent, a carrier need not seek Commission approval when discontinuing service to carrier customers if there is no discontinuance, reduction, or impairment of service to retail end-users,” as well as the Commission’s statement that it does “not propose to change course from this precedent.”¹²⁹ There is no reason to depart from the Commission’s longstanding (and correct) interpretation of § 214’s focus on retail services, and the Commission should not accept the invitation of these commenters to do so.

Finally, one commenter invites the Commission to discriminate between carriers with purported market power (by which it means ILECs) and other carriers when determining whether adequate alternative services exist.¹³⁰ There is no lawful basis for such a distinction. Whether adequate alternatives exist for a service being discontinued does not correlate to whether the discontinuing carrier has market power. Furthermore, including a market power analysis in every § 214 discontinuance application would make the process even more unmanageable than the Commission’s existing proposals threaten to do.

The Commission should not adopt its own or these commenters’ proposals to convert § 214 into something Congress never intended.

C. The Commission Should Reject Commenters’ Proposed Treatment of Wireless Replacement Services

Given the increased deployment of wireless services and consumers’ rapid adoption of those services, it is likely that many of the services identified as substitutes for discontinued legacy services will employ wireless technology to some degree. Some commenters contest the adequacy of wireless services as substitutes and ask the Commission to adopt special rules that

¹²⁹ Notice ¶ 102.

¹³⁰ See Comments of Sprint Corp. at 7-8.

would either discourage or prevent discontinuing carriers from relying on wireless replacement services. The Commission should reject these invitations.

First, the Michigan Public Service Commission argues that, if the Commission allows for wireless services to serve as substitutes for wireline service,¹³¹ “it should develop discontinuance of service requirements for those providers along the lines of those crafted for domestic carriers and interconnected VoIP providers.”¹³² In substance, what the Michigan PSC is asking the Commission to do is reverse two decades of forbearance and impose § 214 discontinuance obligations on wireless providers. That is a drastic remedy that is both substantively and procedurally inappropriate in this context. In 1994, the Commission determined that in the competitive CMRS marketplace, applying § 214 barriers to exit could “deter potential entrants from entering the marketplace.”¹³³ Accordingly, the Commission determined under 47 U.S.C. § 332(c)(1)(A) to forbear from exercising its § 214 authority over CMRS.¹³⁴ The Commission has never reversed a forbearance ruling under either § 332(c)(1)(A) or § 160(a), and there is no reason to do so now. Furthermore, if the Commission were to revisit its CMRS forbearance decision, it could only do so by conducting a new notice-and-comment rulemaking, compiling substantial record evidence of changed circumstances, and finding that current marketplace

¹³¹ The Michigan PSC’s preference is that wireless services should never be considered adequate substitutes for wireline service. Comments of Michigan PSC at 9. But there is no basis to adopt a bar on wireless substitutes. Indeed, the Commission long ago held that dismantling a wired connection between two carriers and rerouting the traffic over a connection including multiple microwave links did not even constitute a discontinuance or impairment of service to the interconnecting carrier’s end-user customers. See Memorandum Opinion and Order, *Lincoln Cnty. Tel. Sys., Inc.*, 81 F.C.C.2d 328, ¶ 22 (1980). A ruling that wireless services can never substitute for wireline services would be inconsistent with that precedent.

¹³² Comments of Michigan PSC at 9.

¹³³ Second Report and Order, *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 1411, ¶ 182 (1994).

¹³⁴ *Id.*

conditions justify imposing § 214 discontinuance obligations on CMRS.¹³⁵ It cannot simply decide in this proceeding to start applying those obligations to services that have been exempt from them for more than twenty years.

Beyond the procedural error in the Michigan PSC’s argument, it is substantively flawed as well. The Commission has never required that replacement services themselves be subject to § 214 discontinuance obligations in order to qualify as adequate. And, if there were legitimate concerns in particular cases that end-users might face a sudden disappearance of a wireless replacement service, the Commission could use its conditioning authority to protect against that result.¹³⁶

A second commenter, NASUCA, suggests that the Commission should prohibit wireless services from being offered as substitutes for discontinued wireline services.¹³⁷ NASUCA suggests that the Commission might use the “traditional antitrust formula for determining substitutability” when considering the adequacy of substitutes under § 214.¹³⁸ It then asserts that the Commission has previously applied that antitrust formula and concluded “that wireless voice service was not a substitute for wireline voice service”; NASUCA therefore reasons that wireless cannot be a substitute under § 214.¹³⁹ There are several flaws in this argument. To begin with, there is no basis for equating substitutability in the antitrust context with adequate substitutes in the context of § 214. The former is concerned with defining relevant product markets (to

¹³⁵ See Comments of AT&T Inc. at 9-13, *Special Access for Price Cap Local Exchange Carriers et al.*, WC Docket No. 05-25 et al. (filed Apr. 16, 2013) (explaining the procedures the Commission must undertake to reverse an existing forbearance decision).

¹³⁶ See 47 U.S.C. § 214(c) (stating that the Commission may attach to a certificate “such terms and conditions as in its judgment the public convenience and necessity may require”).

¹³⁷ Comments of NASUCA at 25.

¹³⁸ *Id.*

¹³⁹ *Id.*

determine market power) by inquiring into the degree of price constraints between two competing products or services.¹⁴⁰ The latter, in contrast, is concerned with ensuring continuity of communications services to particular communities and – except in rare circumstances – is not focused on the price of those services.¹⁴¹ These are two different analyses with two different purposes. NASUCA offers no reason for applying an antitrust analysis under § 214.

Furthermore, even within the antitrust context, NASUCA’s comments overstate the Commission’s holding with respect to the substitutability of wireless services. In 2010, the Commission described the issue as “complicated” and “evolving over time.”¹⁴² It acknowledged that “the increasing number of households that rely solely on mobile wireless services suggests that more consumers may view mobile wireless as a closer substitute for wireline voice service than in the past,” and emphasized that it was making “no affirmative finding that mobile wireless services do not currently, or may not soon, belong in the same product market as residential wireline voice services.”¹⁴³ The Commission simply found that the parties in that proceeding had presented insufficient economic evidence to justify a finding of substitutability for antitrust purposes.

In sum, the Commission did not propose in the Notice to preclude carriers from relying on wireless services as substitutes for legacy wireline services. Nor did it propose to revisit § 214 forbearance for wireless services. The commenters who advocate these approaches have not offered any sound argument for adopting them. The Commission can consider in any given

¹⁴⁰ See, e.g., Memorandum Opinion and Order, *Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd 8622, ¶ 55 (2010) (“*Qwest Phoenix Forbearance Order*”).

¹⁴¹ See Comments of AT&T at 44 & n.113 (discussing the purpose of § 214 certification); see *supra* at 34-35 (discussing the role of price in the § 214 inquiry).

¹⁴² *Qwest Phoenix Forbearance Order* ¶ 55.

¹⁴³ *Id.* ¶ 60.

§ 214 application whether a proffered wireless substitute is adequate and what measures are necessary to protect the public convenience and necessity.

D. There Is No Need for the Commission’s Proposal

AT&T does not believe it is necessary (or useful) for the Commission to adopt the kind of detailed criteria it has proposed to judge the adequacy of substitutes for discontinued retail services.¹⁴⁴ And the commenters supporting the Commission’s proposal provide no basis for finding otherwise.

In fact, only the Public Interest Commenters even attempt to do so. These commenters claim that “we are not yet at a place where all customers feel they can switch to new network technologies without losing some important function or feature that they rely on in the existing network.”¹⁴⁵ They argue that customers need reassurance about this transition and suggest a campaign (in coordination with state regulators and the industry) to educate consumers about changes to their services.¹⁴⁶ AT&T agrees that this kind of public-education campaign is the best way to ensure a smooth transition for consumers. AT&T in fact proposed exactly this kind of effort in connection with its IP wire center trials.¹⁴⁷ And AT&T continues to believe that consumer outreach and education – not burdensome new regulatory requirements – will best

¹⁴⁴ Although some of the Commission’s proposed checklist items – such as 911 reliability and access for disabled customers – are important considerations, AT&T explained that these issues can and should be addressed through generally applicable requirements, not through the piecemeal § 214 process. *See* Comments of AT&T at 47-49. No commenter has explained why industry-standard rules are insufficient or otherwise inappropriate.

¹⁴⁵ Comments of Public Knowledge *et al.* at 7.

¹⁴⁶ *See id.* at 5, 28-29.

¹⁴⁷ *See* AT&T Wire Center Trial Operating Plan at 16-20, Attachment to Letter from Christopher M. Heimann to Marlene H. Dortch, *Technology Transitions*, GN Docket No. 13-5 (Feb. 27, 2014) (outlining AT&T’s “detailed and extensive plans both to notify specific customers about the transition and its impact on them, and to educate the customers, community leaders and other stakeholders about the transition and trial in the trial wire centers and more broadly”).

serve the interests of the public by allowing the IP transition to proceed while ensuring that customers are informed about their choices and about the features and functionalities of available services.

While AT&T agrees that consumer education is critical, the survey data cited by the Public Interest Commenters¹⁴⁸ actually undermine many arguments advanced in this proceeding about consumer behavior and preferences. For example, despite comments about the alleged inferiority of wireless services, the survey reports that 45% of responding households receive all or almost all calls on a cell phone.¹⁴⁹ Similarly, despite the frequently asserted need to preserve compatibility with fax machines, 75% of respondents reported that this was not an important function for their telephone service – and only 8% regarded it as “very important.”¹⁵⁰ Finally, despite the voluminous comments generated in this proceeding on the issue of backup power, this survey suggests that fewer than half of consumers either know or care whether their phone line works during a power outage.¹⁵¹ AT&T has not evaluated the methodology of this survey and cannot speak to its reliability. But it is telling that a survey put forward by commenters endorsing the Commission’s proposals in several respects casts doubt on the stated bases for those proposals.

¹⁴⁸ See John B. Horrigan, *Consumers and the IP Transition: Communications Patterns in the Midst of Technological Change* (Nov. 2014), <https://www.publicknowledge.org/assets/uploads/blog/Consumers.IP.Transition.FINAL.pdf> (cited in Comments of Public Knowledge *et al.* at 7 n.6).

¹⁴⁹ *Id.* at 12 (Q17 results).

¹⁵⁰ *Id.* at 16 (Q26c results).

¹⁵¹ *Id.* at 14 (Q22g results). When asked whether they retain their landline because “[i]t works when there is an electric outage in my house,” 40% of respondents answered “No” and 14% answered “Don’t know.”

IV. The Commission’s Proposed Rebuttable Presumption Is Unlawful and Unjustified

In the Notice, the Commission acknowledged its longstanding precedent holding that “a carrier need not seek Commission approval when discontinuing service to carrier customers if there is no discontinuance, reduction, or impairment of service to retail end-users.”¹⁵² Although purporting to adhere to that precedent, the Commission nonetheless proposed to effectively undo it by establishing a rebuttable presumption that an incumbent LEC’s discontinuance, reduction, or impairment of a wholesale service will also “discontinue, reduce, or impair” service to end-users, requiring a § 214 application.¹⁵³ AT&T explained in its opening comments that such a presumption was inconsistent with real-world experience, would introduce unnecessary delay and complication into the IP transition, and would effectively rewrite the statute.¹⁵⁴

The commenters who support the presumption make no effort to reconcile it with the statute or Commission precedent; indeed, some of them urge the Commission to depart even further from that precedent by requiring § 214 applications for every wholesale discontinuance. Nor do these commenters provide any evidentiary basis to support the Commission’s speculation that removal of one wholesale input will typically result in retail discontinuance. The Commission should not adopt a rebuttable presumption based on that speculation – and it certainly should not require a § 214 application for all wholesale discontinuances.

A. Requiring § 214 Applications for Wholesale Discontinuance Is Unlawful

As AT&T explained, the rebuttable presumption described in the Notice would not only depart from well-established precedent but would also effectively (and unlawfully) rewrite § 214 to require Commission approval any time a carrier discontinues a service used as a wholesale

¹⁵² Notice ¶ 102.

¹⁵³ *Id.* ¶ 103.

¹⁵⁴ *See* Comments of AT&T at 49-57.

input by other carriers, regardless of whether the end-user community experiences a loss of service.¹⁵⁵ Because incumbent LECs cannot be expected to know how their wholesale customers' end-users would be affected by any such discontinuance, and because the process for rebutting the presumption would be nearly as burdensome as a § 214 application, the likely result is that carriers would be effectively required to file § 214 applications for the majority of wholesale discontinuances.

Some commenters want to compound this problem by making the presumption impossible to rebut without filing the equivalent of a § 214 application, albeit different in name. These commenters suggest requiring incumbent LECs seeking to rebut the presumption to submit evidence establishing a “*prima facie* case” that there is a “functionally equivalent” replacement for the wholesale service being discontinued.¹⁵⁶ While the Commission reviewed the submission, the carrier’s ability to discontinue the service would be “suspend[ed].”¹⁵⁷ In other words, these commenters want to require a § 214 application – without calling it a § 214 application. This approach would produce the same negative effects described in AT&T’s opening comments and would be just as unlawful.

Still other commenters want the Commission to go further and actually hold that a wholesale discontinuance requires § 214 approval regardless of its effect on end-users.¹⁵⁸ Some of these commenters suggest the Commission reach that result by reinterpreting the statutory

¹⁵⁵ See Comments of AT&T at 50-55.

¹⁵⁶ Comments of the Wholesale DS-0 Coalition at 10-11; *see also* Comments of Granite Telecommunications, LLC at 9-11.

¹⁵⁷ Comments of XO Communications at 24.

¹⁵⁸ *See, e.g.*, Comments of Competitive Carriers Association at 10-11; Comments of COMPTel at 5-8; Comments of NASUCA at 25-26; Comments of TruConnect at 5-6; Comments of XO Communications at 22-24.

language “community, or part of a community” to include CLECs.¹⁵⁹ These commenters tacitly acknowledge that such a holding would be inconsistent with the Commission’s established interpretation of § 214, but they simply state in a conclusory footnote that “the Commission could reverse contrary precedent” if necessary.¹⁶⁰

The Commission cannot so easily abandon its longstanding approach. To do so, the new interpretation would first have to be “permissible under the statute.”¹⁶¹ AT&T has demonstrated that the interpretation advanced by certain commenters would not be permissible.¹⁶² Moreover, even if the new interpretation were a theoretically permissible reading of the statute, the Commission would have to show “that there are good reasons for it.”¹⁶³ There are not. Certainly the commenters favoring a revised approach do not suggest any. One commenter asserts that requiring § 214 applications for wholesale discontinuance is necessary because incumbent LECs lack sufficient information about the potential effects on CLEC end-users.¹⁶⁴ As AT&T explained,¹⁶⁵ however, that is a reason to continue placing the burden on CLECs to show that a particular wholesale change will render an end-user service unavailable;¹⁶⁶ it is not a reason to expand the scope of § 214 beyond the terms of the statute and the Commission’s longstanding interpretation.

¹⁵⁹ See Comments of COMPTTEL at 5-8; Comments of TruConnect at 5-6.

¹⁶⁰ Comments of COMPTTEL at 5-6 n.8.

¹⁶¹ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

¹⁶² See Comments AT&T at 54-55.

¹⁶³ *Fox*, 556 U.S. at 515.

¹⁶⁴ See Comments of Competitive Carriers Association at 10-11.

¹⁶⁵ See Comments of AT&T at 55-56.

¹⁶⁶ See Memorandum Opinion and Order, *Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131, ¶ 29 (2002) (rejecting wholesale customer’s argument that § 214 approval was required because the customer “failed to produce any persuasive evidence” of an impairment in service to its own retail customers).

The Commission has rightly recognized that Congress’s concern in enacting § 214 was focused on “the ultimate impact on the community served,”¹⁶⁷ not on the technical or financial impact on carriers purchasing wholesale services.¹⁶⁸ There is no basis for extending § 214 to cover situations where the end-user community will not experience a discontinuance, either by expressly reinterpreting the statute to do so or by adopting a presumption (however “rebuttable” it might be) that would effectively achieve the same result.

B. A Rebuttable Presumption Is Not Factually Justified

In proposing a rebuttable presumption, the Commission sought comment on whether the concerns animating that proposal are justified.¹⁶⁹ None of the opening comments offers any reason to believe that they are. As AT&T explained, “[c]ircumstances 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.”¹⁷⁰ The comments supporting the Commission’s rebuttable presumption (or similar extensions of § 214 to the wholesale context) do not demonstrate otherwise.

Some commenters claim that certain CLECs provide unique and useful services.¹⁷¹ Assuming for the sake of argument that is so, it is irrelevant to the question whether end-users could still receive those or similar services (from the CLEC or from other carriers) if one particular wholesale service were unavailable. Several commenters simply state, without

¹⁶⁷ *Western Union Mem. Op.* ¶¶ 6-7 & n.4.

¹⁶⁸ As AT&T explained (*See* Comments at 53-54), the fact that § 214 is not concerned with wholesale rate increases means that carriers’ elimination of rate options for term discount plans does not implicate § 214. Commenters arguing that § 214 approval is required for these rate changes fail to distinguish the Commission and D.C. Circuit precedent to the contrary.

¹⁶⁹ *See* Notice ¶ 102.

¹⁷⁰ Comments of AT&T at 52.

¹⁷¹ *See, e.g.,* Comments of COMPTTEL at 10-11.

analysis or evidence, that discontinuance of wholesale service will typically affect retail service as well.¹⁷² That is insufficient. These commenters do not explain why wholesale customers faced with the loss of one particular service option cannot substitute a different wholesale input or deploy their own facilities, or alternatively why customers would necessarily be unable to obtain comparable service from other carriers. Repeated assertions by some commenters that CLECs typically *do not* obtain such alternatives does not suggest that they *cannot* do so.

What these commenters' arguments reveal is that their true concern is not about wholesale customers' inability to provide service but an inability to do so at the same price and with the same regulatory benefits they currently enjoy. COMPTTEL, for instance, argues that AT&T's ASE service is not an adequate substitute for DS1 and DS3 special access.¹⁷³ But the principal inadequacy COMPTTEL cites is that the ASE service costs more.¹⁷⁴ As COMPTTEL concedes, rate increases are not a basis for requiring a § 214 application.¹⁷⁵ Yet COMPTTEL nonetheless asserts, with no support or explanation, that the Commission "must consider the pricing of a replacement product for purposes of granting an application."¹⁷⁶ Another comment is particularly telling. XO Communications, a CLEC, suggests that the only way a carrier should be able to obtain § 214 approval to replace a tariffed wholesale service with a non-tariffed one is if the non-tariffed service is "functionally equivalent," has "*equivalent* rates, terms, and

¹⁷² See, e.g., *id.* at 8 (stating that retail effects from wholesale discontinuance are "indisputable" but providing no actual evidence or examples); Comments of XO Communications at 23 (claiming, without citation, that it is "virtually axiomatic" that wholesale discontinuance amounts to retail discontinuance).

¹⁷³ Comments of COMPTTEL at 19.

¹⁷⁴ See *id.*

¹⁷⁵ *Id.*; see also *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980).

¹⁷⁶ Comments of COMPTTEL at 19.

conditions,” and will be made available “indefinitely.”¹⁷⁷ In other words, what the CLECs want from an IP transition is no transition at all. The Commission should reject these pleas.

V. The Commission Cannot Use § 214 as a Mechanism for Indirect Regulation

In the Notice, the Commission tentatively concluded it should require incumbent LECs seeking authority to discontinue services used as wholesale inputs to commit to providing CLECs “equivalent wholesale access on equivalent rates, terms, and conditions.”¹⁷⁸ In combination with the Commission’s proposed “rebuttable presumption,” discussed above, the condition the Commission envisions would “transform[] § 214 from a provision designed to ensure continuity of retail service to a competitor-protection provision.”¹⁷⁹ AT&T demonstrated in its opening comments that this would be an unlawful application of § 214; in particular, because there are other statutes expressly addressing competition and carrier-to-carrier obligations, the Commission cannot impose those same obligations under § 214 if it cannot do so directly under the appropriate statutes.¹⁸⁰ AT&T also demonstrated how the Commission’s proposal reflects a wrongheaded policy to protect competitors, not competition, at the expense of innovation.¹⁸¹

As with the Commission’s other two § 214 proposals, the commenters supporting the equivalent access proposal confirm that AT&T’s criticisms are well-placed. These commenters either expressly or implicitly resort to other statutes to justify the Commission’s tentative

¹⁷⁷ Comments of XO Communications at 26 n. 44 (emphasis in original). Even then, XO asserts that a § 214 application would be required and that the process would, at most, be “ease[d].” *Id.*

¹⁷⁸ Notice ¶ 110.

¹⁷⁹ Comments of AT&T at 57.

¹⁸⁰ *See id.* at 57-59; *see also id.* at 59-61 (explaining why a presumptive condition is inconsistent with § 214’s requirement of a case-by-case analysis).

¹⁸¹ *See id.* at 61-64.

conclusion. One commenter, for example, endorses the equivalent access condition by relying on carriers' unbundling obligations under §§ 251 and 271.¹⁸² Another commenter proposes that the Commission require carriers discontinuing legacy service "to offer broadband Internet access on a resale basis";¹⁸³ this proposal not only confuses § 214 with § 251 but also intrudes on issues addressed in the Commission's forthcoming order in the Open Internet proceeding. Yet another commenter suggests that portions of the equivalent access proposal might "flow from the [§] 202(a) prohibition against unreasonable discrimination."¹⁸⁴ And at least some of these commenters acknowledge that the issues raised by the equivalent access proposal are already being addressed in the Commission's separate special access proceeding.¹⁸⁵

None of these commenters even tries to explain how § 214 permits imposing a wholesale equivalent access requirement. It does not. To be clear, AT&T does not agree with *any* of the commenters' legal justifications for an equivalent access condition. But the important point, for purposes of this proceeding, is that these commenters' submissions confirm what AT&T pointed out: § 214 is not among the tools that Congress has given the Commission to address issues related to intercarrier obligations. Where the Commission has not found it necessary or

¹⁸² See Comments of Granite Telecommunications, LLC at 11-12; see also Comments of Competitive Carriers Association at 3-6, 10 (extensively discussing the requirements of §§ 251 and 252 and then arguing that the proposed equivalent access condition should expire only "when ILECs can demonstrate that they lack sufficient market power to dominate the wholesale marketplace"). Further confirming that their focus is not on § 214, many of these commenters also ask the Commission in this proceeding to impose new unbundling obligations or reverse prior decisions not to require unbundling. See, e.g., Comments of COMPTTEL at 30 (urging the Commission to "reconsider its rules regarding access to dark fiber"); Comments of TruConnect at 9-10 (urging the Commission to revisit the 64 Kbps limit on its "fiber to the home" unbundling rule).

¹⁸³ See Comments of TruConnect at 12.

¹⁸⁴ Comments of COMPTTEL at 25.

¹⁸⁵ See, e.g., *id.* at 22.

appropriate to use those tools directly, it cannot do so indirectly under § 214.¹⁸⁶ Nor can the Commission use § 214 to evade the statutory limits on its authority to use those tools – such as the impairment standard for unbundling in § 251(c)(3).

Moreover, the commenters have given the Commission no reason to impose the relief they seek. As AT&T has pointed out, even if the Commission may give some consideration to *competition* under the public convenience standard of § 214, it may not use the statute to protect the business interests of particular *competitors* who fail to innovate and invest, and whose products are therefore rendered obsolete or unattractive to consumers.¹⁸⁷ Yet the commenters who support the wholesale equivalent access proposal make no effort to show how it will promote competition at all (much less the genuine facilities-based competition the D.C. Circuit has recognized was the aim of the 1996 Act) or provide end-user customers with more or better choices; they merely claim that this guarantee is necessary in order to allow them to continue providing their own specific services. Even then, these commenters are not truly complaining that they will be unable to continue providing those services – only that it may (allegedly) cost them more to do so. For example, COMPTTEL complains about one particular service (ASE) that AT&T has proposed as a potential replacement for DS1 and DS3 special access as part of the IP transition. But COMPTTEL's primary complaint, as noted above, is that the ASE service costs more than existing DS1 or DS3 services.¹⁸⁸ And, although COMPTTEL suggests that there may also be technical incompatibilities with this one particular replacement service,¹⁸⁹ it has

¹⁸⁶ See Comments of AT&T at 58 & n.156.

¹⁸⁷ See *id.* at 59-61.

¹⁸⁸ See Comments of COMPTTEL at 19.

¹⁸⁹ *Id.* at 20.

acknowledged that these claims are based on incomplete information about the ASE service.¹⁹⁰

In short, COMPTTEL (like its fellow commenters) has offered no credible evidence from which the Commission may conclude that an equivalent access condition is necessary to protect competition (as opposed to competitors).¹⁹¹

In issuing the Notice, the Commission apparently contemplated that CLECs, like incumbent LECs, would participate in the IP transition and would upgrade their own services accordingly. For example, one cited concern animating the “equivalent access” proposal was that CLECs need sufficient advance notice to plan changes to their end-user offerings and advise their customers of those changes.¹⁹² But the comments make no mention of such changes. Neither the CLECs nor their supporters discuss how the Commission’s equivalent access proposal (or anything else in the Notice) will facilitate their own transition of services. Instead, these commenters embrace the proposal because they want to keep their current services as they are. That is their choice, and consumers can likewise choose whether they want to retain the services offered by these CLECs or upgrade to newer options from other carriers. But incumbent LECs should not be saddled indefinitely with outdated regulatory obligations solely to satisfy the

¹⁹⁰ See *id.* at 19, *Technology Transitions et al.*, GN Docket No. 13-5, *et al.* (filed Mar. 31, 2014). As AT&T explained in response to COMPTTEL, this analysis of the ASE service is in any event “premature.” Reply to Comments of AT&T Services, Inc., at 32 n.79, *Technology Transitions et al.*, GN Docket No. 13-5, *et al.* (filed Apr. 10, 2014).

¹⁹¹ One commenter has suggested that CLECs must have access to incumbents’ fiber networks because of alleged competitive advantage in serving data center customers. See Comments of Garland Connect, LLC. AT&T disagrees with these contentions. The dispute underlying Garland Connect’s comments is the subject of active litigation in California state court; as AT&T will explain to the court, Garland Connect is limited by contract from recovering the charges it seeks from AT&T, which are more than ten times the amount charged to any other customer. Regardless, this contractual dispute is not relevant to the issues before the Commission.

¹⁹² See Notice ¶ 113.

CLECs' desire to maintain the status quo. There is neither legal authority nor any public interest justification for doing so.

As USTelecom points out,¹⁹³ the Commission's unbundling rules – which, unlike § 214, are meant to address competitive carriers' concerns – were never intended to impose indefinite obligations on incumbent carriers. Rather, the rules were “designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets.”¹⁹⁴ The IP transition and the attending proliferation of next-generation services are part of the evolution away from legacy unbundling requirements that the Commission envisioned and intended. Certain CLECs do not want to evolve. So they ask the Commission to preserve its outdated unbundling rules by adopting an interpretation and application of § 214 that has no basis in the statute, market reality, or sound policy. The Commission should not do so.

¹⁹³ Comments of USTelecom at 12.

¹⁹⁴ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, ¶ 3 (2005), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

Respectfully submitted,

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