

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

In the Matter of)	
)	
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
)	
Windstream Petition for Declaratory Ruling)	WC Docket No. 15-1

**REPLY COMMENTS OF
BIRCH, INTEGRA, AND LEVEL 3**

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Birch Communications, Inc. (“Birch”), Integra Telecom, Inc. (“Integra”), and Level 3 Communications, LLC (“Level 3”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these reply comments in the above-captioned proceedings on the Commission’s November 25, 2014 Notice of Proposed Rulemaking (“*NPRM*”).¹

I. INTRODUCTION AND SUMMARY

In the *NPRM*, the Commission recognizes that competitive carriers have driven the deployment of packet-based broadband services—and in the process, delivered choice,

¹ See generally *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications; Technology Transitions; Policies and Rules Governing Retirement of Cooper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd. 14968 (2014) (“*NPRM*”).

innovation, and competitive prices—to businesses and anchor institutions nationwide.² The Commission also recognizes that, due to the extremely high barriers to constructing their own last-mile facilities, competitive carriers rely substantially on last-mile inputs purchased from incumbent LECs in order to deliver their services³ to provide customers with an alternative to the incumbent LEC monopoly (or incumbent LEC-cable company duopoly). The Commission is appropriately considering a number of proposals designed to preserve and promote this competition as incumbent LECs transition from copper to fiber facilities and from TDM to packet-based technologies.⁴ These include (1) a rebuttable presumption that incumbent LECs must obtain prior approval to discontinue legacy services (*e.g.*, DSn special access services) used by competitive carriers as wholesale inputs to their downstream retail services;⁵ (2) a requirement that incumbent LECs obtain prior approval to discontinue tariffed term discount plans for legacy wholesale services; (3) a requirement that incumbent LECs seeking to discontinue a legacy wholesale service provide competitive carriers with equivalent wholesale access on equivalent rates, terms, and conditions (hereinafter the “Equivalent Wholesale Access” requirement);⁶ and (4) changes to the Commission’s copper retirement rules, including adoption of a definition of “copper retirement”⁷ and a requirement that incumbent LECs provide notice of

² *Id.* ¶¶ 6, 28, 106.

³ *Id.* ¶ 27.

⁴ *See id.* (“One of the primary goals of this Notice is to begin the process of ensuring that there is competition in serving every level of the enterprise market, from very small businesses to large enterprises.”); *id.* ¶ 110 (“Technology transitions must not harm or undermine competition.”).

⁵ *Id.* ¶¶ 102-103.

⁶ *Id.* ¶ 110.

⁷ *Id.* ¶¶ 50-53.

the changes in rates, terms, and conditions caused by a planned copper retirement.⁸ There is support in the record for these proposals from competitive carriers, enterprise customers, public interest groups, and state regulatory commissions.

Not surprisingly, the incumbent LECs object to these proposals because the incumbents seek to exploit their market power over the last-mile inputs necessary to compete in the business broadband market. They argue, for instance, that (1) competitive carriers can readily obtain alternatives to incumbent LEC wholesale inputs; (2) the Commission lacks the statutory authority to adopt most of its proposals; and (3) adoption of these proposals will somehow slow the ongoing technology transitions. As discussed herein, none of the incumbent LECs' arguments have merit.

First, the Commission should reject the incumbent LECs' policy arguments against its proposed discontinuance requirements. For example, as discussed in Part II.A, it is entirely reasonable for the Commission to adopt a rebuttable presumption that an incumbent LEC's discontinuance of a legacy wholesale service will result in discontinuance, reduction, or impairment of service to the downstream retail customers served using those wholesale inputs. In addition, contrary to the incumbent LECs' claims, there is insufficient facilities-based competition in the relevant markets to obviate the need for the proposed rebuttable presumption and Equivalent Wholesale Access requirement. Nor would adopting a rebuttable presumption that incumbent LECs must obtain approval to discontinue legacy wholesale services impede the technology transitions.

Second, as the Joint Commenters have proposed, the Commission should adopt a rebuttable presumption that an incumbent LEC must seek prior approval to discontinue a tariffed

⁸ *Id.* ¶ 57.

term discount plan. As discussed in Part II.B., the Commission's existing tariff review process does not obviate the need for this requirement.

Third, as explained in Part II.C, the Commission has ample statutory authority under Sections 201 and 214 of the Act and Section 706 of the 1996 Act to adopt these discontinuance requirements. With respect to Section 214 in particular, nothing—including the terms of the provision, its legislative history, past precedent, or the structure of the Act—precludes the Commission from adopting a rebuttable presumption or any other requirements to address the harms to competition posed by discontinuance of incumbent LEC legacy wholesale services and tariffed term discount plans.

Fourth, as discussed in Part III.A-B, the Commission should (1) define copper retirement to include the feeder portion of the loop and an incumbent LEC's failure to maintain copper loop facilities; and (2) require incumbent LECs to provide notice of changes in their rates, terms, and conditions resulting from a planned copper retirement. The Commission has the authority to adopt the latter requirement under Sections 251(c)(5), 201(b), and 706. Additionally, as explained in Part III.C, the record supports requiring incumbents to file copper retirement notifications on substantially more than the minimum 90-day notice period in the existing rules (*e.g.*, on at least one year's notice, as proposed by the Joint Commenters). Furthermore, as discussed in Part III.D, there is no basis for the incumbent LECs' claims that the proposed copper retirement rule changes will cause incumbent LECs to forego or delay fiber deployments.

II. THE COMMISSION SHOULD ADOPT REQUIREMENTS GOVERNING INCUMBENT LECs' DISCONTINUANCE OF LEGACY WHOLESALE SERVICES.

A. Incumbent LECs' Policy Arguments Against The Proposed Rebuttable Presumption For Discontinuance Of Incumbent LEC Legacy Wholesale Services And The Proposed Equivalent Wholesale Access Requirement Are Without Merit.

As the Joint Commenters have explained,⁹ the Commission should adopt its proposed rebuttable presumption that where an incumbent LEC “seeks to discontinue, reduce, or impair a [legacy] wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community” such that prior approval for the discontinuance is required.¹⁰ The record supports adoption of this proposal;¹¹ in fact, a number of commenters advocate adoption of a conclusion, rather than a rebuttable presumption, that approval is required.¹² There is also widespread support in the record for the Commission’s proposal that incumbent LECs seeking to discontinue DSn special access services and other legacy wholesale services comply with the Equivalent Wholesale Access requirement.¹³ While the incumbent LECs oppose the proposed requirements on various policy grounds, their arguments are baseless.

⁹ See Comments of Birch, Integra, and Level 3, GN Dkt. No. 13-5, RM-11358, WC Dkt. No. 05-25, RM-10593, & WC Dkt. No. 15-1, at 8-11 (filed Feb. 5, 2015) (“Joint Commenters’ Initial Comments”).

¹⁰ *NPRM* ¶ 103.

¹¹ See, e.g., Granite Comments at 10; Wholesale DS-0 Coalition Comments at 10; Michigan PSC Comments at 9. All references herein to “Comments” are to those filed in GN Dkt. No. 13-5 on February 5, 2015, unless otherwise indicated.

¹² Competitive Carriers Association Comments at 10; COMPTTEL Comments at 8-10; Windstream Comments at 33; XO Comments at 23.

¹³ See, e.g., Ad Hoc Telecommunications Users Committee Comments at 17; Competitive Carriers Association Comments at 8-9; COMPTTEL Comments at 16-20; Granite Comments at 11; Sprint Comments at 3; Windstream Comments at 26-30; XO Comments at 26; Wholesale DS-0 Coalition Comments at 3; NASUCA Comments at 25-26; Michigan PSC Comments at 9;

First, AT&T asserts that, in light of existing competition,¹⁴ the Commission cannot reasonably presume that “[w]here an incumbent LEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with service, this can also be expected to affect the competitive LECs’ retail customers.”¹⁵ According to AT&T, “the prevalence” of available substitutes from “alternative local providers” will almost always preclude the discontinuance of an incumbent LEC’s wholesale service from affecting competitive carriers’ downstream retail customers.¹⁶ But AT&T fails to cite any relevant evidence to support its claim.¹⁷ In fact, all of the available evidence demonstrates that non-incumbent LECs have deployed their own facilities to only a small percentage of commercial buildings in the U.S.,¹⁸

Pennsylvania PUC Comments at 16; *see also id.* at 3 (“[T]he Pa. PUC strongly believes that . . . wholesale access should not be affected or severely impacted ‘merely because technologies are in transition.’”) (internal citation omitted); New York PSC Comments at 12 (agreeing that when incumbent LEC legacy wholesale services are discontinued “without a similarly functional and priced alternative product being available, the cost of providing telecommunications services, including broadband, to small and medium size businesses by CLECs” can increase significantly); City of New York Comments at 6 (recommending that “service transitions not be permitted unless comparable services are available to the City and other consumers at comparable prices”).

¹⁴ AT&T Comments at 51-52.

¹⁵ *NPRM* ¶ 102.

¹⁶ AT&T Comments at 52.

¹⁷ *See id.* n.140 (citing the Commission’s reference to “the growth of a vibrantly competitive telecommunications marketplace” in a 2010 high-cost universal service support order) (internal citation omitted). To support its claim that competitors can readily obtain viable substitutes for discontinued incumbent LEC legacy wholesale services, such as DSn special access service, AT&T also cites its offer to sell its retired copper loops to interested providers at salvage value. AT&T Comments at 52 & n.139. The Commission should dismiss this argument because, among other things, the sale of copper loops poses what appear to be insurmountable challenges for many prospective purchasers (*e.g.*, how a purchaser would maintain and repair the copper free of incumbent LEC oversight, whether and how a competitor would be able to choose which loops to purchase, etc.).

¹⁸ *See Joint Commenters’ Initial Comments* n.5 (citing evidence).

and competitive carriers therefore “rely substantially on last-mile inputs from the incumbent LEC” to provide retail service.¹⁹ Accordingly, it is entirely reasonable for the Commission to presume that discontinuance of an incumbent LEC wholesale input will result in a discontinuance, reduction, or impairment of service to the competitive carrier’s downstream retail customers.²⁰ For example, in the absence of alternative wholesale suppliers to the incumbent LEC, the competitive carrier would likely incur significantly higher input costs as a result of the discontinuance²¹ and would likely need to (1) pass those higher costs through to its downstream retail customers (thereby impairing the retail service offering); (2) materially reduce the number and/or type of customers to which it markets retail services (thereby reducing or partially discontinuing the retail service offering); and/or (3) materially alter the features, functions, or characteristics of the retail service it offers (thereby impairing the retail service offering).

Second, other incumbent LECs also suggest that competition obviates the need for both the proposed rebuttable presumption and the proposed Equivalent Wholesale Access Requirement, but they fail to cite evidence of sufficient facilities-based competition to support their argument. For example, Verizon and ITTA rely on competition in the retail voice market²²—competition which has no bearing on the extent to which there are viable alternatives

¹⁹ Letter from Angie Kronenberg, COMPTEL, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5 *et al.*, at 5 (filed Apr. 2, 2014) (“COMPTEL Managerial Framework Letter”); *see also* Windstream Comments at 15-17; XO Comments at 26; Granite Comments at 4; COMPTEL Comments at 8-10.

²⁰ *See, e.g.*, Competitive Carriers Association Comments at 10; COMPTEL Comments at 8-10; Windstream Comments at 33; XO Comments at 22-23; Michigan PSC Comments at 9.

²¹ *See* discussion *infra* Part II.C.1 & 2.

²² Verizon Comments at 27-29; ITTA Comments at 6-8.

to incumbent LEC legacy wholesale services post-discontinuance. In addition, CenturyLink cites to purported competition in the Ethernet market that is based in part on the very same legacy wholesale inputs that incumbent LECs plan to cease offering as part of the technology transitions.²³

Third, AT&T claims that the proposed rebuttable presumption would “invite anti-competitive abuse” by “provid[ing] an unwarranted opportunity for incumbents’ competitors . . . to challenge changes in service that have little impact on end-user customers.”²⁴ AT&T, however, provides absolutely no factual support for this claim. Indeed, given that competitive carriers need regulatory certainty concerning the wholesale inputs available to them²⁵ and they have far fewer resources than incumbent LECs, there is no logical basis to conclude that competitive carriers will frivolously challenge discontinuances that will not meaningfully affect their retail customers.

Fourth, AT&T asserts that adopting a rebuttable presumption that incumbent LECs must obtain approval before discontinuing, reducing, or impairing a legacy wholesale service will create “interminable gridlock,”²⁶ “drown the Commission in a flood” of discontinuance

²³ See CenturyLink Comments at 12 & n.27 (citing Vertical Systems Group “Ethernet LEADERBOARD,” which ranks Ethernet service providers based on retail port share without differentiating between Ethernet ports associated with services that competitive carriers provide over their own facilities and Ethernet ports associated with services provided over last-mile facilities leased from incumbent LECs); *id.* at 13-14 (citing competition from Ethernet-over-copper service providers).

²⁴ AT&T Comments at 53.

²⁵ See, e.g., Joint Commenters’ Initial Comments at 8; Competitive Carriers Association Comments at 8; Windstream Comments at 22-23.

²⁶ AT&T Comments at 55.

applications, and “hopelessly slow the TDM-to-IP transition.”²⁷ This is hyperbole. So long as incumbent LECs demonstrate that they will comply with the Equivalent Wholesale Access requirement,²⁸ the Commission could promptly approve applications to discontinue legacy wholesale services. For example, if the Commission adopts the Joint Commenters’ proposal to require incumbent LECs to provide at least 12 months of notice before filing a discontinuance application,²⁹ incumbent LECs could submit with such notices a document memorializing the rates, terms, and conditions governing their packet-based replacement offerings.³⁰ And if those rates, terms, and conditions fully comply with the Equivalent Wholesale Access requirement, the applications could be automatically granted after 60 days unless the Commission notifies the incumbent LECs otherwise.³¹

²⁷ *Id.* at 3.

²⁸ *See* Joint Commenters’ Initial Comments at 13-14.

²⁹ *See id.* at 10. The Commission should adopt this requirement because competitive carriers need adequate time to, among other things, (1) plan for any necessary changes to their service offerings that rely on the discontinued inputs and prepare existing retail business customers for those changes; (2) offer services to new retail business customers (many of whom demand multi-year contracts); and (3) conduct the requisite business planning. *See, e.g., id.* at 8; Letter from Jennie B. Chandra, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5, at 3 (filed Aug. 7, 2014); Granite Comments at 9; Wholesale DS0 Coalition Comments at 11-12.

³⁰ *See, e.g.,* Wholesale DS0 Coalition Comments at 11-12 (“The identification of an adequate, functional equivalent, substitute wholesale service, including disclosure of the rates, terms and conditions of that substitute service, should be required well in advance of an ILEC’s section 214 filing so that CLECs and the public can have adequate time to plan for the . . . transitions, and to negotiate and enter into the necessary multi-year contracts that such shifts will necessitate.”).

³¹ *See* 47 C.F.R. § 63.71(c).

B. The Commission’s Tariff Review Process Does Not Obviate The Need To Establish New Requirements Governing Incumbent LECs’ Discontinuance Of Tariffed Term Discount Plans.

As the Joint Commenters discussed in their initial comments, because of incumbent LECs’ exorbitant rack rates for special access, tariffed term discount plans are critical to competitive carriers’ ability to compete in the retail business market.³² Elimination of such plans without offering adequate replacements would constitute an unreasonable practice under Section 201(b).³³ Therefore, the Commission should establish a rebuttable presumption that an incumbent LEC must seek approval prior to discontinuing a tariffed term discount plan.³⁴ Many commenters support an approval requirement for discontinuance of such plans.³⁵

Contrary to the incumbent LECs’ suggestions,³⁶ the Commission’s existing tariff review process is not sufficient to address discontinuance of term discount plans. As the Joint Commenters have already explained, that process gives the agency little time, data, or guidance to evaluate the harms to competition and business customers posed by the elimination of a

³² See Joint Commenters’ Initial Comments at 16-21.

³³ See *id.* at 26-27.

³⁴ See *id.* at 21-24. As explained in the Joint Commenters’ initial comments, the Commission should also require incumbent LECs to (1) offer either (a) the legacy wholesale services at issue (*e.g.*, DS_n special access services) under their remaining term discount plans on rates, terms, and conditions that are at least as favorable as those that have been applicable under the plan to be discontinued, or (b) equivalent wholesale access; (2) provide at least 12 months of notice prior to filing an application to discontinue a term discount plan; and (3) grandfather the term discount plan for circuits previously purchased thereunder for the longer of 36 months from the grant of the discontinuance application or the remaining duration of the term applicable to a circuit. See *id.* at 23-24.

³⁵ See, *e.g.*, Sprint Comments at 6; COMPTTEL Comments at 14-15; Windstream Comments at 32-33; XO Comments at 25.

³⁶ See Verizon Comments at 30; CenturyLink Comments at 26-27.

tariffed term discount plan.³⁷ In addition, at least one incumbent LEC has asserted that the Commission lacks authority in tariff review proceedings to consider the harms to competition caused by the elimination of term discount plans.³⁸ Furthermore, under current law, it is not clear that a competitive carrier would have the right to appeal a Commission decision not to suspend and investigate an incumbent's discontinuance of a tariffed term discount plan.³⁹

C. The Commission Has Ample Statutory Authority To Adopt The Proposed Discontinuance Requirements.

As the Joint Commenters explained in their initial comments,⁴⁰ the Commission has the authority under Sections 201 and 214 of the Act and Section 706 of the 1996 Act to (1) adopt a rebuttable presumption that incumbent LECs must obtain Commission approval prior to discontinuing, reducing, or impairing legacy wholesale services or tariffed term discount plans for such services; and (2) condition its approval of such discontinuances on the Equivalent Wholesale Access Requirement and the other requirements proposed by the Joint Commenters.⁴¹ While the incumbent LECs argue that the Commission lacks the statutory authority to adopt these proposals, they fail to recognize that the agency can do so under Sections 201 and 706. In

³⁷ See Joint Commenters' Initial Comments at 21.

³⁸ See Reply of AT&T Services Inc. to Petitions to Suspend and Investigate, Transmittal No. 1803 *et al.*, at 8-10 (filed Dec. 6, 2013) (arguing that under Section 204 of the Act, the Commission is authorized only to suspend and investigate "new or revised" charges and cannot consider the rates that customers would pay under remaining term discount plans if a particular term discount plan is eliminated).

³⁹ See *Papago Tribal Util. Auth. v. FERC*, 628 F.2d 235, 239-40 (D.C. Cir. 1980) (holding that an agency's refusal to reject a rate filing is not reviewable).

⁴⁰ See Joint Commenters' Initial Comments at 24-28.

⁴¹ See, e.g., *id.* at 11 (proposing a requirement that incumbent LECs grandfather the existing DSn special access circuits to be discontinued for the longer of 36 months from the grant of the discontinuance application or the remaining duration of the term applicable to a circuit).

addition, contrary to the incumbent LECs' arguments, the terms of Section 214, its legislative history, the structure of the Act, and existing precedent in no way preclude adoption of the proposed discontinuance requirements.

1. Commission Authority Under Section 706

In arguing that the Commission lacks the authority to adopt the protections proposed in the *NPRM*,⁴² the incumbent LECs fail to address the Commission's broad authority under Section 706. This is a fatal omission. As the Commission has held, "Section 706(a) authorizes the Commission (along with state commissions) to take actions, *within their subject matter jurisdiction and not inconsistent with other provisions of law*, that encourage the deployment of advanced telecommunications capability by *any of the means listed* in the provision."⁴³ There is no question that the legacy DSn special access services that incumbent LECs plan to discontinue and the packet-based replacement services for those discontinued legacy services are within the Commission's subject matter jurisdiction over "communications by wire or radio."⁴⁴ There are also no "other provisions of the law" that limit the Commission's adoption of the protections proposed in the *NPRM* (as well as those proposed in the Joint Commenters' initial comments).⁴⁵

⁴² See, e.g., AT&T Comments at 54-55 & 57-61; Verizon Comments at 30-31.

⁴³ *Preserving the Open Internet; Broadband Industry Practices*, Report and Order, 25 FCC Rcd. 17905, ¶ 119 (2010) (emphasis added), *aff'd in relevant part*, *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) ("*Verizon*").

⁴⁴ 47 U.S.C. § 151.

⁴⁵ In *Verizon*, the D.C. Circuit held that the terms of the Act, namely that "[a] telecommunications carrier shall be treated as a common carrier under this [Act] only to the extent that it is engaged in providing telecommunications services," precluded the Commission from applying common carrier regulation (e.g., a prohibition against unreasonable discrimination) to a service that it had classified as an information service. *Verizon*, 740 F.3d at 650-659 (quoting 47 U.S.C. § 153(51)). No similar prohibition in the Act restricts the Commission's discretion to adopt the protections proposed in the *NPRM* and by the Joint Commenters here, in part because the services at issue are telecommunications services.

Nor is there any question that the “means listed in” Section 706(a) provide the Commission with the tools to adopt the requirements proposed here. That provision directs the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability” using, among other things, “measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”⁴⁶ The broadband services that competitive carriers provide to business customers clearly qualify as “advanced telecommunications capabilities.”⁴⁷ And competitive carriers will face substantial increases in the cost of providing those business broadband services if incumbent LECs are permitted to discontinue legacy wholesale inputs to broadband absent an Equivalent Wholesale Access requirement.⁴⁸ These substantial cost increases will likely diminish competitive carriers’ ability to compete in the provision of business broadband services. Accordingly, the Commission’s adoption of such a requirement

⁴⁶ 47 U.S.C. § 1302(a).

⁴⁷ Section 706 defines advanced telecommunications capability as “high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.” *Id.* § 1302(d)(1). The DS1, DS3, and Ethernet services that competitive carriers provide using incumbent LEC legacy wholesale services, such as DS_n special access inputs, deliver these capabilities to business customers.

⁴⁸ *See, e.g.*, Windstream Comments at 20 (demonstrating that “[m]arket-based pricing for last-mile Ethernet special access services that would replace TDM special access services would effect a significant price increase [for] last-mile connections to small and medium-sized business customer locations with limited bandwidth needs”) (citing Letter from Malena Barzilai, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Dkt. Nos. 13-5 & 12-353, Attachment, at 1 (filed June 10, 2014) (“Windstream June 10, 2014 Letter”) (comparing AT&T’s rates for DS_n special access services and comparable Ethernet services in the Kings Point, Florida wire center)); COMPTTEL Comments at 19 (“As COMPTTEL demonstrates in comments on the AT&T proposed Wire Center Trial, as described in the publicly available guidebook, the pricing for DS3 capacity nearly doubles using AT&T’s ASE [Switched Ethernet] service and the price increase for DS1 capacity in some areas could be 1000 percent higher.”) (citing Comments of COMPTTEL, GN Dkt. No. 13-5 *et al.*, at Exhibit, Tables 1 and 2 (filed Mar. 31, 2014)).

will ensure that competitive carriers have the equivalent access necessary to provide broadband and thereby “promote competition in the local telecommunications market” for business broadband services.

By promoting such competition, the proposals at issue here would “encourage the deployment” of advanced telecommunications capabilities for business customers. This is because competitive carriers use local transmission facilities purchased from incumbent LECs to develop and market lower-priced and higher-quality business broadband services than would otherwise be available in a monopoly or duopoly market. Such innovative offerings increase the quantity of business broadband services demanded (indeed, hundreds of thousands of American businesses purchase services, including broadband services, from competitive carriers).⁴⁹ It is also logical to assume that the increased purchase of such services increases the extent to which end users and edge providers develop and deliver new, data-intensive services over those connections. This, in turn, increases the incentive of competitive carriers as well as incumbent LECs to improve business broadband service offerings even further. This is exactly the kind of “virtuous cycle” of investment, innovation, demand, and further investment that the D.C. Circuit held was a sufficient basis under Section 706(a) for the Commission’s adoption of open internet regulations.⁵⁰ And, as with open internet regulations, “absent rules such as those set forth” in the *NPRM* and the Joint Commenters’ initial comments, incumbent LECs “could act in ways that would ultimately inhibit the speed and extent of future broadband deployment.”⁵¹ As the Commission has repeatedly held, incumbent LECs have the incentive and (absent the

⁴⁹ *NPRM* ¶ 106.

⁵⁰ *Verizon*, 740 F.3d at 642-645.

⁵¹ *See id.* at 645.

requirements proposed here) ability to raise their rivals' costs by overpricing wholesale inputs needed by their competitors.⁵² The result of such behavior would be higher prices, decreased availability, slower deployment, and diminished innovation in the provision of business broadband services, all in direct contravention of the policy goals of Section 706.⁵³

2. Commission Authority Under Section 201

The Commission also has authority to adopt the proposed discontinuance requirements under Section 201(b). That provision requires that incumbent LECs provide common carrier services on just and reasonable rates, terms, and conditions.⁵⁴ This mandate governs the rates, terms, and conditions on which incumbent LECs offer packet-based replacement services for discontinued DSn special access services, and the prices they plan to charge for DSn special access services after discontinuing tariffed term discount plans.

As the Commission explains, wholesale buyers have no choice but to purchase last-mile inputs from incumbent LECs,⁵⁵ and once DSn special access services are discontinued,

⁵² See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd. 8622, ¶ 34 & n.102 (2010) (citing longstanding precedent); *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd. 14032, ¶ 176 (2000) (“Incumbent LECs in general have both the incentive and ability to discriminate against competitors in incumbent LECs’ retail markets. . . . Incumbent LECs’ ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.”).

⁵³ It is also worth noting that the Commission could rely on Section 706(b) as the basis for adopting the rules discussed herein if and when the Commission determines (and it appears to have already done so) that “advanced telecommunications capability is [not] being deployed to all American[] [businesses] in a reasonable and timely fashion.” See 47 U.S.C. § 1302(b).

⁵⁴ *Id.* § 201(b).

⁵⁵ *NPRM* ¶ 27.

wholesale buyers will need to purchase packet-based replacement inputs, such as Ethernet services. Given that incumbent LECs generally charge much higher prices for Ethernet services than DSn special access services,⁵⁶ and given that the Commission relied on the continued availability of DSn special access services as a key basis for deregulating Ethernet prices,⁵⁷ the Commission would be well within its authority to adopt the requirements proposed here to address the likely significant price hike that discontinuance of DSn special access services would cause. For example, a simple comparison of AT&T's "just and reasonable" prices for DS1 special access service with its rates for comparable Ethernet services in the Kings Point, Florida proposed trial wire center yields the conclusion that the Ethernet prices are almost certainly unreasonable,⁵⁸ and elimination of the backstop of regulated DSn special access services would likely make this situation even worse. Limiting incumbent LECs' ability to charge unreasonable prices until the Commission adopts final rules in the special access proceeding is well within the grant of authority in Section 201(b).

Similarly, as the Commission recognizes in the *NPRM*, the discontinuance of tariffed term discount plans results in "an effective rate increase"⁵⁹ for wholesale customers. The Commission has the authority to determine that eliminating key discount plans upon which competitors rely to provide downstream retail services would seriously harm competition and is

⁵⁶ See, e.g., Windstream June 10, 2014 Letter, Attachment, at 1 (comparing AT&T's rates for DSn special access services and comparable Ethernet services in the Kings Point, Florida wire center).

⁵⁷ See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, ¶ 25 (2007).

⁵⁸ See *supra* note 56.

⁵⁹ *NPRM* ¶ 104.

therefore an unreasonable practice under Section 201(b).⁶⁰ Pursuant to that authority, the Commission can adopt requirements designed to address this problem, as proposed in the Joint Commenters' initial comments.⁶¹

3. Commission Authority Under Section 214

The incumbent LECs make several arguments in support of their contentions that the Commission may not adopt its proposed rebuttable presumption and Equivalent Wholesale Access requirement for discontinued incumbent LEC legacy wholesale services pursuant to Section 214 of the Act. All of these arguments should be rejected.

Community, or part of a community. Section 214(a) requires prior agency approval of any discontinuance, reduction, or impairment of a “service” to a “community, or part of a community.”⁶² There can be no dispute that services offered to wholesale customers qualify as “services” for purposes of this provision. The Commission has long held that services offered at wholesale are telecommunications services and common carrier services,⁶³ and there is no reason

⁶⁰ See *Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd. 22983, ¶ 35 (1995) (concluding that Section 201(b) provides the Commission with authority to combat conduct that “impede[s] the pro-competitive purposes of the 1996 Act” and “confer[s] no substantial countervailing public benefits”); *Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech – Illinois*, Declaratory Ruling and Order, 10 FCC Rcd. 4596, ¶ 35 (1995) (relying on Section 201(b) to prevent carriers from engaging in practices that impose “significant competitive disadvantages” on other carriers while “giving certain advantages” to the carrier engaging in the practice).

⁶¹ See *supra* note 34 (summarizing Joint Commenters' proposals for addressing discontinuance of tariffed term discount plans).

⁶² 47 U.S.C. § 214(a).

⁶³ See *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd. 8776, ¶ 785 (1997) (subsequent history omitted) (“Federal precedent holds that a carrier may be a common carrier if it holds itself out ‘to service indifferently all potential users.’ Such users, however, are not limited to end users. Common carrier services include services offered to other carriers, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers.”) (internal citation omitted); *Implementation of the Non-*

to reach a different result in the context of Section 214(a). The incumbent LECs, however, dispute the conclusion that discontinuance of incumbent LEC legacy wholesale services would constitute discontinuance, reduction, or impairment of service to “a community, or part of a community.”

Specifically, the incumbent LECs argue that the relevant inquiry under Section 214(a) is whether a community of retail customers experiences discontinuance, reduction, or impairment.⁶⁴ However, as the Joint Commenters and other commenters have explained, discontinuance of DSn special access services and other incumbent LEC legacy wholesale services will in the vast majority of cases cause a “reduction,” “impairment,” or even “discontinuance” of competitive carriers’ downstream retail services.⁶⁵ In particular, as explained, increases in the price for incumbent LEC wholesale input services would usually result in one or more of the following forms of discontinuance, reduction, or impairment of the competitive carriers’ retail services: (1) competitive carriers would need to pass through higher

Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶¶ 264-265 (1996) (concluding that “wholesale services are not excluded from the definition of ‘telecommunications service’”).

⁶⁴ See, e.g., AT&T Comments at 49-52; Cincinnati Bell Comments at 19-20; Verizon Comments at 22.

⁶⁵ See Joint Commenters’ Initial Comments at 22-23; see also XO Comments at 23 (“[I]t is virtually axiomatic that when an ILEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with service, such as DS1s or DS3s, this will affect the competitive LECs’ retail customers.”); COMPTTEL Comments at 8-10; Competitive Carriers Association Comments at 10-11 (“The discontinuance of a wholesale service inevitably impacts end users, because a competitive LEC purchases wholesale service from an ILEC either to serve end users on its own, or to sell connectivity to downstream service provider(s) that is then used to offer service to end users. By way of example, competitive LECs routinely utilize wholesale access to ILEC networks not only to facilitate their own retail offerings to end users, but also to provide cellular backhaul, special access, and other services to wireless providers, including CCA’s members. These services are critical to the retail wireless offerings of CCA’s members.”).

input costs in the form of materially higher retail prices; (2) competitive carriers would be forced to cease or forego marketing services in certain geographic areas or to certain classes of customers; and/or (3) competitive carriers would need to materially alter the features, functions, or characteristics of their retail services.⁶⁶

In any event, the Commission has the authority to interpret Section 214(a) as requiring prior approval for discontinuing legacy wholesale services without regard to the effects on the wholesale customers' downstream retail customers. While the Commission has in the past tended to focus its inquiry under Section 214(a) on whether retail customers experience reduction, impairment, or discontinuance, this approach is by no means compelled by the terms of Section 214(a). The terms "community" and "part of a community" as used in that provision can mean different things. For example, dictionaries define the term "community" as either members of a group defined by their common geographic location (*e.g.*, a geographic community of end users) or members of a group scattered throughout multiple geographic areas who share common interests, training, religion, race, ethnic background, or some other characteristic.⁶⁷ (Notably, *none* of the dictionary definitions supports the view that community includes only end users or excludes wholesale customers *per se*.)⁶⁸ Such competing possible definitions of a term render it ambiguous, and courts grant deference to the Commission's interpretation of such

⁶⁶ See *supra* discussion Parts II.A & II.C.1 & 2; see also XO Comments at 23 (explaining that discontinuance of DS_n special access inputs will likely result in an increase in retail end users' rates and may preclude competitive carriers from serving certain customers altogether).

⁶⁷ For example, Merriam-Webster defines "community" as, among other things, "a body of persons of common and especially professional interests scattered through the larger society." See <http://www.merriam-webster.com/dictionary/community>.

⁶⁸ Wholesale buyers would qualify as "a body of persons of common . . . interests scattered through the larger society." See *id.*

terms.⁶⁹ Moreover, the Commission may change its interpretation of an ambiguous term as long as it acknowledges the change and provides a reasonable explanation for it.⁷⁰

Here, it would be reasonable and consistent with the broader policy goals of the Communications Act to interpret “community, or part of a community” in Section 214(a) to refer to a community of wholesale buyers. Allowing incumbent LECs to discontinue, reduce or impair legacy wholesale services without the adoption of appropriate conditions, such as the Equivalent Wholesale Access requirement, could undermine competition, slow innovation, and reduce service quality in the business broadband market. Because incumbent LECs plan to discontinue *all* of their wholesale DSn special access services at some point in the near future, these harmful consequences are likely to be felt across the entire country. Discontinuance, reduction, and impairment of a set of common carrier wholesale services has never raised risks to competition and consumer welfare as grave and far-reaching as those at issue here.⁷¹ It therefore makes sense for the Commission to revise its interpretation of the ambiguous terms of Section 214 in a manner that enables the agency to address these potential harms. In addition, doing so

⁶⁹ See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981-989 (2005) (applying *Chevron* deference to FCC interpretation of “offer”); *Nat’l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 418 (1992) (agency construction of a statutory term is entitled to deference where there are “alternative dictionary definitions of the word” at issue).

⁷⁰ See *FCC v. Fox Television Stations Inc.*, 556 U.S. 502, 515 (2009).

⁷¹ See, e.g., COMPTTEL Managerial Framework Letter at 5 (“Absent access to last-mile facilities . . . on reasonable rates, terms, and conditions, competitive carriers would likely be unable to serve most of the business customer locations they serve today. Hundreds of thousands of American businesses would lose their service provider and/or would be forced to pay higher prices.”); Letter from Jennie B. Chandra, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Dkt. No. 13-5 *et al.*, at 4 (filed Sept. 26, 2014) (“[I]f CLECs – the most important source of competition to ILECs in the business services market – ultimately are rendered unable to compete, business, government, and nonprofit customers will have access to fewer innovative service offerings and will be more vulnerable to ILEC price increases.”).

advances the goals of Section 706 of the 1996 Act because it increases the Commission’s ability to promote the deployment of advanced communications services to American businesses.

Rebuttable presumption. AT&T argues that the Commission may not adopt a rebuttable presumption that Section 214(a) applies to discontinuance of legacy wholesale services because the agency must consider the merits of each individual application on its own terms and may not prejudge that determination.⁷² There is no merit to this argument. The Commission routinely employs presumptions as a means of increasing the efficiency of its procedures.⁷³ In reviewing evidentiary presumptions adopted by administrative agencies, courts ““must defer to the agency’s judgment.””⁷⁴ They must uphold presumptions where there is a ““sound and rational connection between the proved and inferred facts, and when proof of one fact renders the existence of another fact so probable that it is sensible and timesaving to assume the truth of the [inferred fact] . . . until the adversary disproves it.””⁷⁵

⁷² AT&T Comments at 59-60.

⁷³ See, e.g., *Connect America Fund*, Report and Order, 28 FCC Rcd. 7211, ¶¶ 7-8 (2013) (holding that, in determining whether a service provider meets the criteria for eligibility to receive universal service subsidies, it is “reasonable to presume that providers that provide broadband of the required speed also meet the non-speed broadband criteria, with that presumption subject to rebuttal in particular instances”); *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, Report and Order, 17 FCC Rcd. 5517, ¶¶ 27-34 (2002) (adopting presumption that 30-day streamlined review process will apply to applications to transfer domestic Section 214 applications meeting specified criteria); *Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic & Int’l Satellite Serv. in the United States*, Report and Order, 12 FCC Rcd. 24094, ¶ 39 (1997) (adopting a presumption that entry by WTO Member satellite systems will promote competition in the U.S. satellite services market and is in the public interest).

⁷⁴ *Cablevision Systems Corp., v. FCC*, 649 F.3d 695, 716 (D.C. Cir. 2011) (“*Cablevision*”) (internal citation omitted); see also *Atchison, Topeka & Santa Fe Railway Co. v. ICC*, 580 F.2d 623, 629 (D.C. Cir. 1978) (“*Atchison*”).

⁷⁵ *Cablevision*, 649 F.3d at 716 (internal citation omitted).

This standard is met here. To begin with, if the Commission interprets “community or part of a community” to mean a community of wholesale buyers, there is little doubt that discontinuance of legacy incumbent LEC wholesale services would require approval under Section 214(a) in the overwhelming majority of cases. A sound and rational connection undeniably exists between the proven fact of discontinuance of a wholesale service and the inferred fact that a community or part of a community of wholesale buyers purchases the service in most cases.

Even if the Commission does not modify its interpretation of “community or party of a community,” it is highly probable, as explained above, that discontinuance, impairment, or reduction of an incumbent LEC’s wholesale service that is an essential input to competitive carrier retail services will cause those retail services to be discontinued, reduced, or impaired. Such predictive judgments are given “substantial deference” by courts where used by agencies as the basis for the adoption of rebuttable presumptions.⁷⁶ Indeed, this is precisely the sort of rational connection between the proved fact (discontinuance, reduction, or impairment of incumbent LEC wholesale service) and the inferred fact (discontinuance, reduction, or impairment of competitive carrier retail service) that the D.C. Circuit has held justifies an FCC evidentiary presumption.⁷⁷

Nor is there any basis for AT&T’s argument that the presumption would somehow cause the Commission to “prejudge” Section 214 applications.⁷⁸ The presumption simply requires that

⁷⁶ *See id.*

⁷⁷ *See id.* at 716-718 (upholding rebuttable presumption that denial of regional sports network terrestrial programming will “significantly hinder” the wholesale customer’s provision of satellite cable programming in violation of Section 628(b) of the Act).

⁷⁸ AT&T Comments at 60.

the incumbent LEC submit to the Commission's prior approval process unless it can be shown that such a process is unnecessary. The presumption itself does not dictate any particular outcome for that review process. In any event, incumbent LECs would be free to rebut the presumption.

Similarly, AT&T implies that the presumption, when combined with the Equivalent Wholesale Access requirement, would somehow deprive incumbent LECs of the "application-specific" review process purportedly required under Section 214(a).⁷⁹ But this line of reasoning misinterprets the law. The Commission may adopt reasonable rules, consistent with its jurisdiction under the statute, that (1) govern specific types of requests for discontinuance under Section 214(a); and (2) are designed to ensure that discontinuance, reduction, or impairment comports with the public interest under Section 214(c). The Commission would of course need to assess whether the incumbent LEC has complied with such rules (and other relevant statutory and regulatory requirements) on an "application specific" basis, but the rules themselves would not deprive the incumbent LEC applicant of its due process rights.⁸⁰

There is nothing remotely novel about the idea that the Commission may establish requirements that all applicants must meet to qualify for a certain right or privilege under the Act. For example, as part of its regulatory framework for market entry by specialized common

⁷⁹ *Id.*

⁸⁰ AT&T cites *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771 (D.C. Cir. 1974) ("*Hawaiian Tel.*") in support of its argument. See AT&T Comments at 60, n.162. But *Hawaiian Tel.* simply stands for the proposition that the Commission may not assume that an applicant seeking Section 214(a) approval has met the criteria for approval without examining the facts. See *Hawaiian Tel.*, 498 F.2d at 774-776 (overturning the Commission's approval of RCA's request for authority under Section 214(a) to provide voice-only services because the agency had assumed, without providing any supporting analysis, that further competition on the route in question would benefit the public). That case says nothing about whether the Commission may adopt reasonable rules governing specified classes of Section 214(a) discontinuance applications.

carriers, the Commission established rules with which all such competitors were required to comply in order to obtain authorization to provide service under Sections 214(a) and 309.⁸¹ Moreover, the Commission has adopted numerous rules with which applicants for broadcast station licenses must comply, including the multiple ownership rules.⁸² Each such applicant must certify compliance with the multiple ownership rules on its application,⁸³ and applicants whose ownership interests would exceed the limits established by the rules are *not* entitled to a case-by-case review under the public interest standard. The Commission adopted these rules pursuant to the public interest standards in Sections 307(a) and 310(d) of the Act, which are almost identical to the public interest standard in Section 214(a).⁸⁴ And there is no question that the Commission possesses authority to adopt and enforce such rules as prerequisites to granting applications for broadcast station licenses.⁸⁵ Requiring all incumbent LEC applicants for discontinuance of legacy wholesale services to comply with the rebuttable presumption and

⁸¹ See *Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services*, First Report and Order, 29 FCC 2d 870, ¶¶ 123-144 (1971) (“*Specialized Common Carrier Services*”).

⁸² See 47 C.F.R. § 73.3555.

⁸³ See FCC Form 301, Worksheet #2.

⁸⁴ Compare 47 U.S.C. § 214(a) (prohibiting carriers from discontinuing, reducing, or impairing service unless the Commission determines that “neither the present nor future public convenience and necessity will be adversely affected thereby”) with *id.* § 307(a) (directing the Commission to grant an application for a station license if the “public convenience, interest, or necessity will be served thereby”) and *id.* § 310(d) (prohibiting the transfer, assignment, or disposal of construction permits and station licenses except upon a Commission finding that “the public interest, convenience and necessity will be served thereby”).

⁸⁵ See *Prometheus Radio Project v. FCC*, 373 F.3d 372, 382 (3d Cir. 2004) (remanding aspects of media ownership rules that were not supported by the record but “affirm[ing] the power of the Commission to regulate media ownership”).

Equivalent Wholesale Access requirement would similarly be a permissible exercise of the Commission's Section 214(a) discontinuance authority.

Legislative history. Verizon and AT&T argue that the legislative history of Section 214 somehow forecloses application of that provision to wholesale services,⁸⁶ but they are incorrect. The original impetus for adoption of the Section 214(a) discontinuance provision was a desire to prevent telegraph company mergers from depriving military and industrial facilities of service during wartime.⁸⁷ But there is nothing in the legislative history indicating that Congress intended that Section 214 discontinuance proceedings would be limited to these concerns or that they could not encompass wholesale services. On the contrary, Congress chose to adopt language in Section 214(a) prohibiting *any* discontinuance, reduction, or impairment of a service to a community or part of a community unless the Commission deems it consistent with the public interest. This language extends far beyond the context of the provision's adoption. As the Supreme Court has held, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."⁸⁸ The Commission is therefore empowered to rely on the broad and flexible language of Section 214(a) to address new concerns associated with discontinuance as they arise, even though Congress might not have anticipated

⁸⁶ Verizon Comments at 23-25; AT&T Comments at 44.

⁸⁷ See *Western Union Telegraph Co. Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC 2d 293, n.4 (1979) (describing legislative history).

⁸⁸ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998).

these concerns in 1943 when it adopted the discontinuance provisions.⁸⁹ Statutes, like Section 214(a), “written in broad, sweeping language should be given broad, sweeping application.”⁹⁰

Statutory structure. AT&T argues that application of Section 214 to wholesale services is inconsistent with the structure of the statute, which contains other provisions that address wholesale services (*e.g.*, Sections 201-205 and 251).⁹¹ This argument is also without basis.

The D.C. Circuit has long recognized that conditions adopted under Section 214(c) might well address concerns about competition and effects felt by competitors’ customers.⁹² Nor does the presence of other provisions in the Act that address wholesale services somehow imply that Section 214 cannot be interpreted to address such services. Where two statutory provisions are “related conceptually, in that they both reflect an effort to promote” the same policy objective, but differ “in their approaches to this goal,” it is permissible for an agency to adopt complementary and even partially overlapping regulations under each of the provisions.⁹³ The Commission’s objective in proposing the Equivalent Wholesale Access requirement is “conceptually related” to the goals of Sections 201 to 205 (to the extent that they encompass

⁸⁹ *Cf. Cablevision*, 649 F.3d at 704-710 (holding that the Commission has the authority to rely on Section 628(b) for the purpose of regulating terrestrial programming even though the statute was originally adopted for the purpose of regulating satellite programming); *Nat’l Cable & Telecomms. Ass’n v. FCC*, 567 F.3d 659, 663-667 (D.C. Cir. 2009) (holding that the Commission has the authority under the “literal terms” of Section 628(b) of the Act to prohibit exclusivity agreements between cable companies and owners of apartment buildings, even though Congress adopted Section 628(b) for the purpose of preventing cable companies from denying satellite programming to their competitors).

⁹⁰ *Consumer Elecs. Ass’n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003).

⁹¹ AT&T Comments at 58.

⁹² *See MCI Telecomms. Corp., v. FCC*, 561 F.2d 365, 375 n.46 (D.C. Cir. 1977) (“[W]e do not intend to suggest that a showing of harm to competitors or competitors’ customers would be insufficient to sustain a service restriction promulgated in accord with 47 U.S.C. § 214(c).”).

⁹³ *See Atchison*, 580 F.2d at 637-638.

wholesale services) and Section 251 in that all of these provisions, to one degree or another, promote the goal of ensuring access to wholesale inputs on reasonable rates, terms, and conditions. But the Equivalent Wholesale Access requirement differs significantly in its approach to this goal. It is designed to address the consequences – *i.e.*, significant rate increases – of incumbent LEC wholesale legacy service discontinuance that the other statutory provisions and regulations adopted thereunder do not address and did not adequately account for.

AT&T further contends that the existence of other statutory provisions that address wholesale services renders unlawful obligations imposed under Section 214 that are “inconsistent” with those imposed under Sections 201 to 205 and 251.⁹⁴ This argument fails because the Equivalent Wholesale Access requirement is not “inconsistent” with the regime adopted under Sections 201 to 205 and 251. Again, to the extent that the Commission has deregulated the rates incumbent LECs charge for packet-based special access services, such as Ethernet, it relied on the continued availability of regulated DSn special access services as a basis for doing so.⁹⁵ The Equivalent Wholesale Access requirement is designed to prevent harms caused by the elimination of this precondition, and it is therefore entirely consistent with the regime adopted under Sections 201 to 205.

Moreover, the Commission has long treated wholesale requirements adopted under Section 251 as independent of and complementary to the regulatory regime adopted under the provisions of the Act that predated the 1996 amendments. For example, rate regulations adopted under Sections 201 to 205 apply to DS1 and DS3 services in the many circumstances in which Section 251 rate-regulated unbundled network elements (“UNEs”) are not available (*e.g.*, where

⁹⁴ See AT&T Comments at 58, n.156.

⁹⁵ See *supra* note 57.

the non-impairment triggers are met, where caps on the number of DS1 or DS3 loops to a location are exceeded, and where the facility is sought for the purpose of providing services such as mobile wireless or stand-alone long distance service). But once legacy DS_n special access services are discontinued, no rate regulation will apply to special access services or facilities at all unless the Commission adopts the Equivalent Wholesale Access requirement. Again, it would be completely consistent with the statutory scheme for the Commission to fill this gap and to do so by relying on Section 214.⁹⁶

Nor are the cases AT&T cites in support of its statutory structure argument remotely persuasive. For example, in *FDA v. Brown & Williamson Tobacco Corp.*, the Supreme Court held that the FDA did not have the jurisdiction to regulate the sale and distribution of tobacco products because (1) the FDA could only apply such regulations to drugs that have been approved as safe and effective, but the FDA had repeatedly held that tobacco could not be used safely; and (2) over 35 years, Congress had adopted numerous statutes establishing a distinct regulatory regime for tobacco, effectively ratifying the FDA's prior view that it lacked jurisdiction to regulate tobacco.⁹⁷ The situation here is entirely different because, as explained, the Equivalent Wholesale Access requirement is consistent with the broader structure of the Act. Nor is there any basis for concluding that Congress created a distinct and exclusive scheme for regulating rates that forecloses addressing rates under Section 214. There is simply no indication that Congress intended this outcome or even considered it.

⁹⁶ Cf. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, ¶¶ 653-655 (2003) (subsequent history omitted) (interpreting Section 271(c)(2)(B) checklist provisions as establishing independent unbundling obligations that apply even when unbundling requirements under Section 251(c)(3) have been eliminated).

⁹⁷ See generally *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

AT&T's reliance on a passage from a staff report quoted in *Specialized Common Carrier Services*⁹⁸ fares no better. In the quoted passage, the staff concluded that allowing competition from specialized common carriers did not warrant a change to the uniform rate requirement applicable to AT&T because any public interest concerns could be addressed in tariff proceedings, and it had not been shown that AT&T would be unable to use uniform rates to match the rates of its new competitors.⁹⁹ However, as the Commission recognized in *Specialized Common Carrier Services*, the Commission has the discretion to choose whether to implement Section 214(a) via industry-wide rulemaking or adjudications (*e.g.*, specific Section 214 applications).¹⁰⁰ Moreover, it *has* been shown that it is necessary to adopt the Equivalent Wholesale Access requirement in the instant rulemaking to prevent harm to competition caused by discontinuance of incumbent LEC legacy wholesale services.

Finally, AT&T cites several cases in support of its related assertion that, if an incumbent LEC lacks an obligation to provide a wholesale service under Sections 201 to 205 and 251, such an obligation cannot be established under Section 214.¹⁰¹ Again, the cases do not support AT&T's argument. AT&T relies on *Nat'l Fuel Gas Supply Corp. v. FCC*.¹⁰² There, the D.C. Circuit held that FERC could not (on rehearing) impose a new condition on a grant of a certificate to sell gas where FERC had, in its original order, concluded that the certificate was in

⁹⁸ See AT&T Comments at 58, n.156 (quoting *Specialized Common Carrier Services* ¶ 22) (quoting staff report ¶ 40). It is worth emphasizing that the staff report was not itself part of the Commission order.

⁹⁹ See *Specialized Common Carrier Services* ¶ 22 (quoting staff report ¶ 40).

¹⁰⁰ See *id.* ¶¶ 46-54.

¹⁰¹ See AT&T Comments at 58, n.157.

¹⁰² *Nat'l Fuel Gas Supply Corp. v. FCC*, 909 F.2d 1519 (D.C. Cir. 1990).

the public interest absent such a condition and FERC offered “no reason” for the change on rehearing. In contrast, here, the Commission has not concluded that incumbent LEC applications to discontinue DSn special access services are in the public interest absent conditions, such as the Equivalent Wholesale Access requirement.

Nor does *Time Warner Entm’t Co. v. FCC*¹⁰³ help AT&T’s cause. In that case, the D.C. Circuit held that the Commission could not do indirectly (*i.e.*, effectively force a local franchising authority to spend franchise fee revenues to pay for the oversight of cable basic tier rates) what it cannot do directly¹⁰⁴ (*i.e.*, Section 542(i) of the Act prohibits the Commission from “regulat[ing] the use of funds derived from” franchise fees collected by local franchising authorities).¹⁰⁵ Again, the FCC has full authority to directly adopt regulations governing rates, terms and conditions on which Ethernet and other packet-based replacement services are offered. There is therefore no legal impediment to Commission adoption of its proposed rebuttable presumption and Equivalent Wholesale Access requirement.

III. THE COMMISSION SHOULD ADOPT ITS PROPOSED COPPER RETIREMENT RULE CHANGES.

A. The Commission Should Adopt Its Proposed Definition of Copper Retirement.

The Commission should adopt its proposal to define copper retirement.¹⁰⁶ As the Commission recognizes in the *NPRM*, doing so will provide clarity on the circumstances that trigger the agency’s copper retirement rules and will facilitate competition.¹⁰⁷

¹⁰³ *Time Warner Entm’t Co. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995).

¹⁰⁴ *See id.* at 201.

¹⁰⁵ 47 U.S.C. § 542(i).

¹⁰⁶ *NPRM* ¶¶ 50-53.

1. The Commission Should Include The Feeder Portion Of Loops Within The Definition Of Copper Retirement.

As the record demonstrates, where incumbent LECs replace copper feeder with fiber, competitive carriers are generally unable to provide Ethernet-over-copper service to business customers served by those loops.¹⁰⁸ And as the record further demonstrates, competitive carriers have been providing affordable Ethernet-over-copper service to meet the demands of small and medium-sized business customers throughout the country.¹⁰⁹ Given the harmful impact of copper feeder replacement on competitors' ability to provide Ethernet-over-copper service, the Commission should adopt its proposal to define copper retirement to include the feeder portion of copper loops.¹¹⁰ In addition, the Commission should amend Section 51.325(a)(4) of its rules to clarify that retirement of copper feeder triggers network change notification requirements.¹¹¹

¹⁰⁷ *Id.* ¶¶ 49-50.

¹⁰⁸ *See, e.g.*, XO Comments at 12-13; COMPTTEL Comments at 28, 33; Reply Comments of XO Communications, LLC and Broadview Networks, Inc., GN Dkt. No. 12-353 & RM-11358, n.17 (filed Mar. 20, 2013); *see also* Comments of California Public Utilities Commission, GN Dkt. No. 13-5 *et al.*, at 9 (filed Feb. 26, 2015) ("California PUC Comments") ("The CPUC supports the FCC's proposal to include all three components – loop, subloop, and feeder portion of the loop – in the definition of 'copper retirement.' A CLEC's use of an ILEC's facilities for provisioning service may depend on access to all three components."); Pennsylvania PUC Comments at 11.

¹⁰⁹ *See, e.g.*, Comments of EarthLink, Integra, and tw telecom, GN Dkt. No. 12-353 & RM-11358, at 3-7 (filed Mar. 5, 2013); Comments of MegaPath Corporation, GN Dkt. No. 12-353 & RM-11358, at 2-7 (filed Mar. 5, 2013); Comments of XO Communications, LLC and Broadview Networks, Inc., GN Dkt. No. 12-353 & RM-11358, at 5-8 (filed Mar. 5, 2013).

¹¹⁰ *NPRM* ¶ 51.

¹¹¹ 47 C.F.R. § 51.325(a)(4).

2. The Commission Should Include The Failure To Maintain Copper Within The Definition Of Copper Retirement.

As the Joint Commenters have explained,¹¹² the Commission should also adopt its proposal to “define [copper] retirement to include *de facto* retirement, *i.e.*, failure to maintain copper that is the functional equivalent of removal or disabling.”¹¹³ Numerous parties agree.¹¹⁴ And while the incumbent LECs raise several objections to this proposal, none of them have merit.

First, AT&T asserts that record evidence of incumbent LECs’ failure to maintain their copper networks for the provision of service to their own retail customers¹¹⁵ is insufficient to adopt the Commission’s proposal because the purpose of the copper retirement rules is to provide notice of network changes that affect “‘*competing service providers*’ performance or ability to provide service.”¹¹⁶ Where, however, incumbent LECs are failing to maintain copper facilities used to serve their own retail customers, those facilities are also unavailable as a practical matter for competitive carriers to provide service. Thus, copper retirement notices

¹¹² Joint Commenters’ Initial Comments at 36.

¹¹³ *NPRM* ¶ 53.

¹¹⁴ *See, e.g.*, NASUCA Comments at 12; Public Knowledge, Appalshop, Benton Foundation, Center for Media Justice, Center for Rural Strategies, Common Cause, The Greenlining Institute, Media Action Center, Media Literacy Project, National Consumer Law Center, New American Foundation Open Technology Institute, Rural Broadband Policy Group, and TURN Comments at 30; Pennsylvania PUC Comments at 11; *see also* XO Comments at 10-12.

¹¹⁵ *See NPRM* ¶ 19 (citing Letter from Public Knowledge *et al.*, to Julie Veach, Chief, Wireline Competition Bureau, FCC, GN Dkt. No. 09-51 *et al.* (filed May 12, 2014)); CWA Comments at 22-34; California PUC Comments at 10; NASUCA Comments at 13-14.

¹¹⁶ AT&T Comments at 30 (emphasis in original) (quoting *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd. 19392, ¶ 171 (1996)) (“*Local Competition Second Report and Order*”) (subsequent history omitted).

should be required in these circumstances.

Second, AT&T contends that existing rules already fully address potential harms to competition posed by incumbent LECs' failure to maintain copper.¹¹⁷ For example, AT&T cites Section 51.319(a)(8) of the Commission's rules, which prohibits incumbent LECs from engaging in practices "that disrupt[] or degrade[] access to a local loop or subloop . . . for which a requesting telecommunications carrier may obtain or has obtained access pursuant to [Section 51.319(a) of the Commission's rules]."¹¹⁸ This rule, however, applies only to requests for access to UNEs under Section 251(c)(3) and does not apply to the many instances in which competitive carriers must request DSn special access (or Section 271 UNEs) instead of Section 251(c)(3) UNEs (*e.g.*, because Section 251(c)(3) UNEs are unavailable under the non-impairment triggers at the locations in question or because the competitive carrier is subject to an incumbent LEC's volume/term discount plan that effectively penalizes the purchase of UNEs). Thus, the existing rules do not prevent incumbent LECs from failing to maintain copper for the provision of special access (a service which incumbent LECs must provide upon a reasonable request therefor under Section 201 of the Act).¹¹⁹ It follows that competitive carriers should be provided notice when incumbent LECs have allowed their copper facilities to be degraded such that a competitive carrier cannot purchase special access service at the locations in question.

Third, Verizon claims that defining copper retirement to include *de facto* retirement would result in an overly burdensome "loop-by-loop" regulatory review process,¹²⁰ but this

¹¹⁷ AT&T Comments at 31.

¹¹⁸ 47 C.F.R. § 51.319(a)(8).

¹¹⁹ 47 U.S.C. § 201(a).

¹²⁰ Verizon Comments at 12-13.

claim is overstated. Incumbent LECs and competitive carriers currently assess each individual loop's suitability for the provision of service, so the business process between incumbents and competitors is already conducted on a "loop-by-loop" basis today. Defining copper retirement to include *de facto* retirement will simply make this process more efficient by providing competitive carriers with advanced notice as to when and where copper will not be maintained such that the incumbent cannot provide UNEs or special access. Such notices will facilitate competitive carriers' business planning. For example, competitive carriers will know before—not after—trying to win a prospective customer's business that copper is not available to service the customer due to the incumbent LEC's failure to maintain it.

Moreover, the process of identifying *de facto* retirements need not be burdensome. As the Joint Commenters explained in their initial comments, the Commission could establish a standardized form on which competitive carriers could identify copper loops that cannot be used to provide a service (*e.g.*, Ethernet-over-copper) in accordance with industry standards.¹²¹ An incumbent LEC would then have an opportunity to review the status of the loops in question and rebut the competitive carrier's filing with evidence that, for example, the incumbent has successfully utilized the loops in question to provide the service at issue.

In most cases, this process is likely to yield a mutually agreeable resolution of the problem without the need for Commission involvement. And in those cases where the parties cannot resolve the dispute, the Wireline Competition Bureau, on delegated authority from the Commission, should determine whether the copper loops in question should be deemed *de facto* retired. In addition, if an incumbent LEC is deemed to have *de facto* retired a loop without complying with the Commission's copper retirement notice requirements, the matter should be

¹²¹ Joint Commenters' Initial Comments at 36.

referred to the Enforcement Bureau for appropriate enforcement, including the imposition of forfeitures and the establishment of compliance plans when necessary.

B. The Commission Should Require Copper Retirement Notifications To Include Information On Changes In Rates, Terms, And Conditions.

The Commission should adopt its proposal to expand copper retirement notifications to include information on changes in incumbent LECs' rates, terms, and conditions caused by a planned copper retirement.¹²² As the Joint Commenters have explained, this requirement is necessary in light of the potential harmful effects of copper retirement on competition and business customers.¹²³ A number of commenters agree that the Commission should adopt the proposed requirement.¹²⁴ Moreover, the incumbent LECs' objections to the proposal are without basis.

First, AT&T contends that existing copper retirement notice requirements are sufficient.¹²⁵ Specifically, AT&T argues that the proposed requirement is unnecessary because Section 51.327(a)(6) of the Commission's rules already requires incumbent LECs to provide a description of "the reasonably foreseeable impact of the planned changes."¹²⁶ Section

¹²² *NPRM* ¶ 57.

¹²³ Joint Commenters' Initial Comments at 37.

¹²⁴ *See, e.g.*, Ad Hoc Telecommunications Users Committee Comments at 10; Competitive Carriers Association Comments at 12; Pennsylvania PUC Comments at 12; *see also id.* ("agree[ing] that, as ILECs continue with their planned technology transitions, competitive providers should be fully informed about the impact that copper retirements will have on their businesses so that retirement of the legacy copper network facilities will not harm their ability to compete"); California PUC Comments at 12 (agreeing that the proposed notice requirements "will better enable competitors to take steps appropriate to their business models and to forewarn their customers of impending service changes").

¹²⁵ AT&T Comments at 33.

¹²⁶ *Id.* (citing 47 C.F.R. § 51.327(a)(6)).

51.327(a)(6), however, does not clearly require an incumbent LEC to provide information about the changes in rates, terms, and conditions that a competitive carrier will incur as a result of the network change. Given incumbent LECs' plans to retire copper as part of the industry-wide technology transitions, this is a significant gap in the Commission's existing notice requirements, and it should be filled.

For example, as the record makes clear, copper retirement eliminates key inputs for competitive carriers, especially unbundled copper loops used to deliver Ethernet-over-copper services.¹²⁷ However, the rates, terms, and conditions for potential substitutes for those inputs, such as incumbent LEC Ethernet service offerings, are not required to be publicly disclosed.¹²⁸ Competitive carriers need this information to plan their businesses as incumbent LECs retire copper and this information should therefore be included in copper retirement notices.¹²⁹

Second, CenturyLink and Verizon assert that they cannot provide information on changes in rates, terms, and conditions caused by copper retirement because they do not know what

¹²⁷ See *supra* note 108.

¹²⁸ See generally *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 18705 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements et al.*, Memorandum Opinion and Order, 22 FCC Rcd. 19478 (2007); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260 (2008).

¹²⁹ Moreover, if the Commission adopts the Joint Commenters' proposal to require incumbent LECs to provide reasonably-priced substitutes for unbundled copper loops used to deliver Ethernet as a precondition for retiring copper loops to business customer locations (*see* Joint Commenters' Initial Comments at 32-33), then requiring disclosure of the rates, terms, and conditions governing those substitute wholesale Ethernet transmission offerings would be critical to enforcing that proposal.

downstream retail services competitive carriers are providing using copper facilities.¹³⁰ This argument is disingenuous. Incumbent LECs are certainly aware of the products they offer and they should be required to disclose the substitutes available for copper-based inputs (*e.g.*, 2 Mbps Ethernet service as a substitute for a copper DS1 input) as well as the rates, terms, and conditions governing those substitutes. It is worth pointing out that in a competitive market, incumbent LECs would have an incentive to provide this information in an effort to prevent competitive carrier customers from switching to alternative wholesale providers.

Notably, AT&T does not dispute that it can provide the proposed rates, terms, and conditions information. Rather, AT&T contends that doing so would be a burden.¹³¹ AT&T has not shown, however, that this burden would be unreasonable. Indeed, in light of the potential harms to competition and business customers posed by copper retirement, the costs of providing direct notice to competitive carriers are outweighed by the benefits. These include enabling competitive carriers to plan whether and how they will serve (1) existing downstream retail customers that they currently serve using copper inputs purchased from the incumbent LEC; and (2) new downstream retail customers that will no longer be connected to incumbent LEC copper loops.

Third, AT&T argues that the Commission lacks statutory authority to require incumbent LECs to disclose to competitive carriers changes in rates, terms, and conditions caused by copper retirement.¹³² According to AT&T, Section 251(c)(5) requires disclosure of only technical

¹³⁰ CenturyLink Comments at 34-35; Verizon Comments at 13.

¹³¹ AT&T Comments at 36.

¹³² *Id.* at 35-36.

changes.¹³³ However, the Commission has interpreted Section 251(c)(5) to require disclosure of “information about network changes . . . if it affects competing service providers’ performance or ability to provide service.”¹³⁴ The Commission reasoned that “[r]equiring disclosure about network changes promotes open and vigorous competition contemplated by the 1996 Act.”¹³⁵ Consistent with this broad, pro-competitive interpretation of Section 251(c)(5), the Commission could and should find that changes in the rates, terms, and conditions available to a competitor as a result of an incumbent LEC’s planned copper retirement constitutes information that affects a competitor’s ability to provide service, and therefore, must be disclosed.

The Commission could also adopt its proposed requirement pursuant to Section 201(b) of the Act¹³⁶ and Section 706 of the 1996 Act.¹³⁷ In particular, given that competitive carriers cannot conduct the requisite business planning without information on the changes in the rates, terms, and conditions governing wholesale inputs caused by copper retirement, the Commission could find that refusal to disclose such information is an unjust or unreasonable practice under Section 201(b). In addition, because the record demonstrates that competitive carriers have utilized unbundled copper loops to deploy broadband to small and medium-sized businesses nationwide,¹³⁸ the Commission could find that providing competitors with information about

¹³³ *Id.*

¹³⁴ *Local Competition Second Report and Order* ¶ 171.

¹³⁵ *Id.*

¹³⁶ 47 U.S.C. § 201(b).

¹³⁷ *Id.* § 1302(a).

¹³⁸ *See supra* note 109.

substitutes for copper inputs to broadband service will promote broadband deployment pursuant to Section 706.

C. The Commission Should Require Copper Retirement Notifications To Be Provided At Least One Year In Advance.

In the *NPRM*, the Commission sought comment on whether the minimum 90 days' advanced notice for copper retirements under the Commission's existing rules is sufficient.¹³⁹ Notwithstanding AT&T's assertions to the contrary,¹⁴⁰ there is ample evidence in the record demonstrating that a minimum 90-day notice period is insufficient for competitors (and their underlying retail business customers) to adjust to planned copper retirements.¹⁴¹ In particular, competitive carriers require more than three months to plan when copper that is being utilized or could be utilized to serve business customers is going to be retired. As XO explains in its comments, to transition retail business customers without disruption from services using copper purchased from the incumbent LEC, a competitive carrier must, among other things, "validate the impact the noticed retirement will have, meet with the customer to explore service migration options (including possible renegotiation of the contract), examine service alternatives with the ILEC and other service providers, [and] consider whether there is a business case to build out to

¹³⁹ *NPRM* ¶ 59.

¹⁴⁰ AT&T Comments n.92.

¹⁴¹ *See, e.g.*, Competitive Carriers Association Comments at 12 ("[E]ven 180 days may not provide competitive carriers with sufficient lead time to make the upgrades or reconfigurations necessary"); XO Comments at 17; WorldNet Comments at 8-9; California PUC Comments at 13; Ad Hoc Telecommunications Users Committee at 11 ("Large enterprise users like the members of Ad Hoc will typically need substantially more than 90 days [of] lead time in preparing for changes."); *see also* Pennsylvania PUC Comments at 13 (arguing that "[t]he advance notice given by an ILEC to a competitive [LEC] of a planned copper retirement should be of sufficient length that the competitive provider has ample lead time" to obtain replacement inputs and make any necessary changes); City of New York Comments at 6 (explaining that institutional retail customers require advanced notice of network changes because "transition to alternative technologies requires long term planning").

the customer's location.”¹⁴² Accordingly, as the Joint Comments and XO have proposed, the Commission should require incumbent LECs to provide copper retirement notices at least one year in advance of a planned retirement.

D. The Proposed Copper Retirement Rule Changes Will Not Discourage Or Delay Fiber Deployment.

The incumbent LECs argue that adopting protections against the potential harmful consequences of copper retirement will hinder or delay the deployment of fiber.¹⁴³ These arguments are baseless. Verizon, for example, asserts that the “proposed changes to the copper retirement process may discourage fiber deployment,”¹⁴⁴ but Verizon does not explain how this may occur. Instead, Verizon claims that the Commission adopted a notice-based, rather than an approval-based, copper retirement process in 2013 in order to encourage fiber investment,¹⁴⁵ and suggests that the changes proposed in the *NPRM* will discourage such investment. But the Commission is not proposing to adopt an approval-based copper retirement process,¹⁴⁶ and Verizon's fears are therefore unfounded.

CenturyLink's argument regarding the impact of the proposed copper retirement rule changes on fiber deployment is also unfounded. CenturyLink contends that “[r]ules that significantly delay CenturyLink's ability to retire obsolete copper facilities, or impede CenturyLink's capacity to provision new or enhanced services on the replacement fiber network, will extend the ‘payback’ period (*i.e.*, the number of years it will take CenturyLink to recoup its

¹⁴² XO Comments at 17.

¹⁴³ Verizon Comments at 9; CenturyLink Comments at 34.

¹⁴⁴ Verizon Comments at 9.

¹⁴⁵ *Id.* at 10.

¹⁴⁶ *NPRM* ¶ 56.

investment) for fiber deployments, forcing the company to forego some fiber deployments that might otherwise occur.”¹⁴⁷ This argument should be rejected for several reasons. To begin with, CenturyLink’s suggestion that it might forego certain fiber deployments if the Commission defines copper retirement and adopts expanded copper retirement notification requirements is inconsistent with CenturyLink’s own assessment of “marketplace realities.”¹⁴⁸ According to CenturyLink, the market has made an “irreversible” and “irrevocable” shift away from legacy networks and services to fiber networks and IP services such that “the continued provision of those legacy services [would be] impractical, inefficient, and inimical to consumers’ interests.”¹⁴⁹ In light of these “realities,” it is highly likely that CenturyLink will continue with its fiber deployment plans regardless of whether the Commission adopts strengthened copper retirement rules.

Additionally, CenturyLink provides no evidence that either the adoption of a copper retirement definition or expanded notice requirements will delay by years the amount of time it will take the company to recover its fiber investment. The fact is that the proposals made by the Commission and supported by the Joint Commenters would leave incumbents free to retire copper loops and deploy fiber so long as they comply with conditions designed to address the harm to competition that such retirement would otherwise cause.

IV. CONCLUSION

For all of the foregoing reasons, the Commission should adopt the proposals discussed by the Joint Commenters herein.

¹⁴⁷ CenturyLink Comments at 29.

¹⁴⁸ *Id.* at 11.

¹⁴⁹ *Id.* at 9-11.

Respectfully submitted,

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