

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

In the Matter of	)	
	)	
Ensuring Customer Premises Equipment	)	PS Docket No. 14-174
Backup Power for Continuity of	)	
Communications	)	
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of	)	RM-11358
Copper Loops by Incumbent Local Exchange	)	
Carriers	)	
	)	
Special Access for Price Cap Local Exchange	)	WC Docket No. 05-25
Carriers	)	
	)	
AT&T Corporation Petition for Rulemaking	)	RM-10593
to Reform Regulation of Incumbent Local	)	
Exchange Carrier Rates for Interstate Special	)	
Access Services	)	
	)	
Petition for Declaratory Ruling to Clarify	)	WC Docket No. 15-1
That Technology Transitions Do Not Alter	)	
The Obligation of Incumbent Local Exchange	)	
Carriers to Provide DS1 and DS3 Unbundled	)	
Loops Pursuant to 47 U.S.C. § 251(c)(3)	)	

**REPLY COMMENTS OF XO COMMUNICATIONS ON THE  
TECH TRANSITIONS NOTICE OF PROPOSED RULEMAKING AND  
ON THE PETITION FOR DECLARATORY RULING OF WINDSTREAM**

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TECH TRANSITIONS NOTICE OF PROPOSED RULEMAKING AND  
ON THE PETITION FOR DECLARATORY RULING OF WINDSTREAM**

XO Communications, LLC (“XO”), by its attorneys, hereby files its reply comments on the Notice of Proposed Rulemaking in the above-referenced proceeding<sup>1</sup> in which the Commission examines and issues proposals and proposed rules on aspects of the technology transitions.

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<sup>1</sup> *Technology Transitions, et al.*, GN Docket No. 13-5 *et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-184 (rel. Nov. 25, 2014) (“*NPRM*”).

## I. INTRODUCTION AND SUMMARY

In its initial comments, XO called on the Commission to seize the opportunity in this proceeding to modernize the copper retirement rules.<sup>2</sup> Further, in anticipation of large incumbent local exchange carriers (“incumbent LECs”) discontinuing time division multiplexing-based (“TDM-based”) wholesale services used by XO and other competitors to serve their end users – such as DS1 and DS3 special access services provided pursuant to volume commitment plans – the Commission should update its rules and policies applicable to Section 214 discontinuance.

Several incumbent LECs oppose taking these steps. They argue that the current regulatory regime governing copper retirement and Section 214 discontinuance has “worked” and will continue to work through the transition to an all-IP public communications network (“PCN”). But, their arguments are off-base. In essence, these incumbent LECs want the Commission to overlook the critical role that the FCC plays and will continue to play as the technology transitions proceed in supplying essential wholesale inputs – especially last-mile inputs to reach end user locations – which allows competition to exist in many locations and brings attendant benefits to end user customers.<sup>3</sup>

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<sup>2</sup> XO provides, as an Exhibit to this reply, a marked up version of the proposed rules appended to the *NPRM* illustrating how XO’s proposals to the copper retirement rules may be incorporated. See *NPRM*, Appendix A.

<sup>3</sup> The incumbent LECs ask the Commission to turn a blind eye to the importance of incumbent LEC-provided wholesale inputs to the services many end user customers receive. See, e.g., Comments of AT&T at 58, where AT&T states that “a sweeping replacement services mandate [adopted under Section 214] would . . . force incumbent carriers to provide services to retail competitors in circumstances where the obligation is unneeded to protect retail customers’ access to service.” In other words, the incumbent LECs argue that end users are not impaired in their ability to get service if discontinuances force competitors out of the market as long as the incumbent LEC still offers those retail customers some alternative service of some quality. The public interest demands more. See 47 U.S.C. § 214(c) (“The Commission shall have power to . . . attach to the issuance of the certificate [of discontinuance] such terms and conditions as in its judgment the public convenience and necessity may require”). All references to

XO and other competitors urge the Commission to pursue the *NPRM*'s objectives of ensuring that the technology transition to all-IP PCN does not hurt competition and end users, by updating the copper retirement and Section 214 discontinuance rules and policies. Doing so would help ensure that competition transitions are in step with the technology transition and that competitors are able to continue offering advanced communications services. The incumbent LECs fail to offer sufficient basis for the Commission to preserve the regulatory *status quo*, which would allow competition to recede and incumbent LECs to exploit their ubiquitous reach and continuing advantages in serving end user locations on a facilities basis.<sup>4</sup>

XO emphasizes that, by seeking reform, it does not seek to stymie any technology transition. XO is not opposed to the retirement of copper from the network and recognizes this may be a part of certain transitions (although as everyone believes, including the ILECs, copper is expected to be part of the network for some time to come). As XO detailed in its comments, it has been at the forefront of introducing IP-based and other advanced services to its customers

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“Comments” of parties in these Reply Comments are to Comments filed in the above-referenced proceedings in response to the *NPRM*.

<sup>4</sup> AT&T contends that the rules need no updating because the incumbent have been complying with the current copper retirement rules and the Section 214 discontinuance rules (which XO does not concede) and that there have not been complaints to the contrary. *See* Comments of AT&T at 26. *See also id.* at 33-34. The point is not whether the incumbent LECs have been complying with the current rules. Rather, the issue is whether the rules, which were not written in anticipation of the technology transition to an all-IP PCN, are adequate as that transition proceeds. They are not sufficient, for the reasons given by numerous competitors in submissions to the Commission over the past few years. The Commission should not give too much weight to the small number of complaints to date. For example, to date, while a number of copper retirements have been noticed by incumbent LECs from whom XO takes copper loops, DS1s and DS3s, by and large these retirements have had some but not significant impact on customers supported by wholesale copper. Moreover, the copper retirement rules were written before Ethernet over Copper emerged, let alone became a key means for both competitors and incumbent LECs to offer advanced, ultra-high speed, IP-based services. As copper retirements become more prevalent as the transition progresses, their significance will be magnified. Accordingly, having the protections in place proposed by the Commission and sought by XO and other competitors will become essential. It is for this reason the Commission's examination of these rules and the proposed changes in the *NPRM* and from competitors are appropriately being considered.

and installing a fiber-based IP network.<sup>5</sup> USTelecom mischaracterizes what is behind the drive to update the copper retirement and Section 214 regulations when it accuses competitors of wanting to preserve competition in its current form indefinitely.<sup>6</sup> Nor is it an issue of competitors wanting to remain tied to legacy technologies and services.<sup>7</sup> XO recognizes that an all-IP PCN network is the goal and that competition will have to evolve to survive in the new environment. But as indicated in the *NPRM*, XO also asks the Commission to acknowledge, that the incumbent LECs have clear advantages – particularly last-mile access to business and enterprise end user locations – that will remain with them for the foreseeable future, even as the network transitions from copper to fiber and TDM to IP-based protocols. It is critical that procedural safeguards be in place to ensure competition and end user customers are not harmed during the transition, which is more paradigm-shifting than previous changes affecting the public switched telephone network and the industry.<sup>8</sup> The copper retirement and discontinuance rules were not developed in an era when the major incumbent LECs were announcing the end of a copper-based, TDM network, and as such are inadequate as they now stand to address the public interest, particularly the needs of competition and end users.

Finally, as explained below, the Commission should adopt rules to make clear that incumbent LECs cannot impose special construction charges for service over not-retired copper facilities except where they determine, after testing, the facilities are “unavailable,” i.e., cannot

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<sup>5</sup> Comments of XO at 4-7.

<sup>6</sup> See Comments of USTelecom at 11.

<sup>7</sup> See Comments of AT&T at 45.

<sup>8</sup> The empty rhetoric of the incumbent LECs to the contrary should be recognized for what it is. See, e.g., Comments of Verizon at 28 (“ILECs . . . are just one set of many competitors in the marketplace”); Comments of AT&T at 44 (“the Commission has not identified any reason why the [IP] transition [is] unlike the numerous changes to and discontinuance of services the Commission has considered for the last seven decades”).

support the requested service even after maintenance, restoration, conditioning, or repair, and special construction charges are specifically supported in the incumbent LEC's tariff. Further, even if construction is required to deliver requested service, the incumbent LEC should not be permitted to assess special construction charges where the construction is in the normal course of business, meaning the incumbent LEC plans to use capacity on the facilities constructed or infrastructure put in place to support the facilities.

## **II. THE COPPER RETIREMENT RULES MUST REFLECT PRESENT MARKET REALITIES AND BE MODIFIED ACCORDINGLY**

In its opening comments, XO explained that the Commission should adopt a comprehensive definition of "retirement" reflecting the ways in which incumbent LECs can remove, disable, or replace all or part of a copper loop so as to make it practically unavailable to competitive providers.<sup>9</sup> This is especially the case where competitors use copper loops to provide Ethernet over Copper ("EoC") service because the loops used must be home run copper loops. There is strong support for a rule modification to make this clear.<sup>10</sup> Although AT&T contends that removal or disabling of copper feeder already requires a retirement notice, the experience of XO is that this is not as clear among other incumbents within the industry as AT&T suggests.<sup>11</sup> Accordingly, the Commission should remove all doubt, as proposed in the *NPRM* and clarify the rules to state that that elimination of copper feeder requires a retirement notice.<sup>12</sup>

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<sup>9</sup> See Comments of XO at 10-13

<sup>10</sup> See, e.g., Comments of COMPTTEL at 28-30; Comments of Birch, Integra, and Level 3 ("Birch *et al.*") at 34-36.

<sup>11</sup> See Comments of AT&T at 29.

<sup>12</sup> See *NPRM*, Appendix A, proposed rule 51.332(a). XO proposes no additional changes to the Commission's proposed revised rule.

XO also contended that those incumbent LECs should be required to provide notice of retirement one year in advance, a position which Birch, Integra, and Level 3 second.<sup>13</sup> Notices should be consistent across all incumbent LECs.<sup>14</sup> Further, in addition to general retirement notices, the Commission should provide carrier-specific notices identifying the circuits to be retired and otherwise to describe the impacts on individual competitors.<sup>15</sup>

XO also urged the Commission to require incumbent LECs to maintain and regularly update a publicly available and searchable database of locations with available copper loops.<sup>16</sup> Such a database would be invaluable to competitors when planning for customer services and minimize the potential for surprises that copper is not practically available at a location even though the location has not been the subject of a retirement notice. XO concurs in AT&T's observation that copper loops that have not been retired must be restored to serviceable condition.<sup>17</sup> Such a database would help incumbent LECs as well by helping them to better

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<sup>13</sup> See Exhibit, proposed rule subsections 51.332(e) and (f). See also Comments of Birch, *et al.* at 37-38. AT&T notes that, absent certain exceptions, incumbent LEC networks changes require one year's notice. The Commission should make clear that this twelve-month notice applies to copper retirements across the board, in light of the current use of copper to support business and enterprise level EoC service, something that was not the case when the copper retirement rules were first adopted.

<sup>14</sup> See Exhibit proposed rule subsections 51.327(c) and 51.332(c)(6). USTelecom agrees that the Commission should focus on the information to be provided in the notices. See Comments of USTelecom at 8. However, XO underscores that attention is needed in areas in addition to the information to be included within notices.

<sup>15</sup> See Exhibit proposed rule subsection 51.332(c)(5). AT&T raises a concern that this requirement would require carrier specific notices. Comments of AT&T at 36. This is in fact the idea. The burden, however, will be balanced by the fact that, for any given set of locations, only one notice per competitor will be required. Any burden on incumbent LECs is not continuous and will help ensure that the impact on competition and customers from retirements is minimized. Moreover, the impact on many carrier customers will be similar as retirement extends to new locations, minimizing the ongoing burden that AT&T claims will exist.

<sup>16</sup> See Comments of XO at 15-16. See also Exhibit proposed rule subsection 51.332(k).

<sup>17</sup> See Comments of AT&T at 31, quoting 47 C.F.R. §51.319(a)(3)(iii)(B). See also Comments on COMPTTEL at 34-37 (special construction charges should be improper where unretired copper facilities can be made available through maintenance or repair).

manage their loop inventory and to know where copper exists but may require maintenance or restoration before it can be used to support service and to track copper subject to pending retirement notices.

In addition to retirement notices issued at least one year in advance, XO explained why the Commission should require incumbent LECs to provide public, non-binding forecasts of anticipated retirement notices twelve-to-twenty four months after the date of the forecasts, updated semiannually.<sup>18</sup> To facilitate the best use of the copper retirement notices, database, and forecasts, the Commission should also require incumbent LECs to engage with competitors in an open collaborative process regarding copper retirement to promote mutually beneficial information sharing, coordinate planning, and develop best practices, complemented by carrier-specific meetings, when needed.<sup>19</sup>

When copper is damaged or destroyed in a natural disaster or an emergency, the Commission should make clear that is not a retirement and should be treated in a different manner than retirements. Specifically, XO advocated in its opening comments that incumbent

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As XO explained in its comments, unless copper loops are formally retired, they must be maintained and, upon request, restored. *See* Comments of XO at 10-11. While it is somewhat refreshing that AT&T recognizes several of the requirements of the existing rules in its comments, this does not mean that the current rules are adequate for the technology transition which will accelerate the network changes that have occurred under the rules to date. Further, in practice, the rules have not always worked to the benefit of competition and the end user customers of competitors to the extent AT&T's descriptions of the retirements would suggest.

<sup>18</sup> *See* Comments of XO at 18-20. *See also* Exhibit proposed subsection 51.322(l). Verizon asserts that copper retirement forecasts, in addition to notice, are “neither necessary nor practical.” Comments of Verizon at 14. XO disagrees. As explained in the comments, forecasts will be an invaluable tool to competitive LECs in their planning, particularly as they consider the potential impacts form retirement when entering into new or successor agreements with customers – which are typically two to three years in duration. If incumbent LECs are able to maintain that they do not begin to plan for retirements more than twelve months in advance, then they can make the case for a waiver of the forecasting requirement the Commission should adopt. Otherwise, non-binding forecasts will be both beneficial during the technology transitions and sufficiently practical.

<sup>19</sup> Comments of XO at 18-20. *See also* Exhibit proposed subsection 51.322(m).

LECs should be required to develop and obtain advance approval for plans they will put into effect after a disaster or emergency where copper is damaged, including a collaborative process and alternative services and facilities to be offered for at least two years where damaged copper cannot be restored, repaired or replaced.<sup>20</sup>

USTelecom, in its comments, contends that there has been a “dramatic shift away from copper towards fiber,” and that the Commission should neither focus attention on nor commit resources toward improving the copper retirement rules.<sup>21</sup> USTelecom’s portrayal of copper in today’s public network as all but obsolete ignores present realities. A majority of commercial buildings still are not served by fiber, meaning that copper remains the primary means by which the benefits of technology transitions to an all-IP public communications network (“PCN”) will be brought to many businesses and enterprises. Where competitors are serving business and enterprise customers using copper and a decision is made to retire copper at that location, there is the very real prospect that competition will be removed entirely from that location, leaving only the incumbent LEC and eliminating customer choice. At the very least, it is likely the customer will face steep price increases with little warning absent adequate notice periods and provisions that require the incumbent LEC to identify alternative services that will be available in the absence of the copper loop facilities at rates, terms, and conditions that are equivalent and reasonable. In short, contrary to USTelecom’s position, the need to update the copper retirement policies and rules is clear because the continued use of copper, and thus copper retirement, is decidedly not “a process that is quickly winding down and may be fully resolved in the near future.”<sup>22</sup>

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<sup>20</sup> Comments of XO at 20-22. *See also* Exhibit proposed subsection 51.322(n).

<sup>21</sup> *See* Comments of USTelecom at 7.

<sup>22</sup> Comments of USTelecom at 7.

### III. DISCONTINUANCE OF WHOLESALE SERVICES DURING THE TECHNOLOGY TRANSITION REQUIRES APPROVAL UNDER SECTION 214

In its comments, XO advocated for changes to the Section 214 discontinuance rules that would ensure that the substantial changes from incumbent LECs' current service offerings as a result of the transition do not harm consumers and competition. In brief, the Commission should not permit advantages that incumbent LECs have to follow into the environment of an all-IP PCN. XO pushed for the reforms tentatively proposed in the *NPRM* and extended those in some areas. In particular, XO is concerned that the incumbent LECs will continue to enjoy an infrastructure and reach advantage that, regardless of the change in technology, will still leave them with unparalleled last-mile access to business and enterprise end user locations. Therefore XO submits that the Commission should clarify that the discontinuance of last-mile access products provided to competitors on a wholesale basis will inherently discontinue or impair end user services and adopt a presumption to that effect to inject certainty into the process.<sup>23</sup> Accordingly, incumbent LECs should be required to obtain Commission approval under Section 214 when they discontinue last-mile wholesale service options, such as DS1 and DS3 circuits.<sup>24</sup>

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<sup>23</sup> Comments of XO at 22-24. AT&T contends that there are no facts to support such a presumption. *See* Comments of AT&T at 51. The Commission is well aware of the significant extent to which competitors rely upon incumbent LECs for wholesale inputs to be able to provide service when a competitor's own facilities do not serve a location. Similarly, huge economic hurdles face competitors, to put it mildly, in developing a network that would be on the same scale, in terms of reach to end user locations, as incumbent networks. Thus, it is a straightforward matter for the Commission to use its prescriptive judgment to ascertain that a discontinuance of last-mile wholesale inputs, as well as other wholesale inputs, would effectively discontinue or impair end user customers.

<sup>24</sup> Incumbent LECs are much more aware of the extent to which they face competition within their territories, if they do, than their carrier customers, thus the burden should be on the incumbent LECs to affirmatively show that adequate *competitive* alternatives exist in order to rebut the presumption that discontinuance of service used as wholesale inputs requires approval. It would be manifestly unfair to require competitors, whose marketplace knowledge is likely not as extensive as that of the incumbent LEC, to prove

As a condition to approval, incumbent LECs seeking discontinuance should be required to identify functionally equivalent services to those being replaced that will be offered at equivalent rates, terms, and conditions until the Commission specifically finds that competition in the relevant geographic and product markets has developed to a point that obviates the need for any continued regulatory oversight. In addition to providing an equivalent IP-based service, the ILECs should also be required to provide at least two years' notice of discontinuance of wholesale services where the change will discontinue or impair end user services.

Several incumbent LECs attack the proposal that they be required to provide equivalent wholesale services when wholesale services are discontinued under Section 214. USTelecom criticizes the Commission's proposal for lack of clarity and a lack of recognition that equivalent rates would ignore differences in costs.<sup>25</sup> Verizon questions the need for such a requirement and advocates instead that marketplace conditions should dictate what if any alternative services are provided, suggesting that because of intermodal competition, incumbent LECs are likely to have an incentive to provide adequate alternatives.<sup>26</sup> AT&T asserts that the existing Section 214 standard that there be an "adequate substitute" available to customers is already one factor the Commission must consider when entertaining a Section 214 discontinuance request, obviating the need for any equivalent services requirement.<sup>27</sup>

As the Commission well knows, the technology transition is, in effect, a crossroads for the industry. As the industry players enter this juncture, incumbent LECs retain certain advantages which categorically make all of their competitors, especially those that serve the

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a negative and meet a burden to show that there not adequate wholesale alternatives to ensure competition and customers are not harmed.

<sup>25</sup> Comments of USTelecom at 11-12.

<sup>26</sup> *See* Comments of Verizon at 27-29.

<sup>27</sup> Comments of AT&T at 43-44.

business and enterprise markets, dependent upon them for wholesale inputs, in particular last mile access. It is these inputs which may be discontinued, and when they are, the Commission can use its predictive powers and knowledge of the industry and marketplace to take it as a given that the customers of those competitors will be adversely effected. Consequently, the Commission may and should presume that discontinuance of the wholesale inputs will, by definition, involve some discontinuance or impairment of end user service, albeit indirectly, but no less real for that. For this reason, the Commission should not consider a major incumbent LEC as just another competitor, as Verizon suggests.<sup>28</sup> Further the general lack of last-mile access alternatives in the majority of locations to support the provision of service to business and enterprise customers demonstrates unequivocally that the marketplace cannot be expected to provide solutions.<sup>29</sup>

Moreover, absent a regulatory obligation to provide equivalent wholesale services, the incumbent LECs' incentives, when they discontinue services where there are no independent supported wholesale alternatives, will not be to provide competitive alternatives to what is being

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<sup>28</sup> See Comments of Verizon at 28. *Accord* Comments of AT&T at 61-63 (“AT&T . . . offers wholesale services in markets that are often highly competitive and where AT&T can win and keep customers only by providing the best value services available”). While the exact meaning of the word “often” used by AT&T can be debated, within its operating territory, AT&T, like Verizon, still offers the only physical means of accessing commercial locations – and therefore XO’s prospective customers -- in a majority of locations. Moreover, XO does not dispute that wholesale alternatives are at least theoretically available in some locations. But the lock-in provisions of term discount plans for DS1 and DS3 special access services may make those alternatives practically unavailable, as XO and others have explained elsewhere.

<sup>29</sup> This does not mean, as AT&T suggests, that the incumbent LECs must demonstrate that the retail services of their competitors *per se* will still be available after a discontinuances event. See Comments of AT&T at 56. Rather, the issue is whether adequately equivalent wholesale inputs will be available to competitors in order to compete in the marketplace. Many other factors, which incumbent LECs are not being called upon to guarantee, will determine whether competitors are able to continue to offer their services. That is a far cry from the insurance policy that AT&T makes the proposed discontinuance requirement for equivalent wholesale services out to be.

discontinued as Verizon contends.<sup>30</sup> Rather, the incumbent LECs will have an incentive to raise competitors' costs by charging much higher rates for equivalent functionality, to the extent they decide to provide such functionality at all. Nor is the demand for equivalent wholesale service a request for a "shield" to protect "less innovative competitors," as AT&T blithely contends.<sup>31</sup> XO and other competitors are often introducing innovations, for example, all-fiber networks and EoC, which incumbent LECs only later adopt. The advantages that incumbent LECs have and will retain into the transition to an all-IP PCN – especially ubiquitous infrastructure and last-mile access to virtually all commercial and enterprise end user locations – are not the result of innovation but of residual economic power inherited from their monopolistic forbears. Thus, for the Commission to conclude that the presence of so-called intermodal competition will generate wholesale alternatives for competitors would be the equivalent of the agency putting its head in the sand.

To ensure that harm does not come to customers and competition when incumbent LEC TDM-based services are discontinued as the technology transition progresses, it is incumbent upon the Commission to adopt its proposal that equivalent services be provided upon

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<sup>30</sup> Verizon suggests that rather, than "equivalent" services, "reasonably comparable services" should suffice for competitors. Comments of Verizon at 27. XO submits that merely a "reasonably comparable" standard would give the incumbent LECs wide latitude to offer alternatives that would be completely useless to competitors in serving end user customers. Further, Verizon's urging that the Commission take into account the alleged widespread availability of intermodal options betrays an effort to obscure the potential damage to competitors and their business and enterprise customers who, unlike the incumbent LECs' retail residential and small-business customers, receive no or very little benefit from intermodal competition. *Id.* While intermodal competition may offer adequate alternatives for these customers with basic communications needs, *i.e.*, residential customers, they do not present substitutes for lost TDM services that competitors serving the enterprise market and their customers will face in the wake of discontinuance.

<sup>31</sup> See Comments of AT&T at 59.

discontinuance.<sup>32</sup> To do so, the Commission need not make all determinations now, in advance, what the equivalent services are. XO anticipates that application of that standard will evolve as circumstances change. But the Commission should adopt basic principles as rules to guide incumbent LECs and carrier customers in evaluating the adequacy of the services the incumbent LECs will offer. The principles proposed by Windstream, coupled with the additions proposed by COMPTTEL and Birch, Integra, and Level 3 in their comments, should be adopted as rules and serve as a floor for determining equivalency.<sup>33</sup> In sum, adoption of these principles would provide sufficient clarity to put incumbent LECs on notice what is expected of them to meet an

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<sup>32</sup> XO disagrees with Verizon that the NPRM's proposed focus on equivalent wholesale services improperly diverts attention in the Section 214 discontinuance context from end users. *See* Comments of Verizon at 28. *See also* Comments of AT&T at 54 (Section 214 was not written to protect competitors). Rather, zeroing in on equivalent wholesale services facilitates a deeper focus on end users and accounts for the various ways in which incumbent LEC discontinuance decisions can affect end users. As AT&T notes, Section 214 was inserted into the Act during a monopoly era seventy years ago, *id.* In applying that Section today, consistent with the broad scope of its language and accounting for the level of competition that has developed and depends, naturally, on the networks of the former monopolies for wholesale inputs, and last-mile access in particular, the Commission must take an eyes-wide-open view as what proposed discontinuances may affect end users and communities of end users.

<sup>33</sup> *See NPRM* ¶ 111; Comments of COMPTTEL at 21-25; Comments of Birch, *et al.* at 11-14. *See also* Comments of Windstream at 23-26. While XO continues to believe that two years' notice is required before the discontinuance of whole services that competitors use to provide last mile access to end user customers, it is also sympathetic to Verizon's request that the Commission establish a timeline for decision on Section 214 discontinuance applications. *See* Comments of Verizon at 26. The certainty provided by a prompt decision, in addition to the two years' notice requirement, is as important to competitors as it is to the incumbent LECs themselves for purposes of planning. The timeline adopted should be sufficiently generous to allow the Commission to develop and evaluate the record needed for a decision. Of course, the Commission in some cases may be able to decide more quickly than the deadline. XO proposes a deadline for completion of four (4) months, unless the Commission believes more time is required, in which case, on the Commission's own motion, an additional two (2) months would be appropriate. In making this proposal, however, XO underscores that affirmative approval of a discontinuance application should be required, and that applications should not be deemed granted by the passing of any procedural deadlines the Commission might adopt. This timeline for decision also is conditioned on the Commission's adoption of the principles advocated by Windstream and others, as noted above, as rules for ensuring an at least equivalent IP replacement service is made available to wholesale purchasers as a condition to approval for discontinuance. Having clear ground rules in place will reduce the possibility of disputes and facilitate expedited reviews of Section 214 applications.

equivalency standard.<sup>34</sup> The Commission’s initial case-by-case decisions applying those principles will provide considerable further guidance to the parties that they can apply in subsequent cases of discontinuance.<sup>35</sup>

Moreover, the requirement that a proposal for discontinuance approval affecting services used as wholesale inputs be conditioned on the provision of equivalent wholesale services is within the scope of the Commission’s authority. While AT&T contends that Section 214 cannot be used to impose pricing obligations, for example, the language of Section 214(c) plainly allows the Commission to impose “terms and conditions as in its judgment the public convenience and necessity may require.”<sup>36</sup> Furthermore, the Commission has authority to adopt the proposed wholesale equivalence requirement under Section 706 of the 1996 Telecommunications Act which empowers the Commission to “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans” through regulatory “measures that promote competition in the local telecommunications market, or other regulating

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<sup>34</sup> A requirement that the wholesale alternatives be equivalent does not mean that incumbent LECs will be unable to recover their sunk costs, as US Telecom suggests. *See* Comments of US Telecom at 11-12. XO recognizes that alternative services will have different cost structures than the TDM services that are discontinued. Yet for the same performance and capacity and other characteristics by which equivalency is measured, XO anticipates the incumbent LECs “per unit” costs are likely to be less. XO bases this on its own experience in offering IP-based services but also on the incumbent LECs’ own claims about efficiency gains as they transition to an all-IP PCN.

<sup>35</sup> AT&T contends that a case-by-case review is required to prevent innovative solutions from being stifled and to ensure that potential public interest concerns are addressed. AT&T suggests that the adoption of a presumption that discontinuance is required will frustrate a case-by-case review. *See* Comments of AT&T at 60-61. But, indeed, nothing the *NPRM* proposes or advocated by XO would prevent such a case-by-case review depending on the entirety of the circumstances. Indeed, the principles by which wholesale alternatives offered by the incumbent LEC will be judged are flexible enough theoretically to allow for case-by-case solutions where more than one alternative might exist.

<sup>36</sup> 47 U.S.C. § 214(c).

methods that remove barriers to infrastructure investment.”<sup>37</sup> In addition, the adoption of the requirement to provide equivalent wholesale services when an incumbent LEC seeks to discontinue services used by wholesale competitors would also be justified through the Commission’s authority in Section 201(b) to address incumbent LECs’ unjust and unreasonable practices and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of [Chapter 5 of the Communications Act],” which includes Section 214.<sup>38</sup>

Finally, it is especially important for the Commission to make clear that the proposed elimination of the incumbent LECs’ special access term discount plans be considered under Section 214 discontinuance procedures. Verizon and AT&T contend that the elimination of the plans should not trigger the requirement to seek approval under Section 214 because special access services will still be available pursuant to monthly rates.<sup>39</sup> Verizon even goes so far as to claim that the discount plans are “voluntary,” making Section 214 applicability even less justifiable.<sup>40</sup> The Commission should not give the incumbent LECs’ claims any heed. Given announcements by AT&T and Verizon to phase out special access DS1 and DS3 services, and eventually TDM services in general, elimination of individual longer term discount plans is an integral part of a goal and process to completely eliminate DS1s and DS3s, and not just a price change.<sup>41</sup> Accordingly, the proposed elimination of the term discount plans warrants review and

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<sup>37</sup> 47 U.S.C. § 1302(a). In *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014), the U.S. Court of Appeals affirmed the Commission’s finding that Section 706 was a grant of authority to regulate. *See also* 47 U.S.C. § 1302(b).

<sup>38</sup> 47 U.S.C. § 201(b).

<sup>39</sup> Comments of Verizon at 30-31; Comments of AT&T at 53-54.

<sup>40</sup> Comments of Verizon at 30-31.

<sup>41</sup> *Accord* Comments of Windstream at 32-34. Indeed, given the importance of longer term special access DS1 and DS3 discount plans to XO and competitors generally as the sole means in many cases to access buildings to serve commercial and enterprise customer, it

requires approval under Section 214. Further, Verizon's repeated suggestion that competitors' taking of the term discount plans is a voluntary choice ignores the fact that monthly rates are materially higher than the rates offered under the discount plans, which represent the only way that competitors can access many end user locations at costs that are roughly approximate to what would be available were the wholesale market actually competitive in all geographic areas, which it is not. As such, there is no choice on the part of competitors but to take the plans along with the onerous terms and conditions, including shortfall penalties that characterize the term discount plans and lock competitors in.

#### **IV. THE COMMISSION SHOULD ADOPT RULES TO PREVENT ABUSE OF SPECIAL CONSTRUCTION CHARGES DURING THE TECHNOLOGY TRANSITION**

XO finds that increasingly incumbent LECs are assessing special construction charges for a whole host of reasons where previously they had not. Moreover, there is the danger that special construction charges can be abused by incumbent LECs to raise improperly competitors' costs. As XO commented earlier, the Commission should ensure that incumbent LECs' obligation to maintain and restore copper where it has not been retired is clear.<sup>42</sup> To complement that requirement, the Commission should, as proposed by COMPTEL, adopt regulations that preclude incumbent LECs from assessing special construction charges in at least two general circumstances.<sup>43</sup> First, where existing copper facilities have not been retired and are available, even if maintenance, restoration, conditioning, or repair is needed, incumbent LECs should be

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is not a stretch to assert that the longer term discount plans are the heart of the ILECs' DS1 and DS3 special access service offerings.

<sup>42</sup> Comments of XO at 10-11.

<sup>43</sup> Comments of COMPTEL at 35-37. *See also* Letter of Karen Reidy, COMPTEL, to Marlene H. Dortch, FCC, GN Docket Nos. 13-5 and 12-353, attachment, filed Oct. 24, 2104 ("COMPTEL Special Construction Letter").

prohibited from assessing special construction charges.<sup>44</sup> Were incumbent LECs permitted to assess special construction charges in these situations, on the theory that copper facilities are unavailable, it would amount to an end run around the copper retirement rules. Incumbent LECs should be required to test existing unused copper loop facilities in response to an order to determine if any can fulfill the order (even if maintenance, restoration, or repair is required) before declaring a loop is “unavailable.”<sup>45</sup> Moreover, as Birch *et al.* argue, even where copper is not available at a location, but fiber is, the incumbent LEC should be required, without special construction charges, to make capacity available where it could do so for a retail customer or already does so for a wholesale customer at the same location.<sup>46</sup>

Second, even if construction is required to deliver requested service, if the incumbent LEC plans to use capacity on the facilities constructed (*e.g.*, extra copper or fiber pairs not required by the requesting carrier) or infrastructure put in place to support the facilities, the incumbent LEC should not be permitted to assess special construction charges. Were the incumbent LEC able to assess special construction charges in such cases, competitors would be

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<sup>44</sup> The Commission should also make clear that the mere fact that fiber or fiber-based IP service is being brought to a building, *e.g.*, Verizon’s FiOS, is not a basis in itself for assessing special construction charges to meet a request for copper-based services or facilities TDM services, respectively. Rather, the requested facilities must be truly “unavailable” (meaning physically absent or incapable of being conditioned, maintained, restored, or repaired) before special construction can be permitted, provided other tariff criteria are also satisfied.

<sup>45</sup> Where an incumbent LEC seeks to assert special construction charges are appropriate because of facilities being “unavailable,” they must explain to the requesting carrier how the special construction charges are consistent with conditions set forth in the incumbent LEC’s tariff, and be able to provide to the requesting carrier a detailed factual basis for that conclusion, an explanation of the testing performed, and the cost basis for the proposed charges. *See* COMPTTEL Special Construction Letter, attachment, §§ 1.A .

<sup>46</sup> *See* Comments of Birch *et al.* at 15; *see also* COMPTTEL Special Construction Letter, attachment, § 1.A.

put in a position of, essentially, subsidizing the incumbent LECs' provision of services and construction in the ordinary course of business.<sup>47</sup>

Finally, special construction, if justified, should occur expeditiously. Incumbent LECs should be required to determine whether orders may require special construction charges -- within the restrictions XO advocates above -- within an established, reasonably short time line. The Commission should also establish time frames in which an incumbent LEC produce the testing explanation, provide any special construction quote and supporting data, and complete construction.<sup>48</sup>

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<sup>47</sup> XO concurs in the request of Birch *et al.* that such use by the incumbent LEC should be presumed, absent an incumbent LEC certification to the contrary. *Id.* at 15. *See* COMPTTEL Special Construction Letter, attachment, § 1.B. Special construction charges also should not apply where there are simultaneous or subsequent modifications of a facility to bring the incumbent LEC into compliance with applicable codes and other safety or engineering requirements when those modifications are not for the exclusive benefit of the requesting customer. *Id.*

<sup>48</sup> *See id.* § 3.

**V. CONCLUSION**

For the foregoing reasons, the Commission should update its copper retirement and Section 214 discontinuance rules and policies as proposed in the *NPRM* with the modifications described herein and in XO's opening comments. Moreover, the Commission should adopt rule change concerning special construction XO advocates herein.

Respectfully submitted,  
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