

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

In the Matter of	)	
	)	
Ensuring Customer Premises Equipment Backup Power for Continuity of Communications	)	PS Docket No. 14-174
	)	
Technology Transitions	)	GN Docket No. 13-5
	)	
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
	)	
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
	)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

**REPLY COMMENTS OF FULL SERVICE NETWORK LP AND TRUCONNECT**

James C. Falvey, Esq.  
Earl W. Comstock, Esq.  
Robert J. Gastner, Esq.  
Eckert Seamans Cherin & Mellott, LLC  
1717 Pennsylvania Avenue, N.W.  
12<sup>th</sup> Floor  
Washington, D.C. 20006  
(202) 659-6600  
jfalvey@eckertseamans.com

Counsel for Full Service Network LP and  
TruConnect

March 9, 2015

**TABLE OF CONTENTS**

**Page No.**

**I. EXECUTIVE SUMMARY ..... 1**

**II. THE COMMISSION IS ON FIRM LEGAL GROUND IN RELYING ON THE SECTION 214 DISCONTINUANCE PROCESS TO REVIEW AND DISCIPLINE THE WIDESPREAD DISCONTINUANCE OF TDM-BASED SERVICES IN ORDER TO PROTECT CONSUMERS AND THE PUBLIC INTEREST ..... 6**

**III. THE COMMISSION’S SECTION 214 DISCONTINUANCE REQUIREMENTS ARE BROADLY SUPPORTED BY END USERS AND ALL BUT THE LARGEST ILECS..... 9**

A. End User Commenters Uniformly Supported the Commission’s Robust Section 214 Review Process ..... 10

B. The Platform Commenters Support Many of the Constructive Improvements to the Commission’s Proposed Section 214 Discontinuance Process..... 12

C. The Recommendations of Large ILECs to Take Advantage of the IP Transition Effectively to Eliminate Wholesale Competition Violate the Act and Are Inconsistent with the Telecom Act and Are Not Constructive..... 15

D. Other Competitors Recommended New Wholesale Alternatives Such as Dark Fiber..... 17

**VI. CONCLUSION ..... 19**

Sage Telecommunications, LLC and Telscape Communications, Inc. (collectively, “TruConnect”) and Full Service Network LP (“Full Service Network” or “FSN”) (together, TruConnect and FSN are referred to as “Platform Commenters”) hereby submit these reply comments in response to the comments filed by various parties in the above referenced proceedings. Full Service Network and TruConnect are relatively small carriers that provide competitive voice and data services to over 100,000 consumers relying upon the landmark market-opening provisions Congress adopted in the Telecommunications Act of 1996.

## **I. EXECUTIVE SUMMARY**

Since the release of the Notice of Proposed Rulemaking and Declaratory Order (“NPRM”)<sup>1</sup> and the filing of comments, there have been two important developments that the Commission needs to consider as part of its deliberations in this docket. The first is the adoption by the Commission of the 2015 Broadband Progress Report.<sup>2</sup> In the 2015 Broadband Progress Report, the Commission determined that fixed broadband service providing 25 megabits per second (Mbps) down and 3 Mbps up is the minimum transport capability needed for American households to be able to engage successfully with the digital economy.<sup>3</sup> Using this standard, the

---

<sup>1</sup> *In the Matter of Ensuring Customer Premises Equip. Backup Power for Continuity of Commc'ns Tech. Transitions*, PS Docket No. 14-174, et al, Notice of Proposed Rulemaking and Declaratory Ruling, 61 Communications Reg. (P&F) 808 (Nov. 25, 2014).

<sup>2</sup> *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans*, GN Docket 14-126, 2015 Broadband Progress Report and Notice of Inquiry (rel. Feb. 4, 2015)(“2015 Broadband Progress Report”).

<sup>3</sup> 2015 Broadband Progress Report at ¶ 83 & n. 314.

Commission also found that, at best, “only 2% of housing units have access to 3 or more providers, 23% have access to two providers, 55% have access to one provider...”<sup>4</sup>

The second development is the Commission’s adoption of an order reclassifying broadband Internet access service as a “telecommunications service” under the Communications Act.<sup>5</sup> While the details of that order have not yet been made public, the effect of the reclassification is to confirm what consumers have long known – namely that broadband Internet access service is increasingly the essential local on-ramp to the “information superhighway” known simply as “the Internet.” As Full Service Network and TruConnect discussed at some length in our filing in that docket, the reclassification also means that sections 251 and 252 should now apply – as Congress directed – to ILEC broadband Internet access service offerings and facilities.<sup>6</sup>

Despite RBOC claims of robust intermodal competition, cable companies, far from expanding their networks to compete with each other, have simply opted to maintain their incumbent networks and merge. The seven RBOCs have been combined into three, and swallowed the two largest long distance providers in the process. Verizon did replace roughly half of its existing copper network with fiber—which is cheaper to build and maintain while providing unlimited, inexpensive bandwidth—but has now declared that it is not going to replace

---

<sup>4</sup> *Id.* at note 314. Even including business only providers and fixed wireless the data still demonstrate that competition is not available in most areas of the Nation. *See id.* at ¶ 83.

<sup>5</sup> *See* “FCC Adopts Strong, Sustainable Rules to Protect the Open Internet” (rel. Feb. 27, 2015), available at [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2015/db0226/DOC-332260A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0226/DOC-332260A1.pdf) (viewed Mar. 9, 2015).

<sup>6</sup> *See* Ex-Parte Letter of Full Service Network and TruConnect, GN Dockets 10-127 and 14-28 (Feb. 3, 2015), available at <http://apps.fcc.gov/ecfs/document/view?id=60001025917> (viewed Mar. 9, 2015).

the other half.<sup>7</sup> AT&T and Centurylink, the other two RBOCs, have installed fiber to the neighborhood at best and have no plans for fiber to the home in all but a tiny portion of their footprint. AT&T is buying DirectTV, Comcast is buying Time Warner, and the incumbent phone and cable operators have gotten State legislation adopted in many States to limit municipalities from building competing broadband networks.

While the RBOCs try to paint a picture of robust intermodal competition, the Commission's own reports recognize that the largest broadband carriers have not on their own developed a competitive market. In light of this reality, the Commission should heed the guidance of commenters that recognize the need for new initiatives to stimulate competition in the mass market and enterprise telecommunications service markets, including for broadband Internet access service as reclassified. In addition to emphasizing the need for continued wholesale inputs to support DS-0 level residential competition, the Commission should mandate the availability of dark fiber loops and resale of broadband Internet access service to ensure that consumers gain the benefit of robust competition.

Further, the comments confirm that the Commission in the NPRM has generally established the appropriate procedural framework if incumbent local exchange carriers ("ILECs") are to be permitted to withdraw critical inputs relied upon by competitive providers to provide competitive services. As the Commission succinctly put it: "Technology transitions must not harm or undermine competition."<sup>8</sup> As the Chairman has made clear in the past, the

---

<sup>7</sup> See Jon Brodtkin, *Verizon nears 'the end' of FiOS builds*, ARS TECHNICA (Jan. 23, 2015, 12:20pm EST) available at <http://arstechnica.com/business/2015/01/verizon-nears-the-end-of-fios-builds/> (last viewed Mar. 8, 2015) ("It has been nearly five years since Verizon decided to stop expanding its FiOS fiber network into new cities and towns... 'We are getting to the end of our committed build around FiOS...' Verizon CFO Fran Shammo said yesterday in the Q4 2014 call with investors.").

<sup>8</sup> *Id.*, ¶ 110.

NPRM is appropriately guided by pro-consumer concerns, and a determination to protect “competition where it exists today, so that the mere change of a network facility or discontinuance of a legacy service does not deprive small and medium-sized business, schools, libraries, and other enterprises of the ability to choose the kinds of innovative services that best suit their needs.”<sup>9</sup>

Most commenters, like the Platform Commenters, recognized that the present exercise in revisiting the Commission’s discontinuance and copper retirement rules is to accommodate, at the request of the largest ILECs (*e.g.*, AT&T, Verizon, and CenturyLink), a long-delayed shift in the way telecommunications services are delivered by those large ILECs as part of transition of their portion of the Public Switched Network (“PSN”) from TDM-based circuit switched technology to IP-based packet switched technology (“IP Transition”). In particular, commenters representing end users—including the Utilities Telecom Council, the Public Interest Commenters, and the Ad Hoc Telecommunications Users Committee—all recognized that the wide-scale withdrawal of TDM-based services by these ILECs requires modifications to the Commission’s rules to ensure that consumers, like themselves, and competition are protected during that withdrawal. Competitive providers—for example, the Platform Commenters, the Wholesale DS-0 Coalition, Birch, Integra, and Level 3, the Competitive Carriers Association, and COMPTEL—also consistently recognized the need to create a disciplined and rigorous process to ensure that consumers and competitors continue to have access to the statutorily prescribed wholesale inputs that have proven to facilitate much needed competition for the benefit of consumers who will otherwise be captive to the ILECs. A wide variety of commenters

---

<sup>9</sup> *Id.*, ¶ 2.

supported a process that promotes continued competition at the DS-0 level, for residential and business customers, when transitioning from tariffed to non-tariffed services, and for call and non-call related functionality.

Only the largest ILECs, and particularly the Regional Bell Operating Companies (“RBOCs”), failed to engage in a constructive conversation with the Commission concerning the best means to establish a process to protect consumers from the elimination of the wide variety of competitively-priced, alternative services offered by competitors. Ignoring the Commission’s Declaratory Ruling’s conclusion that “the analysis under section 214 of whether a change constitutes a discontinuance, reduction, or impairment of service is a functional test,”<sup>10</sup> the RBOCs declined to provide constructive input on a process to require the provisioning of functionally equivalent replacement services. CenturyLink, for example, openly promoted a duopoly model (“CenturyLink Duopoly Model”), recommending that “discontinuance of a service should be granted if there are any reasonable substitute services available from any source, via any technology or platform.”<sup>11</sup> Recommendations such as this create the distinct impression that the intent of the largest carriers is to use the IP Transition to eliminate the host of competitors that have made twenty years of investment in reliance on the wholesale inputs mandated by the statutory requirements of the Telecommunications Act of 1996.

When the RBOCs are not pointing to false competitors such as wireless carriers that do not provide functionally equivalent services, they reach back to cases from the 1970s (or in Verizon’s case, statutes from the 1940s) to somehow attempt to argue that the section 214

---

<sup>10</sup> NPRM, ¶ 114.

<sup>11</sup> See *Comments of CenturyLink*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 21 (Feb. 5, 2014)(“CenturyLink Comments”).

discontinuance process aimed at guarding against reduction and impairment of services is not a legal mechanism to review their proposed wide-scale reduction and impairment of consumer-friendly competitive alternatives. In addition to eliminating themselves from the collective constructive effort to craft an effective section 214 process that makes sense in the 2015 IP Transition context, the RBOCs comments should cause the Commission to redouble its efforts to ensure that there is a thorough and rigorous process to ensure that statutorily-mandated wholesale alternatives remain available.

**II. THE COMMISSION IS ON FIRM LEGAL GROUND IN RELYING ON THE SECTION 214 DISCONTINUANCE PROCESS TO REVIEW AND DISCIPLINE THE WIDESPREAD DISCONTINUANCE OF TDM-BASED SERVICES IN ORDER TO PROTECT CONSUMERS AND THE PUBLIC INTEREST**

As a threshold matter, the Commission is on firm legal ground in utilizing the section 214 discontinuance process to review the discontinuance of TDM-based services in order to ensure that statutorily guaranteed wholesale offerings are not eliminated during the IP Transition. As the Platform Commenters have previously noted,<sup>12</sup> it is critical to businesses that relied upon the statutory guarantees of the market-opening provisions of the Telecommunications Act that those guarantees be recognized before, during and after the IP Transition. The Platform Commenters agree with the DS-0 Coalition and other providers that “the Commission should confirm that the Section 214 discontinuance process does not eliminate the ILEC’s additional obligations to provide UNEs under Section 251 and, for RBOCs, Section 271 requirements.”<sup>13</sup> The Commission is appropriately implementing a system to ensure that ILECs do not take advantage

---

<sup>12</sup> *Comments of Full Service Network LP and TruConnect*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 2 (Feb. 5, 2014)(“Platform Provider Comments”).

<sup>13</sup> *Comments of the Wholesale DS-0 Coalition*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 5 (Feb. 5, 2014)(“DS-0 Coalition Comments”).

of the IP Transition to “shake off” competitive providers during the change to IP-based services. If ILECs wanted to eliminate statutory wholesale legal guarantees, they would have to file a forbearance petition under section 10 of the Communications Act<sup>14</sup> and meet the rigorous forbearance standards of that section, including a showing that severely diminished competition is in the public interest.

The principal RBOC input in response to the Commission’s myriad inquiries on how to fashion a section 214 process is extensive questioning of the Commission’s clear authority to review the discontinuance of services under section 214. The Commission has at its disposal a variety of legal theories to support its reliance on the section 214 process.

Section 214 of the Communications Act specifically requires that no carrier “shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby....”<sup>15</sup> As the Platform Commenters have recommended, the Commission should interpret the statutory phrase “community, or part of a community” to include Platform Providers and other CLECs, as well as retail customers. The Platform Commenters endorse COMPTTEL’s Comments in this docket which provide extensive support for the fact that CLECs are the community and/or part of the community and, as such, the discontinuance, reduction or impairment of service to CLECs directly implicates the section 214 approval process.<sup>16</sup>

---

<sup>14</sup> 47 U.S.C. § 160.

<sup>15</sup> 47 U.S.C. § 214(a).

<sup>16</sup> *Comments of COMPTTEL*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 6-7 (Feb. 5, 2014)(“CompTel Comments”).

For example, as Birch, Integra, and Level 3 point out, the Commission has previously reviewed discontinuance of service to carrier customers in the *Dark Fiber Order* and found that “where the technical or financial impact on the carrier customer is such that it would lead to discontinuance or impairment of service to its customers, such considerations may establish that Section 214 authorization is required.”<sup>17</sup> In that case, the Commission found that a reduction of service to the public would occur and the Commission found that section 214 authorization was required.<sup>18</sup>

AT&T tries to rely on the same decision to support its claim that considering the impact on competitive carriers in the section 214 process would be illegal. In the *Dark Fiber Order*, the Commission has found that:

A number of factors are considered in balancing the interests of the carrier and the user community. These factors include: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services. Judicial approval has been given to such factors.

AT&T claims that the adequacy of alternative services are only implicated in “one-third of one factor in a five factor test.”<sup>19</sup> In fact, the impact on alternative services is implicated in factors 2, 3, 4, and 5, which is actually 4 out of the 5 factors established by the Commission. Contrary to

---

<sup>17</sup> *In the Matter of Sw. Bell Tel. Co. Us W. Commc'ns Bell Atl. Tel. Companies Bellsouth Tel. Companies Applications for Auth. Pursuant to Section 214 of the Commc'ns Act of 1934 to Cease Providing Dark Fiber Serv.*, Memorandum Opinion and Order, 8 F.C.C. Rcd. 2600 ¶ 54 (1993) (“Dark Fiber Order”), *remanded on other grounds, Sw. Bell Tel. Co. v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994); *see also Comments of Birch, Integra, and Level 3*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 24, n. 54. (Feb. 5, 2014)(“Birch Comments”).

<sup>18</sup> *Dark Fiber Order*, ¶ 49.

<sup>19</sup> *Comments of AT&T Services, Inc., on Notice of Proposed Rulemaking*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 43 (Feb. 5, 2014)(“AT&T Comments”).

AT&T's claims, Commission precedent heavily weighs the impact of a discontinuance on the adequacy of alternative services in almost every factor of the Commission's traditional test. While AT&T points to precedent from the 1970s,<sup>20</sup> long before Congress adopted significant changes to the Act to promote competitive choices for consumers and even years before the breakup of AT&T, and Verizon points to statutes from the 1940s<sup>21</sup> to interpret section 214, this more recent precedent from the competitive era highlights the Commission's increasing interest in preserving statutory wholesale alternatives. This emphasis is particularly necessary if ILECs are going to be permitted to turn off the TDM-based PSN that has served the country's needs for more than half a century. In this recent context, which is not mentioned in the RBOC journey through history, the Commission's reliance on the section 214 process is eminently justified.

### **III. THE COMMISSION'S SECTION 214 DISCONTINUANCE REQUIREMENTS ARE BROADLY SUPPORTED BY END USERS AND ALL BUT THE LARGEST ILECS**

Given the importance of competition from CLECs relying on wholesale alternatives, the Commission was justified in adopting its rebuttable presumption "that where a carrier seeks to discontinue, reduce, or impair a wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community such that approval is necessary pursuant to section 214(a)"<sup>22</sup> ("Rebuttable Presumption"). Given the statutory mandates of section 251 and section 271, and in particular the requirements for unrestricted resale and access to unbundled network elements as express mechanisms for providing competitive service to consumers,<sup>23</sup> the

---

<sup>20</sup> AT&T Comments, at 44, n. 112.

<sup>21</sup> *Comments of Verizon*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 23-25. (Feb. 5, 2014) ("Verizon Comments").

<sup>22</sup> NPRM, ¶ 103.

<sup>23</sup> See 47 U.S.C. §§ 251(b), 251(c) and 271(c).

Commission was also justified in its tentative conclusion “that we should require incumbent LECs that seek 214 authority to discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers to commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions.”<sup>24</sup> (“Tentative Conclusion”).

**A. End User Commenters Uniformly Supported the Commission’s Robust Section 214 Review Process**

A number of end user coalitions filed comments. While each comes from a slightly different perspective, all supported the Commission’s proposed Section 214 process. The Public Interest Commenters were “encouraged that the Commission’s NPRM considers several aspects of the technology transition’s impact on competition.”<sup>25</sup> The Public Interest Commenters recognized, as has the Commission, that the “continued viability in the network brings significant benefits to end-users, particularly by lowering costs for small businesses.”<sup>26</sup> The Public Interest Commenters fully support the Commission’s Tentative Conclusion requiring equivalent wholesale access, and the competitive standards proposed by Windstream as a framework for determining equivalence.<sup>27</sup> The Ad Hoc Telecommunications Users Committee

---

<sup>24</sup> NPRM, ¶ 110.

<sup>25</sup> *Comments of 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, on behalf of its low-income clients, New America Foundation Open Technology Institute, Rural Broadband Policy Group, and TURN (The Utility Reform Network)*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 15 (Feb. 5, 2014)(“Public Interest Comments”).

<sup>26</sup> *Id.* at 16.

<sup>27</sup> *Id.*

(“Ad Hoc Users”) endorsed the Declaratory Ruling’s functional test for determining equivalency,<sup>28</sup> as well as the Windstream criteria to measure equivalency of wholesale access.<sup>29</sup>

The Utilities Telecom Council (“UTC”) noted that “the Commission recognizes the importance of maintaining wholesale access to protect the enduring value of competition and to ensure that the customers of both incumbent and competitive LECs who currently depend on legacy services continue to have appropriate access to either adequate legacy or IP-based service alternatives.”<sup>30</sup> The UTC further stated that “it is appropriate for the Commission to address this issue and ensure that commercial service providers offer substitute services that are technically capable of meeting utility functional requirements . . . .”<sup>31</sup> In addition, “UTC supports the Commission’s tentative conclusion to require that incumbent LECs provide competitive carriers equivalent wholesale access on equivalent terms and conditions, when they seek section 214 authority to discontinue, reduce, or impair a legacy service that is used as a wholesale input by competitive carriers.”<sup>32</sup>

As such, these end user coalitions, including coalitions representing large corporate customers, resoundingly support the Commission’s section 214 process, including the Tentative Conclusion regarding equivalent wholesale offerings.

---

<sup>28</sup> *Comments of Ad Hoc Telecommunications Users Committee*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 14 (Feb. 5, 2014).

<sup>29</sup> *Id.* at 17.

<sup>30</sup> *Comments of Utilities Telecom Council*, PS Docket No. 14-174; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593, at 9-10 (Feb. 5, 2014)(“UTC Comments”).

<sup>31</sup> *Id.* at 11.

<sup>32</sup> *Id.* at 12.

**B. The Platform Commenters Support Many of the Constructive Improvements to the Commission's Proposed Section 214 Discontinuance Process**

Competitive providers suggested numerous constructive improvements to the Commission's Section 214 discontinuance process, many of which represent important clarifications to support competitive alternatives and consumer interests. Given the hostile reaction of the largest ILECs to the Commission's proposed 214 process, the Commission should incorporate these suggestions into its rules in order to tighten up the Section 214 review process in the context of the IP Transition.

A wide variety of carriers endorsed the Commission's Tentative Conclusion on requiring equivalent wholesale substitutes,<sup>33</sup> and the 6 Windstream principles to evaluate replacement offerings.<sup>34</sup> The Platform Commenters endorsed the principles but suggested that the Commission ensure that copper not be retired absent a commitment to ensure that replacement products mirror the ever-increasing bandwidth of copper, a trend recognized by the Commission.<sup>35</sup> The Platform Commenters urged the Commission to make it clear that wholesale offerings to both business and residential customers be protected,<sup>36</sup> a suggestion that was echoed by the DS-0 Coalition,<sup>37</sup> a coalition of similarly situated DS-0 providers. The Platform Commenters also recommended that the Commission's section 214 process apply to any ILEC transition of services from tariffed to non-tariffed services,<sup>38</sup> a suggestion also endorsed by

---

<sup>33</sup> See, e.g., Platform Providers Comments at 12; DS-0 Coalition Comments at 5; COMPTTEL Comments at 16; Birch Comments at 5.

<sup>34</sup> See, e.g., Platform Providers Comments at 8; COMPTTEL Comments at 21; DS-0 Coalition Comments at 6.

<sup>35</sup> Platform Providers Comments at 8.

<sup>36</sup> Platform Providers Comments at 3.

<sup>37</sup> DS-0 Coalition Comments at 9.

<sup>38</sup> Platform Providers Comments at 7.

COMPTEL<sup>39</sup> and the DS-0 Coalition,<sup>40</sup> among others. The Platform Commenters also agree with those commenters that recommended that call and non-call functionality be considered when reviewing equivalent services under the Commission’s Tentative Conclusion. These include the recommendations of the comments of the DS-0 Coalition<sup>41</sup> and the UTC Comments.<sup>42</sup>

The Platform Commenters urge the Commission to pay particular attention to those commenters that emphasized that replacement products must be offered at the same rates as the legacy products being replaced.<sup>43</sup> The Platform Commenters noted that the obligation to provide resale services “at wholesale rates” is a statutory obligation that does not evaporate with the IP Transition.<sup>44</sup> The Platform Commenters support the DS-0 Coalition’s recommendation to amend Windstream principle 2 to clarify that wholesale replacement services and elements must be provided at the same cost as the wholesale service previously offered, not at retail rates, as would be permitted by Windstream principle 2.<sup>45</sup> The Act requires that wholesale rates, as the name suggests, be set below retail rates, either at the avoided cost resale discount (required by section 252(d)(3)) or the just and reasonable TELRIC rates for unbundled network elements (required by section 252(d)(1) and the Commission’s regulations implementing that section as applicable).<sup>46</sup> Whether under sections 251/252 or section 271, the rates for competitive access elements are not

---

<sup>39</sup> COMPTEL Comments at 11-12.

<sup>40</sup> DS-0 Coalition Comments at 10.

<sup>41</sup> DS-0 Coalition Comments at 9.

<sup>42</sup> UTC Comments at 11-12.

<sup>43</sup> *See, e.g.*, Platform Providers Comments at 12; DS-0 Coalition Comments at 7.

<sup>44</sup> Platform Provider Comments at 12.

<sup>45</sup> DS-0 Coalition Comments at 7.

<sup>46</sup> *See* 47 U.S.C. § 252(d)(3) and 47 U.S.C. § 252(d)(1); *see also* 47 C.F.R. § 51.505

set at retail rates and the Commission must clarify that the pricing of ILEC replacement offerings must be at or below the wholesale rates available for legacy TDM wholesale offerings.

A number of commenters, in response to the Commission's request in the NPRM,<sup>47</sup> emphasized that CLECs require significant notice of any discontinuance, a carefully prescribed process, and an opportunity to review and comment on ILEC replacement offerings. The Platform Commenters support the Birch, Integra, and Level 3 suggestion of procedural rules to provide adequate process<sup>48</sup> and their recommendation of 12 months advance notice with a detailed description of replacement products.<sup>49</sup> The Platform Commenters recommended that platform providers also receive notice of any copper retirement at the same time as interconnected carriers.<sup>50</sup> The Platform Commenters recommend that the Commission rationalize these two notice periods for simplicity's sake and so that non-interconnected carriers are not treated in an inferior or discriminatory manner vis-a-vis interconnected carriers. Congress directed in the Communications Act that all three methods of entry – resale, unbundled network elements, and interconnection – be made available to provide competitive alternatives to consumers and the Commission should ensure all three are treated equally in a competitively neutral manner.

---

<sup>47</sup> NPRM, ¶ 113.

<sup>48</sup> Birch Comments at 8.

<sup>49</sup> *Id.* at 10; *see also* Platform Provider Comments at 10.

<sup>50</sup> Platform Provider Comments at 10.

**C. The Recommendations of Large ILECs to Take Advantage of the IP Transition Effectively to Eliminate Wholesale Competition Violate the Act and Are Inconsistent with the Telecom Act and Are Not Constructive**

The RBOCs put forth a series of non-proposals for a section 214 review process that generally consists of utilizing the IP Transition effectively to eliminate two decades of competitive investment and development since the Telecom Act and on the false premise of ostensible competition offered by wireless providers and cable providers.<sup>51</sup> While they criticize the use of the section 214 process, *they never put forth an alternative mechanism to protect twenty years of nationwide competitive entry.*

As a threshold point, what the ILECs are being asked to do is not the insurmountable task that the RBOCs make it out to be. For example, AT&T warns of “interminable gridlock, as incumbent carriers would be forced to justify virtually every step of the transition to the Commission through a § 214 proceeding.”<sup>52</sup> AT&T goes on to claim that the delay of section 214 review “is unacceptable not only because it would indefinitely strand incumbents’ resources while the Commission rules on each individual application, but also because it would set in motion rippling adverse effects on the deployment of next-generation services that will ultimately harm consumers.”<sup>53</sup> The sky has been falling since *Carterphone* but somehow the industry has made enormous competitive and technological progress since that time.<sup>54</sup>

AT&T and other RBOCs have a range of competitive offerings available today (*e.g.*, AT&T’s Local Wholesale Complete, Verizon’s Wholesale Advantage, and other similar

---

<sup>51</sup> See *e.g.*, Verizon Comments at 27.

<sup>52</sup> AT&T Comments at 55.

<sup>53</sup> *Id.*

<sup>54</sup> See *e.g.*, *Carter v. Am. Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966).

wholesale products). They need to develop replacement products in order to satisfy the purchasers of those products, and similar replacement products to replace other wholesale products. This is not the gargantuan undertaking that AT&T and the other RBOCs have made it out to be.

The fact is that cable and wireless “alternatives” exist today in the footprint of Full Service Networks and TruConnect but well over 100,000 wireline customers have chosen the services of FSN and TruConnect. The Commission wisely is honoring that customer choice by developing a process that will not reverse and frustrate consumer choices by forcing them onto the network of a service provider to which they have already affirmatively chosen not to subscribe. Considering wireless alternatives for wireline services also does not take into account the Commission’s adoption of a functional test under section 214.<sup>55</sup>

As noted in the Executive Summary, competition between large facilities-based ILECs and cable providers has stagnated. In addition, the CenturyLink Duopoly Proposal would be a great leap backward in terms of the competitive alternatives. Anyone who is currently faced with only two alternatives for broadband services knows all too well that having two alternatives provides a level of service that is remarkably similar to the old Ma Bell monopoly. As noted, U.S. consumers would be considered lucky to have two competitive broadband offerings, as only 23% of U.S. households have that luxury. In the 2015 Broadband Progress Report, the Commission determined that fixed broadband service providing 25 megabits per second (Mbps) down and 3 Mbps up is the minimum transport capability needed for American households to be able to engage successfully with the digital economy.<sup>56</sup> Using this standard, the Commission

---

<sup>55</sup> NPRM, ¶ 114.

<sup>56</sup> 2015 Broadband Progress Report, *supra* note 2, ¶ 3.

also found that, at best, “only 2% of housing units have access to 3 or more providers, 23% have access to two providers, 55% have access to one provider....”<sup>57</sup>

In light of these statistics, the Commission should not be looking backwards towards inadequate, functionally inferior or monopoly priced intermodal alternatives, but should instead be looking forward to new ways to stimulate competition through new wholesale alternatives.

#### **D. Other Competitors Recommended New Wholesale Alternatives Such as Dark Fiber**

The IP Transition is an ideal opportunity for the Commission to consider new competitive alternatives to jumpstart competitive markets. In particular the Commission needs to re-examine its 2003<sup>58</sup> and 2005<sup>59</sup> decisions that competitors are not impaired by being denied access to ILEC dark fiber as an unbundled network element or resale of ILEC broadband offerings. Much has changed in the intervening decade plus, and the competitive environment the Commission predicted as a result of its actions has not materialized.

The Commission found in both the 2003 and 2005 orders that “the barriers to entry impeding competitive deployment of loops are substantial”<sup>60</sup> and as a result continued to require ILECs to provide access to copper facilities for the provision by competitors of both narrowband and broadband services. Indeed, the Commission’s decision that competitors were not impaired in their access to fiber as unbundled network elements in the mass market relied directly on the

---

<sup>57</sup> *Id.* at n. 314 and ¶ 83.

<sup>58</sup> In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, 18 F.C.C. Rcd. 16978 (2003)(“2003 Unbundling Order”).

<sup>59</sup> In the Matter of Unbundled Access to Network Elements, 20 F.C.C. Rcd. 2533 (2005)(“2005 Unbundling Order”).

<sup>60</sup> *Id.* ¶ 153.

availability of resale and the presence of the copper alternative.<sup>61</sup> The Commission also said in 2005 that

“dark fiber allows for very efficient use of facilities that incumbent LECs have already deployed but that would otherwise lay fallow. The record indicates that most incumbent LEC interoffice facilities had been replaced with fiber prior to the 1996 Act. The record also indicates that competing carriers using unbundled dark fiber transport can operate more efficiently than when using lit transport, because the competing carrier itself engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber.”<sup>62</sup>

The same rationale is true for dark fiber deployed to residences. The ILEC that deployed fiber to the home or neighborhood has already had the chance to serve residential customers reached by those facilities. For whatever reason, either because the ILEC has not chosen to attach the necessary electronics to light the fiber already deployed or because customers have chosen not to take service over those facilities, those facilities are lying fallow and providing no revenue to the ILEC. Allowing competitors to utilize those facilities would in no way discourage facilities deployment; a decade plus of non-deployment by ILECs demonstrates that. By allowing

---

<sup>61</sup> In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exch. Carriers, 18 F.C.C. Rcd. 16978, 17146 (¶ 279) (2003) (“We further agree with Corning that our FTTH policy adopted herein should not adversely affect competitive LECs for several reasons. First, competitive LECs have demonstrated that they can self-deploy FTTH loops and are doing so at this time. Second, competitive LECs can continue to use resale as a means for serving mass market customers after incumbent LECs deploy FTTH loops. Finally, competitive LECs can continue to have unbundled access to existing copper facilities, to the extent such facilities are available.”)(footnotes omitted). Clearly the record of the past 12 years is that it is uneconomic for competitive LECs to deploy FTTH, and now the Commission is being asked to allow ILECs to retire copper, even where no fiber facilities are yet available. This leaves resale as the only available tool for the Commission to continue to ensure consumers have a competitive choice.

<sup>62</sup> 2005 Unbundling Order ¶ 135.

competitors access to this fallow broadband infrastructure the Commission would be providing consumers new choices and increasing the availability and affordability of broadband Internet access services.

The Platform Commenters recommended dark fiber loops as a means to guarantee the continued availability of wholesale loops with the retirement of copper.<sup>63</sup> Other commenters, such as COMPTTEL,<sup>64</sup> also called on the Commission to make dark fiber loops available in order to provide competitors continued access. The Platform Commenters have also recommended that the Commission make broadband Internet access service available for resale.<sup>65</sup>

The Commission said it best in 2003 when they said “[s]imply put, delivering broadband service is impossible without a transmission path to the customer’s premises that supports broadband capabilities.”<sup>66</sup> Given the limited broadband Internet access service options available to consumers, the Commission needs to update its unbundled network element and resale policies as part of any order approving the wholesale retirement of ILEC copper facilities. Doing so would provide critical new alternatives to consumers as the IP Transition unfolds and would discipline price and customer service in a manner that is not happening today.

## **VI. CONCLUSION**

For the foregoing reasons, the Commission should adopt the rules and recommendations in the NPRM and the Declaratory Ruling, subject to the constructive suggestions of end users

---

<sup>63</sup> Platform Provider Comments at 7.

<sup>64</sup> COMPTTEL Comments at 31.

<sup>65</sup> Platform Provider Comments at 12.

<sup>66</sup> 2005 Unbundling Order ¶ 278.

and competitive carriers. The Platform Commenters look forward to working with the Commission over the coming months to implement these ideas.

Respectfully submitted,

/s/ James C. Falvey

James C. Falvey, Esq.  
Earl Comstock, Esq.  
Robert J. Gastner, Esq.  
ECKERT SEAMANS CHERIN &  
MELLOTT LLC

*Counsel for Full Service Network and  
TruConnect*

Dated: March 9, 2015