

## Proposals in the NPRM Fail to Achieve the Commission's Stated Goal to Maintain Established Rules and Decisions

*“Our present goal is to maintain established rules and decisions that provide for wholesale access to critical inputs as we continue our special access rulemaking proceeding, along with other initiatives such as technology trials, to determine how customers are affected and whether rules and policies need to be modified in the future.”*

NPRM & Declaratory Ruling, FCC 14-185, Nov. 25, 2014

The established rules and decisions

- concluded that pricing regulation of Ethernet-based services and optical network services is not necessary to ensure that rates and practices for those services are just, reasonable, and not unjustly or unreasonably discriminatory. Broadband Forbearance Order, FCC 07-180, Oct. 12, 2007;
- make clear that § 214 is meant to protect end users;
- do not require ILECs seeking authority to discontinue 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;
- were put in place to provide the proper incentives to achieve widespread broadband infrastructure investment by all carriers, not just the incumbent local exchange carriers.

## **The Commission Should Not Adopt a Rebuttable Presumption That Discontinuing Particular Wholesale Services Will Discontinue End-User Service**

**The Commission's long-standing precedent makes clear that § 214 is meant to protect end users.**

**In its request for comments on the scope of § 214 discontinuance, the Commission states that it “do[es] not propose to change course from [Commission] precedent”**

- Commission formerly held that “a carrier need not seek Commission approval when discontinuing service to carrier customers if there is no discontinuance, reduction, or impairment of service to retail end-users.” *Western Union Tel. Co.*, 74 F.C.C. 2d 293.
- The Commission, without any evidence, speculates that “[w]here an incumbent LEC discontinues, reduces, or impairs a service offering used by competitive LECs to provide end users with this service, this can also be expected to affect the competitive LECs’ retail customers.”

### **The Proposed Presumption Is Inconsistent with the Statute**

- The Commission's proposed presumption is not supported by the text or history of § 214 and would essentially re-write the statute to make discontinuance of service to a wholesale carrier an *additional trigger* for filing a § 214 application.
  - Would circumvent Congress's judgment that § 214 approval is required only when a carrier proposes to discontinue service “to a community, or part of a community.”
  - Congress has never expressed any desire to expand § 214(a) to cover competitive carriers.
  - Even where end-user choices might be reduced, there is neither textual nor historical support for interpreting § 214(a) to equate the robustness of retail competition with the availability of retail service.

## **The Commission Should Not Adopt a Rebuttable Presumption That Discontinuing Particular Wholesale Services Will Discontinue End-User Service**

### **The Proposed Presumption Would Constitute an Improper and Unjustified Departure from Long-Standing Commission Precedent Applying § 214(a) in the Context of Carrier-to-Carrier Services.**

- The Commission has always sharply distinguished between “the ultimate impact on the community served” and “any technical or financial impact on the carrier itself.” *Western Union Tel. Co.*, 74 F.C.C. 2d 293.
- Under § 214, the primary focus should be on the using public, “while affects on carriers are more appropriately considered in a proceeding involving [§]201(a).” *Western Union Tel. Co*
- The Commission has said it “must distinguish those situations in which a change in a carrier’s service offerings to another carrier will result in actual discontinuance, reduction, or impairment to the latter carrier’s customers as opposed to discontinuance to only the carrier itself.” *Western Union Tel. Co*
- The Commission’s proposed rebuttable presumption disregards this long-standing distinction and assumes in every case that discontinuing a wholesale service to a carrier customer is tantamount to discontinuing or impairing service to end-user customers and thus presumptively requires a § 214 application.
- In the event an incumbent carrier discontinues a wholesale service to a competitive carrier, the competitive carrier can purchase or provide for itself a substitute.
  - For example, wholesale carrier-customers will have the opportunity to obtain bare copper loops and utilize their own electronics to provide high-capacity services to their end-user customers
- Given the prevalence of alternative local providers – including the incumbent local provider – it will rarely be true that discontinuance of a wholesale service will deprive a community of end-users of adequate replacement or alternative services.

## The Commission Should Not Adopt a Rebuttable Presumption That Discontinuing Particular Wholesale Services Will Discontinue End-User Service

### The Presumption Would Invite Anti-Competitive Abuse

- Would provide an unwarranted opportunity for incumbents' competitors to abuse the § 214 process to challenge changes in service that have little impact on end-user customers
- For example, it may be the case that an incumbent's decision to discontinue a given service to a wholesale carrier will raise that wholesale carrier's costs of providing retail service, but both the Commission and the D.C. Circuit have held that such a "rate increase" does "not in fact discontinue, reduce, or impair any service at all."
- *Aeronautical Radio* also demonstrates why a carrier's decision to eliminate individual rate options for a term discount plan does not implicate § 214(a) unless and until doing so eliminates service (and any adequate substitutes) altogether. *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980)
  - The Commission and the D.C. Circuit agreed that terminating the bulk-discount offering did not implicate § 214(a), even though doing so "eliminate[d] a rate discount, thereby effectuating a rate increase," because "[a]ll the services which had been offered under the TELPAK tariff were still available."
  - There is a fundamental distinction between the provision of service and the rates charged for service; a service is not "discontinue[d], reduce[d], or impair[ed]," i.e., made worse or less valuable, merely because it costs more.

## The Commission Should Not Adopt a Rebuttable Presumption That Discontinuing Particular Wholesale Services Will Discontinue End-User Service

### The Proposed Presumption Would Be Contrary to the Public Interest

- Stretching the scope of § 214 presumptively to cover *every* discontinuance of legacy wholesale services would multiply § 214 applications and tax the resources of both carriers and the Commission, particularly as the technology transition accelerates.
  - Would create interminable gridlock as incumbent carriers would be forced to justify virtually every step of the transition to the Commission through a § 214 proceeding; indefinitely stranding incumbents' resources pending Commission ruling and ultimately affecting future deployments.
  - The Commission's suggested standard for the case-by-case adjudication necessary to rebut the presumption would require incumbents to prove a negative to obtain each approval.
  - Commission's proposal would turn the § 214 process on its head by requiring incumbents to determine what retail services their *competitors provide*, in order to show that those retail services will remain available.
- Inappropriate for the Commission to require incumbent carriers to file certifications rebutting the presumption or to maintain a record of the facts and analysis they relied on to determine the presumption was rebutted.
  - Not only be burdensome and inefficient, but such a requirement would also eliminate whatever streamlining benefits an incumbent would otherwise receive from not having to file a § 214 application.
  - Present incumbents with the cumbersome task of proving the absence of end-user service impact.
  - Any claimed benefit of a certification or recordkeeping requirement would pale in comparison to the regulatory uncertainty inherent in such a procedure.

## The Commission Cannot and Should Not Require Wholesale Access Through § 214(a) Proceedings

“...commit to providing competitive carriers equivalent wholesale access on equivalent rates, terms, and conditions.”

### The Proposed Conditions Are Unlawful – violate Commission precedent & exceed Commission statutory authority

- Transforms § 214 from a provision designed to ensure continuity of retail service to a competitor protection provision.
- A sweeping replacement-services mandate would force incumbent carriers to provide services to retail competitors in circumstances where the obligation is unneeded to protect retail customers’ access to service.
- Cannot be squared with the structure of the Communications Act where carrier-to-carrier obligations are addressed in other provisions.
  - Sections 201-205 and 251 expressly address the obligations of carriers in general and incumbent carriers in particular vis-à-vis other carriers.
  - If an incumbent carrier lacks any obligation to provide wholesale service under those provisions, such an obligation cannot be imposed under § 214.
  - The Notice suggests that the Commission’s rule would merely “maintain established rules . . . that provide for wholesale access to critical inputs”
    - On the contrary, if existing law imposed the obligations that the Commission proposes in the Notice, there would be no need for a rulemaking.
  - The Commission has no authority under § 214 to regulate price and terms of carrier-to-carrier service, which are a matter to be addressed under other provisions of the Communications Act

## The Commission Cannot and Should Not Require Wholesale Access Through § 214(a) Proceedings

### The Proposed Presumption Is Unlawful

- The Commission cannot lawfully adopt any presumption concerning appropriate conditions on § 214 certifications.
- Section 214(a) requires the Commission to consider each individual application and find the “facts which lead it to reach its conclusion of public benefit,” including the “balance [of] equities and opportunities among the various carriers.” *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776-77 (D.C. Cir. 1974)
  - It would be improper for the Commission to prejudge the application-specific balancing of interests by adopting a general rule for all § 214(a) applications involving legacy services.
  - The dynamics of competition, and thus the balancing of interests, will vary by geography, type of service, subscriber base, and other factors.
- No reason to believe that a one-size-fits-all mandate would appropriately address the variety of market circumstances and alternative service arrangements that may be present in communities.
  - Incumbent carrier may be able to show the availability of inter-modal alternatives
  - Incumbent carrier may propose alternative service arrangements.
  - Permitting carriers to address circumstances as they arise allows the focus to be on the public interest concern and encourages innovative solutions the Commission could not anticipate
- Carriers always have an incentive to negotiate with interested parties in advance of § 214 filings, to attempt to address legitimate concerns and head off opposition that would delay implementation.

## **The Commission Cannot and Should Not Require Wholesale Access Through § 214(a) Proceedings**

**Adopting rules to protect CLECs from the consequences of technological progress runs directly counter to sound regulatory policy.**

- The alleged concern here – that wholesale customers will be left high and dry in the absence of a regulatory wholesale-service-continuity mandate – is without any foundation.
- At the same time, the notion that technological innovation must be a rising tide that lifts each individual competitor’s boat is wrong.
  - Sound regulatory policy – like sound antitrust policy – would never risk jeopardizing valuable innovation for the sake of preserving static competition.
- The Commission should be deeply suspicious of the motives of those competitive carriers that insist on the imposition of heightened access obligations as the price of permission to innovate.
  - AT&T has a strong incentive to meet customer demand, including wholesale customer demand, or it will lose out to competitors able to do so.
  - But competitive carriers understand that a Commission-imposed minimum service requirement can only help them and competitively harm AT&T.
  - That is not fair when one considers the alleged harm is imposed only when AT&T engages in pro-consumer innovation.
  - The Commission should not confuse the viability of competitors with the robustness of competition or equate the business interests of CLECs with the public interest.