



July 9, 2015

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: 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

Dear Ms. Dortch:

On July 7, 2015, Harold Feld, Senior Vice President; Meredith Rose, Staff Attorney; and Edyael Casaperalta, Internet Rights Fellow of Public Knowledge met with Jonathan Sallet and William Dever of the Office of General Counsel.

Public Knowledge expressed their continued concern with growing reports of carriers allowing copper networks to degrade to the point of *de facto* discontinuance of service, without seeking required approval from the Commission under section 214. Three primary issues require the Commission's consideration: (1) setting appropriate technical standards by which to define "comparable" service for the purpose of copper retirement and section 214; (2) establishing a system for receiving complaints about degraded TDM service, or clarifying the availability of the Commission's existing complaint systems, in order to track instances of *de facto* retirement by maintenance neglect; and (3) clarifying when a carrier's obligations under section 214 trigger following the destruction of copper facilities due to a natural disaster.

Public Knowledge supports the establishment of clear, engineering-based metrics to determine whether substitute VoIP or wireless service is indeed comparable to TDM service that a carrier proposes to retire. Existing contracts, such as GSA contracts for IP-based voice service, can provide a useful starting point for determining appropriate standards. However, because carriers have not proposed any appropriate evaluation criteria, the Commission should use six months of real time measurements (three months before the discontinuance of TDM service, and three months after) as an interim requirement. This would clearly meet the statutory objective of ensuring that discontinuance would not "impair" service to all, or any portion of, the local community. While Public Knowledge acknowledges that such a system would be costly, and that a

checklist of technical standards that would permit providers to certify that equipment complies with the metrics would be preferable, a manual approach requiring real time metrics is the only alternative in the absence of any substantive carrier proposal beyond the “dial tone, maybe, if that isn’t too expensive or too hard,” or nothing at all.

In particular, CenturyLink’s proposal that the Commission should grant a Section 214(a) if the incumbent provider certifies that there is “competition” is so inadequate as to be ludicrous. First, self-certification – with the possibility for local subscribers to challenge the adequacy of the competitive offering – would impermissibly shift the burden of establishing whether grant of the application is “consistent with the public convenience and necessity.” Further, CenturyLink’s proposal does not eliminate the need to establish relevant metrics. Which services would the certification cover: basic dial tone, all dial tone supported services, or something in between? Is the “competing” service even available to all of the ILEC’s existing customers? Is there sufficient consistency of voice quality, sustained ability to reach 9-1-1, or adequate back up power, under the “competitor” entity? Under CenturyLink’s proposal, the presence of a Boy Scout with a merit badge in Signaling (and thus able to employ both semifore *and* heliograph) might constitute an adequate level of “competition.” Without specifying the relevant criteria by which to gauge the presence or absence of a comparable competing service, invocation of the empty shibboleth of “competition” cannot be considered consistent with the responsibility of carriers and the Commission under the statute.

Furthermore, Public Knowledge requested that the Commission clarify that when a natural disaster or other circumstance destroys or degrades a physical network, the carrier is obligated to restore service or file an appropriate Section 214(a) application for discontinuance when the carrier determines it will not repair its network and restore pre-existing service. PK acknowledge that some parties continue to maintain that where a network is destroyed or degraded by forces outside the control of the carrier, there is no obligation to file a Section 214(a) discontinuance. This is apparently an application of the theory that where an Act of God has struck down a network in His terrible wrath, no mere mortal shall presume to repair it.¹ Such a religious-based theory finds no sanctuary in the statute, however. Under the plain language of the statute, a carrier is obligated to continue to provide service until it has actually obtained a certificate from the Commission finding that the discontinuance serves the public interest.² Section 214(c) clearly states:

After issuance of such certificate, *and not before*, the carrier may . . . *comply with the terms and conditions contained in or attached to the issuance of such certificate* and proceed with the construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service. Any . . . discontinuance reduction or impairment of service contrary to the provisions of this section may be enjoined in any court in

¹ Cf. Ecclesiastes 7:13 (“Marvel at the work of God, for who may straighten that which He has made crooked?”)

² 47 U.S.C. § 214(c)

the United States, the Commission, any State commission, any State affected, or any party in interest.³

In other words, regardless of whether or not the physical facility is destroyed or damaged, and regardless of whether this network damage, degradation or destruction comes from the Act of God or the hand of man, whether by sin of commission or sin of omission and casual neglect, the carrier is required to offer its preexisting service to the community at sufficient quality as to not constitute an impairment. Section 214(a) permits the Commission to establish rules and procedures governing “authorize temporary or emergency discontinuance, reduction or impairment . . . without regard to the provisions of the statute.” This the Commission has done, by providing guidance for long-term outages in the wake of Hurricane Katrina. Accordingly, no carrier is in violation of Section 214 the day following a hurricane. But when the carrier makes a determination that it will not rebuild the network, and therefore will not resume service, it clearly violates the terms of the “temporary or emergency” discontinuance under Section 214(a) and violates Section 214(c)’s prohibition on permanent discontinuance (absent a formal request for discontinuance and issuance of a certificate of public convenience and necessity).

If this were not sufficient, Section 214(d) provides the Commission with the authority “upon complaint or on its own initiative . . . to require by order any carrier . . . to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line.” In other words, even if Section 214(a) and 214(c) did not already explicitly require carriers to file for permission to discontinue service in the wake of a natural disaster, Section 214(d) clearly authorizes the Commission to require carriers to either repair their networks or file for permission to discontinue service.

Public Knowledge also expressed concern over the lack of a viable system for taking complaints and tracking instances of *de facto* discontinuance of service via copper abandonment. Instances in which the carriers have allowed their copper network to degrade past the point of usability have become increasingly visible and frequent in the media. However, a push toward deregulation on the state level, and the lack of a clear complaint mechanism available to consumers at the federal level, means that data on the frequency and severity of these occurrences is still anecdotal.

Section 214(c) states that “any party in interest” may complain to the FCC that a carrier has discontinued or impaired service without first obtaining a certificate from the Commission. Additionally, Section 214(d) permits the Commission, “upon complaint or upon its own initiative without complaint,” to require a carrier “to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier.” These provisions clearly provide the Commission the authority to

³ *Id.* (emphasis added).

address *de facto* discontinuance, to require carriers to repair facilities, and to fine carriers that fail to comply with the Commission's orders.⁴

In addition to violating Section 214(c), *de facto* termination also violates Sections 201(a), 201(b) and 202(a). Section 201(a) requires "every common carrier" "to furnish such communication service upon reasonable request thereof." *De facto* termination constitutes constructive refusal of the request to provide service in violation of the general duty established by Section 201(a). Section 201(b) requires that "all charges, practices, classifications and regulations for ***and in connection with*** such communication service" (emphasis added) be just and reasonable, and declares any unjust and unreasonable charges, practices, etc. to be unlawful. There can be no doubt that when a carrier charges a subscriber for service and deliberately fails to maintain adequate facilities to provide service; classifies certain geographic areas or customers as undesirable, and therefore refuses to maintain its network; or deliberately allows its physical plant to degrade so as to push customers to switch to an alternative, inferior service, that such charges and practices in connection with provision of its telecommunications service are unjust, unreasonable, and therefore unlawful.

Further, Section 202(a) prohibits:

Unjust or unreasonable discrimination in charges, practices, classifications, regulations ***facilities*** or services for ***or in connection with*** like communication service, directly or indirectly, by any means or device . . . or to subject any particular person, class of persons, or ***locality*** to any undue or unreasonable prejudice or disadvantage.⁵

Again, there can be no doubt that phone lines, central offices, and other physical attributes of the network are "facilities" used "in connection with" communication service. The refusal to maintain local networks simply because a carrier find the rate of return from a local community insufficiently rewarding, or because the carrier would prefer that customers migrate to a different service, is likewise clearly an "undue or unreasonable prejudice or disadvantage."⁶

The consumer and public safety dangers posed by a poorly-managed tech transition fall disproportionately upon rural, low-income, and coastal communities. These same communities are the most vulnerable to extreme weather conditions, depend the most heavily on copper TDM service, and are the least informed about the technology

⁴ 47 U.S.C. § 214(d).

⁵ *Id.* (emphasis added).

⁶ See *Developing an Unified Inter-carrier Compensation Regime, Establishing Just and Reasonable Rates for Local Exchange Carriers*, CC Docket No. 01-92, WC Docket No. 07-135, Declaratory Ruling, 27 FCC Rcd 1351, 1355, 1357-58 ¶¶ 12, 14 (2012).

⁶ 47 U.S.C. § 202(a) specifically prohibits any unreasonable discrimination in "facilities" or based on "locality."

transition. Additionally, they have limited access to the resources to file complaints. The Commission will not hear the concerns of these consumers unless it explicitly reaches out to them. This outreach may include cooperation with the broadcasting community, and requirements that carriers purchase advertising on local broadcast outlets and publish notification in newspapers of record. Although much of the population relies on electronic news and information, vulnerable communities – the aged, the poor, rural communities without broadband access – are both disproportionately reliant on traditional copper line service and disproportionately reliant on traditional media for news and information. The Commission should also consider adequacy of outreach to non-English speaking communities.

The Commission has exceptionally broad authority in this area. Section 214(b) authorizes the Commission to “require such published notice as it shall determine.” Section 214(c) authorizes the Commission to “attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.” The Commission enjoys additional authority in this regard pursuant to other provisions of the Act.

Finally, with regard to back up power, Public Knowledge expressed its support for a rule requiring carriers to provide their users with backup power options by using commercially available D-cell batteries. A broad trend of state-level deregulation of utilities means that the FCC plays a critical role in ensuring consumers are informed about the tech transition broadly, and backup power issues more specifically. Although the FCC cannot be in every state, the commission should consider identifying areas that are at high risk of losing service during the technology transitions. The FCC should collaborate with local advocates in these areas to ensure that the challenges they encounter as telephone providers change technology are recorded, and can be resolved.

Consumers need widely available power alternatives in the event that their VoIP or wireless home service goes down in the event of an emergency. Forcing consumers to rely upon proprietary batteries that can only be replaced or recharged by the carrier itself creates a substantial public safety threat. By comparison, D-cell batteries are widely available and can be stockpiled indefinitely in proper conditions, thus providing consumers with hours of backup time. Moreover, current opt-in rates for proprietary CPE power solutions are not accurate predictors of real consumer need. Hurricane Sandy illustrated in striking detail that consumers grossly underestimate the need for backup power until they are left without it. Public safety dictates that backup power options be universally available, and structured in such a way that consumers may prepare and stockpile commercially available sources of power.

In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020x108.

Respectfully submitted,

/s/ Harold Feld
Senior V.P.
Public Knowledge
1818 N. St., NW
Suite 410
Washington, D.C. 20036
(202) 861-0020

cc: Jon Sallet
William Dever