

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

In the Matter of)	
)	
Technology Transitions)	GN Docket No. 13-5
)	
Policies and Rules Governing Retirement Of)	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)	

COMMENTS OF INCOMPAS

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COMMENTS OF INCOMPAS

INCOMPAS¹ respectfully submits these comments in response to the Commission’s Further Notice of Proposed Rulemaking (“*Further Notice*”) in the above referenced proceedings.²

¹ COMPTTEL is now doing business as INCOMPAS.

² *Technology Transitions, Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, FCC 15-97, Report And Order, Order On Reconsideration, and Further Notice of Proposed Rulemaking (rel. Aug. 7, 2015)(“Report Order” or “Further Notice”).

INTRODUCTION AND SUMMARY

In the August 2015 *Report and Order*, the Commission has taken significant action to ensure competitive providers are able to continue to provide broadband services that are vital inputs for small- and medium-sized business and enterprise users, including mobile carriers. As the Commission stated, “the organizations these carriers serve benefit from this competition in their purchase of communications services, which helps them serve their customers better and more efficiently.”³ Indeed, the Commission recognized that competitive local exchange carriers are the principal source of competition to incumbent local exchange carriers (“LECs”) in the enterprise market.⁴ In particular, the Commission recognized the critical role that access to certain wholesale input services play in promoting competition and emphasized that technology transitions should not be used as an excuse to limit existing competition.⁵ Accordingly, the Commission adopted a requirement that ILECs offer reasonably comparable wholesale IP last mile access to competitors upon discontinuance of its TDM services, pending the Commission’s review of the special access market. The Commission also used this opportunity to strengthen its copper retirement rules.

In the *Further Notice*, the Commission seeks comment on the need for additional action. INCOMPAS focuses its response to the *Further Notice* on certain procedural issues that will ensure effective implementation of the wholesale access policies and strengthen the copper retirement rules the Commission adopted in the *Report and Order*. First, the Commission should ensure that incumbent LECs provide adequate notification and time to competitors for the

³ *Id.*

⁴ *Id.* ¶ 137.

⁵ *Id.* ¶ 6.

successful transition from existing TDM wholesale services to IP wholesale replacement services. Second, the Commission should make certain that incumbent LECs provide network change notices with complete and accurate information regarding the retirement of copper and act in good faith regarding an interconnecting carriers' reasonable request for additional information. Finally, the Commission should not link the reasonably comparable wholesale access rule with regard to wholesale platform services to the pending special access proceeding. These actions will ensure that the objectives the Commission sought to accomplish in the *Report and Order* are not circumvented.

I. THE COMMISSION MUST ENSURE INCUMBENT LECS PROVIDE ADEQUATE NOTIFICATION AND TIME TO COMPETITORS FOR THE SUCCESSFUL TRANSITION FROM EXISTING TDM SPECIAL ACCESS AND WHOLESALE PLATFORM SERVICES TO REPLACEMENT SERVICES

In the *Further Notice* the Commission seeks comment on whether to adopt modifications to Section 63.71 of the Commission rules, which establishes the procedures, including notification requirements, carriers must follow to obtain Section 214(a) approval for discontinuance of services.⁶ As explained below, modification to Section 63.71 is needed with regard to the timeframe for notification of discontinuance of TDM special access services and wholesale platform services. On the other hand, in order to be compatible with the timeframe for notification on copper retirement, the Commission should not modify the Section 63.71 timeframe for the discontinuance of competitive retail services.

The modification proposed below, with regard to the special access and wholesale platform services, is necessary for the Commission to evaluate whether its policies with regard to

⁶ *Further Notice* at ¶ 238.

wholesale inputs are properly implemented so that end-user customers do not suffer loss of competitive choice and/or service disruptions as a result of the transition from TDM to IP-based services. Specifically, incumbent LECs should be required to identify their replacement product(s); provide sufficiently detailed notification to wholesale purchasers with regard to the discontinuance of service and replacement product(s); have an active functioning replacement product; and allow for sufficient time for competitors to perform all necessary functions for transitioning customers – at least one year– *prior to filing an application* with the Commission.

As the record demonstrates, many competitive carriers use ILEC-provided TDM wholesale inputs, such as DS1 and DS3 special access services, to serve as the “last-mile” access to their customers. Hundreds of thousands of such connections are in place today, actively connecting entities of all sizes to the fiber networks and advanced services of their competitive providers. Accordingly, the Commission concluded that an incumbent LEC that seeks to discontinue a TDM-based special access service used as a wholesale input service by competitive carriers must, as a condition to obtaining discontinuance authority, provide competitive carriers reasonably comparable wholesale access on reasonably comparable rates, terms and conditions.⁷ The Commission adopted this requirement “to protect consumers, preserve the extent of existing competition, and facilitate technology transition” and, in particular, to ensure that small- and medium-sized businesses, schools, government entities, healthcare facilities, libraries and other enterprise “end-users *do not lose service and continue to have choices for communications services.*”⁸

So as to ensure the Commission’s objectives are achieved, the Commission should

⁷ *Report and Order* at ¶ 132.

⁸ *Id* at ¶101 (emphasis added).

modify its rules to require that the incumbent LEC's application for discontinuance demonstrate that the necessary steps have been taken to successfully transition customers from TDM to IP-based replacement services and to enable the continuation of competitive options. Specifically, when an incumbent LEC seeks to replace TDM-based special access services and wholesale platform services with IP-based services, the incumbent LEC should be required to demonstrate it performed the following:

1. Defined a reasonably comparable IP-based replacement service that can be used by competitive providers to comparably serve the end user customers (e.g., small to medium-sized business and enterprise customers) currently connected with TDM-based special access or wholesale platform services;
2. Provided adequate advance notification of the particular technology and interface it will use for the chosen replacement service;
3. Provided an active, functioning replacement connectivity at the customer premise for each active customer served by a TDM-based special access or wholesale platform service, as well as at the carrier edge;
4. Provided sufficient time, after the replacement service is active at each customer location, for a competitive carrier to transition its retail customers.

The ILEC needs to complete the first four steps well in advance – at least one year – of the incumbent filing its application with the Commission. This is necessary for the competitive provider to have sufficient time to evaluate the replacement product, plan its part of the transition, and test and implement the transition.

When any network technology is replaced by another, the devices in the network that use the former technology to provide subscriber services must also be replaced. In the case of a change in the last-mile services from TDM to IP, this includes the devices at the customer location (*i.e.* the CPE) as well as at the “carrier edge.” For a competitive carrier to replace the TDM equipment at its customer's premises and at its network edge, it must know, well in advance, what specific technology has been chosen by the ILEC to replace the DS1 or DS3 TDM service being discontinued, in addition to rates, terms and conditions for provision of this

service.

Once the ILEC informs the competitive carrier of its technology choice for the replacement service, the competitive carrier must have sufficient time to evaluate, select, budget for, purchase, acquire, configure, install, and test the equipment necessary to interface to the new replacement service. This includes the new equipment at the carrier edge as well as the new CPE. Each of these categories involves a substantial number of sequenced events, which must occur to prevent an existing customer from losing service.

For example, CPE replacement for an existing customer's service requires the carrier's field service personnel to travel to the customer site to configure, install and test the new CPE. Prior to the truck roll, the technician must review the customer's existing configuration (*e.g.*, interconnected equipment, supported protocols, existing IP subnets, VLAN domains, NAT'ing, security configurations, authorizations and authentications, IPv6 transition mechanisms currently in place, *etc*); pre-program the new CPE with all configuration parameters identified; validate that the ILEC has completed the installation of the replacement service and that it is functional; and validate that the customer has chosen a location for the new CPE that provides adequate power and environmental conditions.

Subsequent to traveling to the customer's site and connecting new CPE, the technician must test and verify physical and IP connectivity to the carrier edge. Additionally, the transition of each of the customer's services (*i.e.* voice, managed services, private Wide-Area Networking, private Local Area Networking, Internet Access service, etc.) must be coordinated with the competitive carrier's network operations group and the customer's representative. Once the service is up and running, since the end-user customer may only use certain functions (*i.e.*, perform certain transactions) on a monthly or quarterly basis, sufficient time must be allotted to

discover if there is a problem with the new IP-based system or its configuration before the fallback to TDM is eliminated. A competitive carrier who has been serving an area for a number of years will have dozens, hundreds, perhaps thousands of customer sites in such an area to transition to the replacement service(s).

In addition to the steps needed to transition each existing customer, the competitor will need to establish mechanized processes for the replacement product so that end users continue to have a choice in providers. The competitor cannot start the internal processes needed for such development until the incumbent has identified and provided the competitor with the necessary information with regard to the replacement product. One INCOMPAS member, TDS, found that to fully mechanize its new process with an ILEC for wholesale Ethernet Service orders required over a year to complete. While not an all-inclusive list, the following are examples of the internal processes that had to be addressed: 1) additional support staff to handle the unique aspects of replacement service; 2) VLANs need to have the right traffic routed to the right locations; 3) enabling CPE used for the replacement product so that it is “visible” to network technicians in their testing; 4) establishment of “trouble” report procedures; and 5) revisions to the tracking systems to accommodate the replacement service.

Competitive providers also need time to budget for the new CPE and any additional personnel necessary or establish commercial arrangements to effect the transition. Overall different skill sets are needed within a competitive carrier’s organization in order to effectively and efficiently deal with these services. The carriers also may need time to negotiate and enter into a new or revised master service agreement. Six months of negotiations often may be needed to enter into a new agreement with the incumbent.

Despite the significant lead time necessary to evaluate and plan for a transition to

replacement wholesale inputs, carriers that lease the incumbent LEC's copper loops/feeder to provide services, such as Ethernet-over-Copper, are only provided six months' notice of planned copper retirements. A carrier transitioning from a copper facility to a copper alternative also needs time to evaluate whether a replacement input is available, plan its part of the transition, replace CPE and network equipment, and test and implement the transition. In the event no alternative to copper is available, competitive carriers using copper facilities cannot provide more than 30 days notification of retail service discontinuance. They will already be under significant time constraints to determine if alternatives exist and evaluate whether they can plan, test, and implement the transition to any such alternatives within the 180 day copper retirement period.

II. INTERCONNECTING CARRIERS REQUIRE NETWORK CHANGE NOTICES THAT PROVIDE COMPLETE AND ACCURATE INFORMATION REGARDING THE TRANSITION AND GOOD FAITH COMMUNICATIONS FOR ADDITIONAL INFORMATION REQUESTS

The Commission's current rules for the content of a network change notice⁹ should be broadly interpreted to provide interconnecting carriers with the information required to determine if any of the carrier's retail customers will be adversely affected by the transition. Currently, the Commission requires incumbent LECs to provide contact information, implementation dates of the planned changes, the location at which the network change will occur, a description of the changes planned, and a description of the reasonably foreseeable impact of the planned changes.¹⁰ INCOMPAS encourages the Commission to ensure that each incumbent provides this baseline information in the notices provided to interconnecting

⁹ See 47 C.F.R. § 51.327.

¹⁰ *Id.* at § 51.327(a)(1)-(6).

carriers.¹¹ This includes the provision of technical information such as the specific circuits that are implicated by the network change.

If, in its internal review of the incumbent LEC's filing, the Commission determines that the notice does not include the information required by Section 51.327 of the Commission's rules, INCOMPAS urges the Commission to refrain from starting its 180-day notice period. This will have the dual benefit of ensuring that interconnecting carriers receive the information they need at the beginning of the process while preserving the timeframe in which they can seek additional information related to the transition. Furthermore, this simple requirement will ensure that competitive carriers are able to realistically determine the end user impact of the network change and explore whether alternatives are available to accommodate the incumbent's changes with no disruption of service to its customers or, where no alternatives are available, whether the retirement will result in the discontinuance of the competitive carrier's retail service.

A. The Commission Should Establish Objective Criteria To Enforce Incumbent's Obligation to Act in Good Faith Following Notice of Copper Retirement

With the elimination of the objection procedures available to interconnecting carriers for copper retirement, the Commission must identify specific criteria for the good faith communication requirement to ensure carriers can either maintain service or provide the requisite advance notice of service discontinuance within the 180-day period. Failure to provide more specific guidance on incumbent LECs' obligation to provide interconnecting carriers with additional information about an incumbent's plan to retire copper will make it difficult for

¹¹ See e.g., Letter of Tamar E. Finn, Counsel for TelePacific Communications to Marlene Dortch, RM-11358, et al. (Aug. 27, 2015) (providing representatives of the FCC with an AT&T network change notice that was "detailed enough to enable TelePacific to determine whether any of its end users would be impacted by the planned [copper] retirement").

competitive carriers to transition retail customers without disruption of service. Defining and enforcing the good faith negotiation requirement will ensure that the incumbent and competitive carrier have “sufficient opportunity to work together to allow for any accommodations needed to maintain uninterrupted service to end users.”¹²

Once an incumbent LEC has provided interconnecting carriers with a copy of the network change notice that it has filed with the Commission, that incumbent must respond in a reasonable and timely manner to a CLEC request for additional information in order to determine whether interconnecting carriers will be able to transition customers to copper alternatives within the Commission’s 180 day notice period. Although the Commission’s rules require incumbents to provide competitive carriers with basic information regarding the network change,¹³ such as the specific circuits implicated and the end user impact, carrier customers often seek additional information from incumbents regarding the availability of retail and wholesale alternatives to copper. Without complete and accurate information about available alternatives, including the location, technical specification, and pricing for alternatives, it is nearly impossible for interconnecting carriers to determine whether alternatives are available to replace copper inputs so that interconnecting carriers can meet the needs of customers impacted by the incumbent’s decision. Furthermore, interconnecting carriers have traditionally sought other information during network changes such as routing information. Competitive carriers rely on incumbents to respond to these reasonable requests for information and without objective criteria by which to hold incumbents accountable, the potential exists for these carriers and their customers to be left with no viable options for service.

¹² *Report and Order* at ¶ 31.

¹³ *See* 47 C.F.R. § 51.327.

With respect to the new obligation on incumbents to act in good faith, the standard the Commission uses for determining whether negotiations in retransmission consent agreements are being conducted in good faith is instructive in this proceeding,¹⁴ although it should be noted that the Commission is currently examining its rules in this area in order to address the rising number of good faith negotiation disputes between television broadcast stations and multi-video channel distributors over program pricing.¹⁵ Under the retransmission consent regime, the Commission has established statutory provisions that include a list of standards, the violation of which is considered a *per se* breach of the good faith negotiation obligation.¹⁶ Drawing from this regime, INCOMPAS proposes the following objective criteria by which to evaluate a *per se* breach of the incumbent's obligation to act and communicate in good faith:

- Refusal by the incumbent LEC to respond to an interconnecting carrier's reasonable request for additional information within 10 days, including by providing specific reasons in writing for rejecting any request;
- Refusal by the incumbent LEC to respond to an interconnecting carrier's reasonable request for a meeting or teleconference within 10 days to discuss the planned network changes and options to transition services or customers;
- Refusal by the incumbent LEC's representative, identified pursuant to Section 51.327(a)(2), to have a meeting or teleconference with a competitor within a reasonable time following a reasonable request;
- Refusal by the incumbent LEC to identify retail and wholesale alternatives, if available, upon request including location, technical specifications, and pricing;

¹⁴ 47 C.F.R. § 76.65.

¹⁵ See *In the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test*, Notice of Proposed Rulemaking, MB Docket No. 15-216, FCC 15-109, at ¶¶ 2, 4-5 (rel. Sep. 2, 2015) (seeking comment on the "totality of the circumstances" test that the Commission uses pursuant to 47 C.F.R. § 76.65(b)(2) to determine whether a negotiating party has violated the good faith negotiation obligation, even if the *per se* standards, described *infra*, are met). INCOMPAS supports the Commission's efforts to update the good faith negotiation framework and has proposed changes to the *per se* standard in other proceedings. See e.g., Reply Comments of COMPTTEL, MB Docket No. 15-58, at 5-6 (filed Sep. 21, 2015).

¹⁶ 47 C.F.R. § 76.65(b)(1).

- Execution of new actions by the incumbent LEC that are harmful to the interconnecting carrier and are taken in retaliation for the carrier making a request for additional information (e.g., new or increased demands for the payment of special construction fees);
- Refusal by the incumbent LEC to execute or agree to a written agreement, if necessary, that sets forth the full understanding of the parties with respect to the transition to copper alternatives; and
- Refusal by the incumbent LEC to undertake actions previously agreed upon by the incumbent LEC and interconnecting carrier.

B. An Additional 90-Day Postponement of the Copper Retirement is Appropriate Should Incumbent LECs Fail to Fulfill the Good Faith Communication Requirement

The Commission has also asked for comment on the recourse that should be available to an interconnecting entity who believes that an incumbent LEC is not acting in good faith.¹⁷ INCOMPAS supports the Commission’s proposal to postpone retirement by an additional 90 days if the incumbent LEC has failed to fulfill the good faith communication requirement. Despite the Commission’s decision to extend the notice period to 180 days, interconnecting carriers remain concerned that a six-month period will not be enough time to transition retail customers if incumbent LECs do not provide timely information of the proposed network changes via good faith communications. In the past, competitive carriers have experienced situations where an incumbent has failed to provide technical and other important transition information that it had requested. The additional 90-day postponement will allow these carriers to obtain information to determine whether interconnecting carries will be able to transition customers to copper alternatives.

The optimal approach would be for the Commission to “stop the clock” on the 180-day notice period for copper retirement should an interconnecting carrier provide evidence that an incumbent is violating the good faith communication requirement. If an incumbent were to fail

¹⁷ *Further Notice* at ¶ 241.

or refuse to respond to an interconnecting carriers request for additional information for more than 90 days, competitive carriers, even with the additional 90-day postponement, would not receive the same 180-day transition period it would attain if the incumbent fulfilled the good faith communication requirement. Suspending the notice period until the Commission has had an opportunity to address the petition alleging a good faith violation will ensure that competitive carriers receive as much of the notice/postponement period as can be afforded under the rules.

III. THE COMMISSION SHOULD NOT LINK THE REASONABLY COMPARABLE WHOLESALE ACCESS RULE WITH REGARD TO WHOLESALE PLATFORM SERVICES TO THE PENDING SPECIAL ACCESS PROCEEDING.

In the *Report and Order*, the Commission determined that, in order to promote prompt and effective transition to IP-based networks – while ensuring that small- and medium-sized businesses, schools, libraries, and other enterprise customers continue to enjoy the benefits of competition – incumbent local exchange carriers that seek to discontinue, reduce, or impair wholesale input services, including TDM-based commercial wholesale platform service, must provide competitive carriers that use those services with reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions.¹⁸ The Commission states that it will have adopted and implemented the rules necessary to end this policy when: (1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective.¹⁹

¹⁸ *Id.* at ¶¶ 131-2.

¹⁹ *Id.* at ¶ 132.

As the Commission recognized, the central issue at stake is “whether the incumbent LECs are subject to substantial competition in the provision of the packet-based services that will replace the services being discontinued” and are, as a result, subject to market-based incentives.²⁰ The Commission also recognized in the *Further Notice* that the special access proceeding will not address the status of commercial wholesale platform services, such as AT&T’s Local Service Complete and Verizon’s Wholesale Advantage, as these services are significantly different from the DSN services at issue in that proceeding.²¹ It therefore sought comments on facilitating the continuance of commercial wholesale platform services which, as the Commission found, “serve an important business need” for nationwide businesses with disparate retail locations seeking a single provider.²²

As noted above, the special access proceeding will not address wholesale platform services and has little relevance to a determination whether substantial competition exists for wholesale platform services. Therefore, the conclusion of that proceeding does not serve as a logical end date for the reasonably comparable wholesale access requirement for wholesale platform services. However, an incumbent can make a showing of substantial competition for wholesale platform services in a specific market or markets through a petition for forbearance – which has a statutory deadline – or the waiver process. Additionally, the Commission on its own motion, or in response to a petition from an incumbent, can initiate a proceeding that collects the necessary data for making a sound determination as to the state of competition for these services. Indeed, the Commission could make this evaluation in the pending IP-Enabled

²⁰ *Id* at 131.

²¹ *Further Notice* at ¶ 242.

²² *Id.* at ¶243.

Proceeding.²³

CONCLUSION

INCOMPAS urges the Commission to resolve the issues raised in the *Further Notice* in a manner consistent with the foregoing recommendations.

Respectfully submitted,

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²³ See *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 73 (2004).