

**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 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
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

Diane Griffin Holland
Jonathan Banks
United States Telecom Association
607 14th Street, N.W.
Suite 400
Washington, D.C. 20005
(202) 326-7300

TABLE OF CONTENTS

- I. INTRODUCTION 2
- II. TECHNOLOGY TRANSITIONS MUST BE ALLOWED TO OCCUR UNENCUMBERED BY UNNECESSARY PROCESS AND REGULATION..... 4
 - A. Technology Transitions are Vital to Achieving the Nation’s Broadband Goals. ... 4
 - 1. Newer technologies offer better network performance, faster service, and more reliability..... 5
 - 2. Investment and innovation thrive in a light regulatory environment..... 6
 - B. A Burdensome Section 214 Test Will Discourage Technology Transitions. 7
- III. THE EXISTING SECTION 214 TEST IS SUFFICIENT FOR TECHNOLOGY TRANSITIONS 8
 - A. New, Detailed Criteria to Assess Substitute Services Are Not Necessary To Protect Consumers. 9
 - B. Where an Application is Not Automatically Granted, All Five Factors Should Be Given Equal Weight. 10
 - C. Marketplace Success of Alternative Services Should Be Proof That They Are Adequate Substitutes..... 10
 - 1. The Commission’s existing public safety, consumer protection, and security requirements adequately protect customers. 12
 - 2. Interoperability and preservation of certain features and functions are important, but not essential. 13
- IV. OTHER PROPOSALS..... 14
 - A. The Record Does Not Support Revisions to the Discontinuance Procedural Rules. 14
 - B. Specific Criteria to Measure Good Faith Are Not Necessary..... 15
 - C. The Comparable Wholesale Access Condition Should Not Be Extended Beyond Completion of the Special Access Proceeding..... 17
- V. CONCLUSION..... 18

SUMMARY

As we consider the move, already strongly embraced by consumers and businesses, to new communications technologies, Chairman Wheeler's recent diagnosis of the role of networks in our history is particularly relevant: "Networks have been a defining economic force throughout history – and the victory laurels have gone to those who embraced the new networks." Prepared Remarks of FCC Chairman Tom Wheeler, The Brookings Institution, Jun. 25, 2015, at 2. Chairman Wheeler notes that the simultaneous emergence of railroad and telegraph networks in the 19th century "reshaped the economy and society of that time more than the Internet and all that it has produced has shaped ours – thus far." Imagine if railroad and telegraph entrepreneurs had to file section 214 requests for approval to offer their new services, demonstrating that their service met eight separate factors of "adequacy." And that their competitors – canal operators, Conestoga wagons and the Pony Express could tangle up their applications in miles of red tape.

The "victory laurels" go to those that embrace new networks. The majority of American consumers and businesses have embraced new fiber, wireless and IP networks. Incumbent local exchange carriers (ILECs) have been investing billions to upgrade their networks. These investments, as the Chairman has noted, are "good for consumers and competitors because they enable local exchange carriers (LEC) to become more fulsome competitors to cable operators' dominant position in high-speed broadband." *Id.* at 2. In this proceeding concerning the regulatory overlay for moving from legacy to new networks, we strongly urge the Commission to "embrace new networks" and, as it assesses how to apply section 214 in these circumstances, to minimize the costs, delays and burdens of companies trying to move to modern fiber and IP

networks. These are the networks that consumers and businesses want and that they have embraced so broadly that there can be no real question that the new, innovative services delivered over these networks are more than adequate substitutes for legacy services.

**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 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
)	

**COMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION**

The United States Telecom Association (USTelecom) submits these comments in response to the Further Notice of Proposed Rulemaking (Further Notice) issued by the Commission seeking comment on measures to facilitate technology transitions.¹ The Further Notice aims to adopt clear standards to eliminate uncertainty that could impede the transition to modern networks,² a transition to which USTelecom and its members are fully committed. It does so against a backdrop of unprecedented competition in the market for retail, residential voice services, and robust (and increasing) competition in the business voice and broadband markets. For business customers, for example, government data indicate that by 2013, non-ILECs served 45 percent of business lines, with this figure trending toward more than half by the

¹ *Technology Transitions, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, Special Access for Price Cap Local Exchange, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, FCC 15-97 (rel. Aug. 7, 2015) (Further Notice).*

² *Further Notice* at ¶ 203.

end of 2015, and 18 percent of businesses lines had migrated to voice over Internet protocol (VoIP) service by 2013, with the figure trending to more than one-quarter by 2015.³ Ethernet bandwidth for business data services surpassed legacy data services bandwidth in 2011, and Ethernet bandwidth is projected to comprise more than double the bandwidth of legacy services by 2015.⁴ In the residential market, cable providers have the predominant share of broadband lines. We therefore ask the Commission not to use the section 214 process to impose additional requirements and costs only on ILECs, but rather to encourage more fulsome competition with the dominant cable providers.

I. INTRODUCTION

The Commission already has an established, fact-specific process for addressing carrier applications for section 214 discontinuance authority in which it considers five factors and seeks to balance the interests of the provider seeking discontinuance with those of users who will be affected.⁵ In the Further Notice, the Commission proposes to significantly modify the evaluation under just one of those factors – the adequacy of substitute services – by requiring providers “seeking to discontinue an existing retail service in favor of a retail service based on a newer technology” to demonstrate that any substitute service offered by the carrier, or available from other providers meets at least eight criteria.⁶ Carriers demonstrating that these and possibly other

³ Federal Communications Commission, Local Telephone Competition: Status as of Dec. 31, 2013 (Oct. 2014) at Tables 2 and 3. Trends are straight-line estimates of shares.

⁴ Vertical Systems Group, U.S. Ethernet Bandwidth Surpasses Legacy Bandwidth (Jul. 26, 2011), available at <http://www.verticalsystems.com/vsgpr/u-s-ethernet-bandwidth-surpasses-legacy-bandwidth/>.

⁵ *Further Notice* at ¶206, n.656 (citing *Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742 (2003)). The criteria are: (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, although this factor may be outweighed by other considerations.

⁶ *See Further Notice* at ¶ 208. The criteria relate to: (1) network capacity and reliability; (2) service quality; (3) device and service interoperability; (4) service for individuals with disabilities; (5) PSAP and 9-1-1 service; (6) cybersecurity; (7) service functionality; and (8) coverage.

criteria are met are then *eligible for* automatic grant under section 63.71(d) of the Commission's rules.⁷ We think this approach adds an unnecessarily complex layer to the section 214 application process, in part because the burden borne by each carrier seeking to discontinue a service will be significantly higher than under current procedures. Indeed, the criteria proposed suggest there is a presumption that no service will be an adequate substitute, and requires the applicant to prove otherwise. Even carriers that certify that they meet all the criteria will bear an increased burden of demonstrating that each of the criteria is met, since competitive providers will have incentive to, and thus will challenge all such certifications.

The proposed additional criteria, many of which are duplicative of existing requirements and/or outside the scope of section 214,⁸ would increase the burdens on providers and hamper the ongoing technology transitions. We therefore oppose any new criteria that focus on providers' networks by imposing metrics pertaining to trouble tickets, repair rates, or performance, in place of a review of the services to be discontinued. We also generally oppose any framework that makes it overall more difficult to move away from of outdated legacy services. We strongly oppose the Commission's suggestion that additional regulation is necessary to ensure the continued availability of commercial wholesale platform services, which have been offered on a voluntary basis for years. Adoption of the requirement on an interim basis was backward-looking and unnecessary to preserve competition, and reversed established policies and decisions that have resulted in a robust, competitive marketplace. Further extension

⁷ 47 C.F.R. § 63.71(d). The Commission also tentatively concludes that a provider that certifies that it meets all such criteria is eligible for automatic grant. *See Further Notice* at ¶ 210 (explaining that automatic grant is not available "if comments or objections call into question whether a substitute or alternative service satisfies all the criteria").

⁸ For example, the proposal to use a market power analysis is misguided and inapposite to the question of service substitutability in this limited context. *See Further Notice* at ¶ 236. Such an inquiry would add considerable time and layers of process without attendant benefits.

of the ILEC requirement to provide commercial platform offerings at regulated prices is not warranted.

II. TECHNOLOGY TRANSITIONS MUST BE ALLOWED TO OCCUR UNENCUMBERED BY UNNECESSARY PROCESS AND REGULATION

A. Technology Transitions are Vital to Achieving the Nation's Broadband Goals.

Technology transitions are vital to this country's overall advancement and ability to maintain its position as the world's economic leader. Each of the National Broadband Plan's six long-term goals, which include connecting 100 million homes with access to download speeds of 100 Mbps and upload speeds of 50 Mbps, and access to 1 gigabit per second broadband for schools, hospitals, and government buildings, depends on the success of our transition from the limitations of legacy services and infrastructure to the benefits of next-generation, high-speed services that are only achievable with modern networks.⁹

ILECs have systematically been moving away from legacy to modern networks for some time. This shift is both prudent (given the cost of maintaining copper infrastructure, especially where fiber plant exists), and necessary to achieving our short-term and longer-term broadband deployment goals. The Commission therefore should ensure that its policies and regulatory actions reflect an urgency and commitment toward ensuring that technology transitions happen as swiftly as possible.

⁹ See Federal Communications Commission, Connecting America: The National Broadband Plan at XIV (Mar. 2010), available at <https://www.fcc.gov/national-broadband-plan>.

1. Newer technologies offer better network performance, faster service, and more reliability.

Even where functionality or some features are lost, technology transitions will result in net gains because of the new features and applications that will be possible. Just as digital TV opened up an unprecedented level of quality and options for video consumers, modern networks and services have connected more Americans to the services and content of their choice, bringing new and improved communications services to the marketplace. The Commission therefore should be encouraging providers and the remaining public to embrace this phase of the technology revolution, rather than empowering some competitors or special interest groups to further delay transition based on misguided and unfounded fears that consumers will not welcome the opportunity to have new and better services. In fact, most consumers already have chosen to give up their legacy services in favor of newer technology, and many have chosen a cable company as the sole provider for all of their communications services. In some cases, they are cutting the cord at home and relying solely on wireless service for voice calls. In other cases, they are subscribing to bundles for broadband and video that include over-the-top, VoIP-based voice service.

The numbers are significant. For residential customers, for example, government data indicate that by the end of 2013; only 27 percent of U.S. households opted for legacy voice service from a traditional provider and trends indicate that this figure had fallen to 16 percent by the end of 2015.¹⁰ Approximately half of U.S. households will have “cut the cord” and gone wireless-only for voice service by the end of 2015, and among the remaining households using

¹⁰ USTelecom Research Brief, Voice Competition Data Support Regulatory Modernization (Nov. 25, 2014) (based on Centers for Disease Control data for wireless-only voice households and Federal Communication Commission data for wireline voice shares; excludes ILEC VoIP, projected to account for nine percent of households at the end of 2015, and non-ILEC switched lines, projected to account for less than one percent of households at the end of 2015), available at http://www.ustelecom.org/sites/default/files/documents/National%20Voice%20Competition%202014_0.pdf.

landlines, almost two-thirds will have moved from a legacy to a VoIP service.¹¹ This voluntary migration to new technologies is proof positive that consumers want what technology transitions offer.

2. Investment and innovation thrive in a light regulatory environment.

The Commission's competitive framework¹² has encouraged significant broadband-related investment. Capital expenditures by broadband providers alone reached \$78 billion in 2014, and competition continues to increase. This is precisely the outcome that the FCC sought to achieve.

Network providers have invested hundreds of billions of dollars in recent decades in large part to build next generation technologies and transition from legacy networks and services. Over the next several years, the goal should be to maximize investment in modern networks and minimize wasteful, unnecessary investment in maintaining legacy networks. We can achieve this objective if the right incentives are in place. Modernizing communications networks can dramatically reduce network costs, allowing providers to serve customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices. It also catalyzes further investments in innovation that both enhance existing products and unleash new services, applications and devices, thus powering economic growth. The lives of millions of Americans could be improved by the direct and indirect effects of technology transitions.

¹¹ *Id.*

¹² See, e.g., *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (forbearing from regulating Ethernet and other services).

B. A Burdensome Section 214 Test Will Discourage Technology Transitions.

Although the proposals in the Further Notice are purportedly intended to facilitate “a rapid and prompt transition to IP and wireless technology,”¹³ the Commission’s proposals will slow and deter, not encourage future technology transitions. The Commission has already acknowledged that the benefits and advantages of modern networks and services far outweigh any burdens or costs associated with moving away from outdated technology. It defies logic to think that providers would risk providing substandard services in the highly competitive communications marketplace and risk losing customers to competitors, especially to facilities-based competitors like cable providers who are rapidly gaining market share away from ILECs.

Several commenters, including USTelecom members, confirm that creating a detailed, multi-factor test with new criteria to address discontinuances involving technology transitions would unnecessarily complicate the section 214 process.¹⁴ This is especially true because technology transitions are well underway, and customers have not only shown a willingness to adapt, but have embraced services using new technologies. For example, line power seems to be a non-issue judging by the prevalence of cord-cutting and adoption of VoIP services;¹⁵ the Commission has acknowledged as much and rightly declined to require providers to supply indefinite backup power.¹⁶ We therefore encourage the Commission to take a “light-touch” regulatory approach to ensure that providers continue to prioritize replacing their outdated,

¹³ *Further Notice* at ¶ 203.

¹⁴ *See, e.g.*, 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 42 (Feb. 5, 2015) (stating that adopting specific criteria “would turn a straightforward part of the § 214(a) inquiry [] into a complicated examination of the specific features and functions of replacement or alternative services”).

¹⁵ *See* Centers for Disease Control, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey*. July-December 014 (Jun. 2015). By the end of 2014, only 8.4 percent of U.S. households used landlines only, and even some portion of these may be VoIP customers.

¹⁶ *See Ensuring Continuity of 911 Communications*, Report and Order, PS Docket No. 14-174, FCC 15-98 (Aug. 7, 2015).

costly-to-maintain legacy networks in favor of newer, more reliable and robust networks that will improve the communications experience for all consumers.

III. THE EXISTING SECTION 214 TEST IS SUFFICIENT FOR TECHNOLOGY TRANSITIONS

Under the statute, providers may discontinue a service upon a finding that the proposed action will not adversely affect the present nor future public convenience and necessity.¹⁷ In applying this standard, the Commission balances “the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.”¹⁸ This balance is important to encourage and facilitate technology transitions, which will immediately lead to improved networks and more choice for consumers. The appropriate inquiry is not whether *any* harm will ensue, but rather whether customers would be subject to undue hardship.

Until recently, the Commission’s regulations and policies implementing section 214 have been focused on reducing harm to consumers caused by service discontinuances. As more technology transitions occur, however, that focus seems to be shifting to the protection of some competitors in the marketplace. For example, in the Order accompanying the Further Notice, the Commission adopted a condition requiring that an ILEC, to receive authority to discontinue a legacy service, provide a reasonably comparable wholesale service at reasonably comparable rates, terms, and conditions to its competitors. This condition applies without regard to whether any consumers would be harmed by the discontinuance; that is, the condition is written broadly enough to apply even when an adequate substitute service is available, and where there has been no showing of actual or potential harm to the public convenience and necessity. Thus, it appears

¹⁷ 47 C.F.R. § 214(a).

¹⁸ Mobilefone Service, Inc., Application for authority to discontinue service at Maritime Mobile Public Coast II–B Station KLG–376 in South Padre Island, Texas, Order and Authorization, 3 FCC Rcd 32 (1987) (citation omitted).

that the singular purpose of the condition is to protect certain *competitors* from losing access to the discontinued service, which even the Commission has said is not the purpose of section 214.¹⁹

This condition, coupled with the additional criteria proposed in the Further Notice, invites and encourages competitors to contest any and all discontinuance applications under the guise of protecting their customers. The net effect will be that no discontinuance requests will be automatically granted because every application will be contested by competitors seeking to protect their competitive positions.

A. New, Detailed Criteria to Assess Substitute Services Are Not Necessary To Protect Consumers.

The Commission's new criteria are a dramatic and unwarranted shift away from the Commission's longtime process for review of section 214 discontinuance applications. Nothing in the record or the Further Notice demonstrates that the current approach to evaluating substitute services fails to protect consumers facing service discontinuances or the public convenience and necessity. And the number of consumers that have chosen to subscribe to services based on newer technology is proof that consumers think these newer services are adequate substitutes. There are simply no claims of actual or potential harm that would justify a change of this significance.

Applying separate criteria only to service changes involving technology transitions is inconsistent with the Commission's commitment to technology-neutral policies and regulations. The Commission thus should carefully consider whether there is a compelling need for specialized criteria to be added solely to evaluate the adequacy of substitute services only when a technology transition is involved.

¹⁹ See *Further Notice* at note 369 (“The Commission has previously equated ‘community, or part of a community’ with the using public.”).

B. Where an Application is Not Automatically Granted, All Five Factors Should Be Given Equal Weight.

As an initial matter, we disagree with the Commission’s proposal to elevate the role of the adequate substitute service prong of the traditional five-part section 214 test. To the extent it does add criteria as proposed; it need not assign more weight to that factor.²⁰ Further, we ask for clarification that any additional criteria adopted to evaluate the adequacy of substitute services will not apply to applications once they are determined not to be subject to automatic grant. Because a section 214 applicant need not meet all criteria to be granted discontinuance authority when automatic grant is not at issue,²¹ there is no need to expand one of the criteria at the expense of any of the others.

C. Marketplace Success of Alternative Services Should Be Proof That They Are Adequate Substitutes.

Among the driving forces behind technology transitions is improving service quality, functionality and reliability. USTelecom and its members know the importance of providing service that is reliable and capable of supporting the basic needs and functionality of its customers; their reputations are largely built on the quality of their service offerings, and competition requires delivering the services that consumers want.

Commenters have proposed several criteria addressing service quality and performance, public safety, and consumer protection for the Commission to consider in determining whether to authorize carriers to discontinue a service involving a technology transition.²² Before imposing any such criteria, the Commission must carefully consider whether and to what extent these

²⁰ Specifically, the Commission proposes that the adequate substitute service evaluation would have a “primacy” in the section 214 analysis when an application is under consideration for automatic grant, but otherwise would retain its traditional role as merely one part of the multi-factor determination of whether to grant a discontinuance application. *Further Notice* at ¶ 210.

²¹ *See id.*

²² *Further Notice* at ¶ 207.

criteria are necessary to evaluate the adequacy of substitute services for the protection of consumers, and must ensure that any adopted criteria actually advance valid regulatory goals.

Sufficient network capacity and reliability, as the Commission notes, are essential to meeting end user needs.²³ Providers understand this, and are constantly working to ensure that their services adequately serve their customer base. Network capacity and reliability, as measured by attributes such as latency, jitter, and packet loss are important to determine the adequacy of *certain* services to meet customer expectations. Similarly, it is reasonable for customers to expect their voice and other communications services to meet minimum quality standards.²⁴ For that reason, we agree generally with the Commission that network performance and service quality should be taken into account, but oppose the imposition of specific criteria to measure them as unnecessary – that consumers have overwhelmingly chosen services based on newer technology is conclusive proof that they are adequate substitutes.

As an alternative, we propose that the Commission consider a more practical approach that would be consistent with its stated desire to streamline section 214 application processing. The Commission should adopt a presumption that any substitute service that is offered in the affected community and that has a significant number of end users subscribed to and using the service is adequate for purposes of network capacity and reliability, and service quality. For example, if an ILEC wants to discontinue a TDM-based voice service in a community where a cable provider offers a competing voice service and has subscribers to that service (separate or in a bundle), that service would be presumed to provide adequate network capacity and reliability, and service quality. Those opposing the discontinuance would have the burden of showing, through state commission findings or other credible evidence, that these benchmarks are not

²³ *Further Notice* at ¶ 216

²⁴ *Further Notice* at ¶ 218.

being met by the existing substitute service. Otherwise, we ask that the Commission decline to impose specific network capacity and reliability criteria as part of the section 214 inquiry and address this important issue in a separate notice and comment rulemaking that would involve all providers of the service or services in question.²⁵

1. The Commission’s existing public safety, consumer protection, and security requirements adequately protect customers.

We agree with the Commission that the importance of accessibility for individuals with disabilities, access to 911 services, and other public safety and consumer protection requirements is indisputable. That is why the Commission already has rules in place to address these issues. To the extent these issues have not been or are not being addressed in separate proceedings, they should be.²⁶ Our primary concern is that any piecemeal development of additional, and possibly different, requirements related to public safety and consumer protection that only apply to ILECs in the particular context of section 214 service discontinuances will result in disparate treatment and requirements for different providers. With regard to disabled access, for example, the Act specifically requires telecommunications relay service to be provided,²⁷ and thus no provider may, or will, risk violation of those statutory and regulatory requirements by cutting off such service without ensuring that their customers have an alternative way to access the telephone network.

Similarly, how new networks and services should incorporate communications security measures is an industry-wide issue that requires broadband and edge and content service providers all to be at the table. Proposals like those that would require only a section 214

²⁵ Note that in the context of CAF, the Commission has already established such measures. fn. 667

²⁶ For example, the Commission asks whether to require real time text over IP networks to replace TTY services on set end date. *Further Notice* at ¶ 223. The complexities and implications of such a decision are far beyond what the Commission should be addressing in this proceeding, and to seek to build a record on those issues in this context makes little sense.

²⁷ See generally 47 U.S.C. § 225.

applicant to demonstrate that it has taken measures to initiate risk management practices consistent with those noted in the Further Notice as reflecting accepted industry standards would not be appropriate.²⁸ The question of what security measures are adequate for today's and tomorrow's networks is a serious and complex matter that the Commission should not undertake to address in this limited context. Moreover, any measures adopted in this proceeding would not affect cable providers, who have a much larger share of the broadband market than ILECs. The Commission need not establish new, or different, measures for ILECs that other providers of newer technology-based services are not subject to, and because cable providers have the largest share of the broadband market, such measures would do little to protect the majority of broadband consumers. All providers should be held to the same public safety, consumer protection, and network security standards, and the section 214 application process is the wrong context in which to address such weighty issues.

2. Interoperability and preservation of certain features and functions are important, but not essential.

The Commission is well aware that certain newer technologies, such as those that are IP-based, may not support every function or piece of equipment that legacy TDM-based technologies can support.²⁹ The right question to ask, though, is to what extent will technology transitions be held up to ensure that customers who choose to use outdated equipment and services that are not compatible with newer technologies (rather than making modest changes

²⁸ *Further Notice* at ¶ 228 (suggesting that the National Institute for Standards and Technology (NIST) and Cybersecurity Framework (NSF) or equivalent risk management constructs would likely be adequate).

²⁹ *See Further Notice* at ¶ 220, nn.680-681. The Commission suggests that certain commenters, including USTelecom, profess to be confused about what functionalities consumers consider to be essential. To be clear, what USTelecom and other commenters intended to convey is that they do not and cannot know what specific services and equipment are in use by all customers at any given time that would require notice to be given that such services and equipment may not function after a technology transition occurs.

such as equipment upgrades or other work-arounds) do not lose access to such equipment and services.

There are many products and services on the market today that can be used for the same functionality as analog-compatible fax machines and alarm systems and the like; one need only conduct a simple online search for “fax machines that work with VoIP” to find multiple alternatives. Cable companies such as Comcast advertise alarm monitoring services that do not require legacy phone service to work.³⁰ Work-arounds are also abundant; for example, many have abandoned traditional fax machines and use scanning and email to “fax” documents.

There are trade-offs that will have to be made, and costs that will have to be weighed against benefits. The onus should not solely be on ILECs seeking authority to discontinue legacy services to preserve all aspects of retail services as they exist today.

IV. OTHER PROPOSALS

A. The Record Does Not Support Revisions to the Discontinuance Procedural Rules.

The Commission asks whether section 63.71 of its rules establishing procedures that carriers must follow to obtain section 214(a) approval should be revised.³¹ We do not generally oppose revisions to these rules, to the extent that a specific issue needs to be addressed, and we are encouraged that the Commission has specifically asked commenters to address costs and benefits of any proposed changes, as should happen in all instances when the Commission is considering changes to its regulations.

Absent a showing of actual or likely harm, the Commission should reject proposals to modify the periods after which automatic approval may be granted. The Commission grants the

³⁰ Comcast’s Xfinity Home product is marketed as a total home security and automation solution. *See* <http://www.xfinity.com/home-security.html>.

³¹ *Further Notice* at ¶ 237.

majority of section 214 applications within 31 or 60 days of public notice of the application filing, and has indicated that nothing in the record supports further expediting the process.³² Because the purpose of these provisions is to streamline the section 214 discontinuance process, it is important to preserve the ability for quick resolution where no one opposes or will be negatively affected by a discontinuance. There is no reason to believe that any real or potential harms will not be discovered or discoverable within those time frames. For that reason, we see no need to modify them.³³

We also see no need to provide for more advance notice for service discontinuances or to align their timing with copper retirement notices; the approval process has built-in safeguards such as FCC authority to condition discontinuance, including delaying it, where the public interest would be served. We also support electronic notice, consistent with other instances in which such notice is allowed (where, for example, customers have consented to be contacted by email). Further, we see no apparent reason to deny tribal governments, which serve a community or part of a community that would be directly affected by a discontinuance, notice consistent with general notice requirements, limited as appropriate (that is, to the extent they and members of their communities are actually affected).³⁴

B. Specific Criteria to Measure Good Faith Are Not Necessary.

The Commission also seeks comment on establishing a test for good faith to determine when one segment of the market, ILECs, are acting in good faith in their dealings with competitors as they seek to retire copper infrastructure. The elimination of procedures for objecting to copper retirements that are properly noticed was a positive development, and

³² *Further Notice* at ¶ 145.

³³ This structure should be preserved even if the Commission adopts criteria to assess the adequacy of substitute services; where parties challenge a discontinuance on that basis, the automatic grant provisions would not come into play.

³⁴ See *Further Notice* at ¶ 240.

replacing that option with a requirement that ILECs “work with interconnecting entities in good faith” to ensure that those entities have the information needed to avoid service disruptions to their end user customers is a reasonable alternative.³⁵ But the Commission risks nullifying the elimination of objection procedures by proposing an onerous good faith test that, in practice, could serve to give interconnecting entities a veto, or a way to significantly slow down the copper retirement process, if they oppose retirement.

In addition to potentially adding unnecessary burden and layers to effectively what is a simple requirement to share information, the proposal is flawed because it is one-sided; it applies only to ILECs’ behavior. Competitors seeking information have no corresponding requirement to act in good faith. We are concerned that this is a recipe for obstructionism.

Good faith is a subjective inquiry, and thus we think it is better suited to evaluation using a case-by-case approach rather than stringent criteria. To some extent, however, criteria could be helpful; for example, reasonable guidelines could help to ensure consistent treatment of providers. We therefore would support a few, common sense parameters to ensure that both parties act in good faith, and encourage the Commission to consider the following:

- An ILEC that provides notice in accordance with the established notice requirements for copper retirement will be presumed to have acted in good faith.
- An interconnecting entity claiming that an ILEC has not acted in good faith has the burden of proof.
- An ILEC’s failure to respond to requests that are not reasonable (for example, timely, and appropriately limited in scope) does not constitute per se lack of good faith.³⁶
- An ILEC’s failure to provide information that is proprietary or confidential does not constitute per se lack of good faith.

³⁵ *Further Notice* at ¶ 241.

³⁶ For example, requests for information not required to be disclosed under established notice requirements or not directly related to the planned copper retirement and the requesting entity’s service should be deemed not reasonable.

Because there is no right to block or delay copper retirements, the Commission should not require an ILEC to delay retirement beyond 180 days at the request of an interconnecting entity unless there is an affirmative FCC finding that the ILEC has acted in bad faith. Any such finding should be made on the record supported by reliable evidence in an enforcement action, including formal and informal complaints, and mediation.

C. The Comparable Wholesale Access Condition Should Not Be Extended Beyond Completion of the Special Access Proceeding.

The Commission asks how to facilitate continuation of commercial wholesale platform services, and seeks comment on whether reasonably comparable access to such services should be extended for a further interim period beyond completion of the special access proceeding.³⁷ The answer is simple; it need not take any action in this regard. ILECs have been offering these services *on a voluntary basis* for some time, without regulatory compulsion or interference. The last minute inclusion of a condition on platform services was at the urging of competitors who are concerned about their future ability to compete and want to lock in or lower current rates, but they offered no proof that these services are not readily available, or that they are in danger of going away.

Using the discontinuance process to address commercial wholesale platform services was a dramatic enlargement of the scope of section 214, and a reversal of policies that had been in place for some time, and were working. It was inappropriate to lump these services into the interim condition because there is no legal mandate to provide them at all. These wholesale platform services are local, non-tariffed, voluntary offerings available under commercially-negotiated contracts. Extending or establishing a permanent requirement to provide these services at regulated prices (or at all) would reverse policies and decisions that providers have

³⁷ *Further Notice* at ¶ 243.

relied on for years. Further, it would discourage facilities-based deployment and unfairly require one segment of the industry to offer services they are not currently required to provide in an environment in which multiple alternatives are available.

In addition, the expectation that absent regulatory action these agreements will no longer be available is unsupported by market conditions or evidence; again, ILECs provide these services voluntarily under negotiated agreements. Thus, a mandate to provide them is not necessary. Even if absent regulatory action these agreements would cease, that outcome would be dictated by market conditions, as is appropriate absent a finding of impairment.

V. CONCLUSION

We appreciate the Commission's consideration of these comments, and ask that it not impose additional onerous requirements that will impede the progress of technology transitions.

Respectfully submitted,

By: 

Diane Griffin Holland
United States Telecom Association
607 14th Street, NW
Suite 400
Washington, DC 20005
(202) 326-7300

Dated: October 26, 2015