

**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 NATIONAL ASSOCIATION OF STATE UTILITY  
CONSUMER ADVOCATES ON FURTHER NOTICE OF PROPOSED  
RULEMAKING**

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## I. INTRODUCTION

On August 7, 2015, the Federal Communications Commission (“FCC” or “Commission”) released a Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking (“FNPRM”) in these dockets. The National Association of State Utility Consumer Advocates (“NASUCA”)<sup>1</sup> generally supports the consumer protections adopted in the Report and Order and in the Order on Reconsideration, as an improvement over the current regime.

The FNPRM seeks comment on "specific criteria for the Commission to use in evaluating applications to discontinue retail services pursuant to section 214 of the Act."<sup>2</sup> NASUCA agrees with the Commission that it is important to establish clear criteria for considering whether a proposed service is an adequate substitute for services proposed to be eliminated pursuant to a Section 214 application. In our view, the touchstone for these criteria must be the overarching policy objective set for the Commission by Congress in the Communications Act of 1934:

...to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, *a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through*

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<sup>1</sup> NASUCA is a voluntary association of 44 consumer advocate offices in 41 states and the District of Columbia and additional associate members, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues.

<sup>2</sup> FCC 15-97 (rel. August 7, 2015), ¶ 7.

the use of wire and radio communication....<sup>3</sup>

, Section 214(a) requires the FCC also "to determine *whether the present or future public convenience and necessity would be adversely affected by any carrier's discontinuance, reduction or impairment of service to a community.*"<sup>4</sup> If a proposed substitute would adversely affect public safety, reliability, affordability or ubiquitous provision of reliable service, that substitute should not be acceptable under section 214.

NASUCA supports the Commission's tentative conclusion that some of the criteria proposed by Public Knowledge should be adopted,<sup>5</sup> along with refinements suggested by comments from other parties such as CWA.<sup>6</sup> However, we are concerned that the FNPRM has reached tentative conclusions on other criteria. The decision to reject those criteria conflicts with the accepted criteria, the Commission's overriding statutory mission and specifically, Section 214(a).

## **II. COMMENTS**

### **A. The Definition of Adequate Substitutes**

The FNPRM states that its purpose is to "adopt clear criteria that will eliminate uncertainty that could potentially impede the industry from actuating a rapid and prompt transition to IP and wireless technology" consistent with the "overarching goal of advancing the public interest and ensuring "that we protect consumers, competition, and

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<sup>3</sup> 47 U.S.C. § 151 (emphasis added).

<sup>4</sup> 47 U.S.C. § 214(a) (emphasis added).

<sup>5</sup> *FNPRM at ¶207-208.*

<sup>6</sup> See, e.g., FNPRM at fn 661. CWA proposes that the proposed criteria should be "rework[ed] and combin[ed] to focus on retail service." CWA Comments at 14.

public safety.”<sup>7</sup> The goal of eliminating uncertainty in the Section 214 process cannot trump the need for proposed substitute services to ensure protection for consumers, competition and public safety.

The Commission asks whether an application "should be dependent on the nature of the existing service and the newer service to which the carrier is transitioning."<sup>8</sup> The answer is yes. From the perspective of retail customers, the legacy services of most concern in Section 214 applications are voice service and Digital Subscriber Line ("DSL") data service. Of these, voice service provided over legacy networks is fundamental to public safety because it is the most vital means of communication between the public and first responders, in terms of the public contacting emergency services and local authorities contacting the public through reverse 911 calls.<sup>9</sup> A properly-maintained legacy copper network will continue to function during power outages, ensuring that emergency calls can continue to be made and received as long as the facilities have not been damaged beyond use.

If the Commission is faced with a decision about whether to allow an Incumbent Local Exchange Carrier ("ILEC") to withdraw legacy service and replace it with a substitute service

1. That is less affordable to consumers,
2. That is not ubiquitously available,

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<sup>7</sup> FNPRM at ¶203.

<sup>8</sup> *Id.* at ¶209.

<sup>9</sup> *See*, for example, “Phone service in rural Mendocino, Sonoma counties under scrutiny,” Santa Rosa Press Democrat, August 18, 2015, [Phone service in rural Mendocino, Sonoma counties under scrutiny](#); New York Times, “Weighing the Need for a Landline in a Cellphone World,” January 17, 2014, [http://www.nytimes.com/2014/01/18/your-money/weighing-the-need-for-a-landline-in-a-cellphone-world.html?\\_r=0](http://www.nytimes.com/2014/01/18/your-money/weighing-the-need-for-a-landline-in-a-cellphone-world.html?_r=0)

3. That is offered by a provider that is not an eligible telecommunications carrier and therefore does not offer Lifeline or have an obligation to fulfill carrier of last resort (COLR) obligations (including service quality),
4. That impedes competition, and, perhaps most importantly,
5. That is less reliable than the legacy service (and is therefore a step backwards in terms of public safety),

the Commission should reject the application.

A service that is less reliable (when provided on a properly maintained network) or less affordable than the legacy service, or a service that is incapable of reaching all customers in a service territory should not be deemed an "adequate substitute" for legacy service.

**B. Criteria for Section 214 Review**

The FNPRM proposes to adopt some of the criteria proposed by Public Knowledge for service withdrawal and also proposes that if the carrier can demonstrate that it meets those criteria it would be deemed eligible for automatic grant of the application pursuant to section 63.71(d) of the Commission's rules.<sup>10</sup> NASUCA believes that even if a carrier purports to meet the criteria, the public and competitors should have the opportunity to review and comment upon the proposal. While we understand the desire of the Commission to prescribe clear criteria, the interpretation of the criteria will always be subjective. The Commission should not rely solely on certification by a carrier that it meets the adopted criteria.<sup>11</sup> Such an approach, even under penalty of perjury, would not be consistent with the objectives of the revised service discontinuation process.

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<sup>10</sup> FNPRM at ¶ 210.

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

The FNPRM proposes that a carrier must demonstrate that any substitute service offered by the carrier - *or alternative services available from other providers in the affected service area* - meet the following criteria: (1) network capacity and reliability; (2) service quality; (3) device and service interoperability, including interoperability with vital third-party services (through existing or new devices); (4) service for individuals with disabilities, including compatibility with assistive technologies; (5) PSAP and 9-1-1 service; (6) cybersecurity; (7) service functionality; and (8) coverage.<sup>12</sup> The FNPRM notes that parties such as CWA and the Rural Broadband Policy Group suggest "reworking and combining" the criteria proposed by Public Knowledge to focus on retail services, as follows.

- Reliable and accurate access to E911;
- Constant availability of service, including during storms and emergencies;
- Adequate call quality;
- Compatibility with health and safety services that use the network;
- Adequate data transmission capability; and
- Affordable to consumers.<sup>13</sup>

NASUCA supports clarifying that the proposed criteria reflect the concepts suggested by CWA and incorporate the concept of affordability proposed by the Rural Broadband Policy group.<sup>14</sup>

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<sup>12</sup> *Id.* at ¶ 208.

<sup>13</sup> *Id.* at fn 661.

<sup>14</sup> Rural Broadband Policy Group Comments at 7.

### **1. Network Capacity and Reliability**

Network Capacity and reliability should be part of the Commission's adequate substitute evaluation. If a service is not reliable, it cannot be an adequate substitute. Without sufficient capacity, service will not be reliable. Reliable service should also involve network design that allows for the continued completion of calls over diverse routes when facilities are damaged, and during storms and emergencies. In addition, the consideration of network capacity and reliability should, at a minimum, also include the criteria spelled out in para. 216 of the FNPRM.

### **2. Service Quality**

The FNPRM proposes that one criteria in an adequate substitute test should be that "the carrier demonstrates in its section 214 application that any replacement or alternative service meets the minimum service quality standards set by the state commission responsible for the relevant service area.<sup>15</sup> NASUCA believes that this proposal is reasonable. However, as the FNPRM recognizes,<sup>16</sup> there are states where the state utilities commission either has not established standards or may lack authority to do so. NASUCA will carefully consider further proposals contained in opening comments and may provide further suggestions in reply.

### **3. Device and Service Interoperability**

NASUCA supports adopting the proposed criterion that the carrier must demonstrate that its replacement service allow for as much or more interoperability of

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<sup>15</sup> FNPRM at ¶ 218.

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

both voice and non-voice devices for the service to be retired.<sup>17</sup> As the FNPRM notes, "the record is already replete with examples of such devices and services."<sup>18</sup> The FNPRM proposed language includes allowing for "newer technology-based devices" that presumably would take the place of existing voice and non-voice devices.<sup>19</sup> The Commission should proceed with caution regarding this aspect of its proposal. Retail and wholesale customers, as well as other interested parties, should have the opportunity to carefully consider – and submit information to the Commission – whether the "newer" device is a true substitute for the existing device. For example, there may be a substantial cost to retail customers to purchase a new device if existing devices are not compatible. Or, while a carrier may claim that the newer device is an adequate replacement, the customers who use the device may disagree and take issue with whether the newer device provides the functionality and ease of use associated with the existing device. This is another reason why an application should not be deemed granted and public comment should be taken regarding section 214 applications.

#### **4. Public Safety Answering Point ("PSAP") and 9-1-1 Services**

The FNPRM tentatively concludes that one criterion in an adequate substitute test should be that "the carrier demonstrates that a substitute service offered by the requesting carrier or alternative services available from other providers in the relevant service area complies with applicable state, Tribal and federal regulations regarding the availability,

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<sup>17</sup> *Id.* at ¶219.

<sup>18</sup> *Id.* at ¶220.

<sup>19</sup> *Id.* At ¶219.

reliability, and required functionality of 9-1-1 service."<sup>20</sup> This criterion should be adopted.

Compliance with the criterion should not be deemed granted based on carrier certification. Members of the public, especially including first responders, should have the opportunity to review and comment on the proposal.

The proposed replacement service should provide as good or better 9-1-1 functionality as the service being replaced. The FNPRM asks for comment on whether a VoIP service "that will not function during a loss of commercial power, or that provides only a limited amount of battery backup for CPE, serve as an adequate substitute to reach 9-1-1 in an emergency...."<sup>21</sup> The answer is no. It is also important to note that non-VoIP services can be offered over facilities such as fiber, coaxial cable or wireless that will not function during a commercial power outage and that provide only a limited amount of battery back-up for CPE. Neither VoIP or non-VoIP services that do not function during a commercial power loss are adequate substitutes for legacy voice services. Moreover, the FNPRM correctly recognizes that "without ensuring adequate service to PSAPs, residential 9-1-1 service could be negatively affected."<sup>22</sup> NASUCA may provide further comment on questions related to this issue in reply.

## **5. Service Functionality**

The FNPRM tentatively concludes that in a section 214 application a carrier must demonstrate that the proposed replacement service will "permit similar service

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<sup>20</sup> *Id.* at ¶225.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

functionalities as the service for which the carrier seeks discontinuance authority."<sup>23</sup> NASUCA agrees that this criterion should be adopted. The importance of ensuring similar service functionalities was evident in the public dissatisfaction with Verizon's Voice Link offering. Many important services, and devices necessary to obtain services, that customers could utilize on the legacy network do not work with Voice Link. These included, but are not limited to, medic-alert service, fax machines, credit card machines and some data services.<sup>24</sup>

The point of technological advance is to improve the communications services available to the public. Allowing a carrier to discontinue legacy service and replace it with a service that does not support the services and functionality that residential and business customers rely upon constitutes an impairment of service to the community, and cannot be considered an adequate substitute.

The FNPRM asks how this proposed criterion correlates to the Commission's statement in the *Declaratory Ruling* "that the relevant task in defining the scope of a carrier's service 'is to identify the service the carrier actually provides to end users' and that '[i]n doing so, the Commission takes a functional approach that evaluates the totality of the circumstances."<sup>25</sup> The proposed service functionality criterion directly correlates with this statement because the service provided by a carrier can be put to multiple uses by retail customers, including the use of additional services offered by third parties that rely on the telecommunications service purchased from a carrier. If the nature of the

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<sup>23</sup> *Id.* at ¶ 229.

<sup>24</sup> *See* Before the Federal Communications Commission, WC Docket No. 13-149, Comp. Pol. File No. 1112 and WC Docket No. 13-150, Comp. Pol. File No. 1115, Initial Comments of the New Jersey Division of Rate Counsel, NASUCA and The Utility Reform Network, July 29, 2013, at 14-22.

<sup>25</sup> *Id.* At ¶230.

ILEC telecommunications service changes to such a degree that customers can no longer utilize previously functioning services, there is a decline in functionality that would be harmful to the public, commerce and public safety.

## 6. Coverage

The FNPRM asks for comment on a tentative conclusion that a carrier must demonstrate that "the substitute service will remain available in the affected service area to the persons to whom the discontinued service had been available."<sup>26</sup> Following from this, the FNPRM asks whether the Commission should adopt a "*de minimis* threshold by percentage of prior population or geographic area reached for which loss of coverage is tolerable...."<sup>27</sup> For retail service the carrier should require that the substitute service will remain available in the entire service area. The Commission should not adopt a *de minimis* threshold by percentage of population, geographic area or another measure. Under section 214, an ILEC might apply to discontinue legacy service in an entire exchange or territory. ILECs are Eligible Telecommunications Carriers ("ETCs") and carriers of last resort, offering Lifeline service and some offer service to customers in high cost areas. The Commission has an obligation to ensure that all customers in a service territory where the legacy service is offered continue to have the ability to obtain service.

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<sup>26</sup> *Id.* at ¶231.

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

**C. The Commission Must Ensure that a Truly Adequate Substitute Retail Service is Ubiquitously Available to All Customers in A Service Territory Covered by a Section 214 Application.**

The FNPRM tentatively concludes that a 214 application can be deemed granted when an ILEC demonstrates that the existence of an adequate substitute, which "can be a service the carrier offers or an existing offering by third parties."<sup>28</sup> The Commission should not adopt this tentative conclusion.

As discussed earlier, it is unwise to deem an application granted based solely on carrier certification without providing an opportunity for comment. An application proposing that the legacy service be substituted for by a variety of services provided by multiple carriers should not be deemed granted.

It is important to recognize that ILECs are typically carriers of last resort, required to provide ubiquitous service without discrimination. ILECs typically offer a stand-alone voice service, and many offer stand-alone data. They are required to serve their entire territory without picking and choosing which customers they serve and don't serve. In many states ILECs are still subject to requirements pertaining to aspects of retail service such as price, customer service, consumer protection and service quality. And not least importantly, the legacy network is reliable during commercial power outages.

The Commission's objective in evaluating 214 applications should be to ensure

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<sup>28</sup> Id. at ¶¶204, 211 and 213. At para. 204, the FNPRM states that the Commission agrees with ILECs that it "must evaluate the availability of alternative services from sources other than the carrier seeking section 214 discontinuance authority" and "evaluate the adequacy of those alternative services using the same criteria as those applied to any replacement service offered by the discontinuing carrier."<sup>28</sup> In para. 211, the FNPRM asks if it should require "that one replacement or alternative service satisfy every criterion" adopted to qualify for automatic grant, "or is it sufficient that multiple alternative services are available which collectively satisfy all of the adopted criteria...."

that all retail and wholesale customers in a service territory where the service is proposed to be withdrawn continue to have non-discriminatory access to an affordable, reliable substitute with no diminution of functionality. The proposal to allow one or more third party services to be considered an adequate substitute for applications that are eligible to be deemed granted creates the potential for an affordable, reliable, ubiquitous legacy service to be replaced by patchwork of services, offered under different terms and conditions, with varying functionality, reliability and levels of affordability, with no guaranty of long-term viability for ubiquitous service.

**D. D. The Tentative Conclusions in Para. 234 Should be Rejected**

The FNPRM tentatively concludes that the Commission **should not adopt** the following criteria:

- Operability during emergencies, including power outages, because this issue is being addressed by the Commission through separate means;
- Adequate transmission capability, because end users and carriers should be free to reach agreement on services at a wide range of transmission capacities;
- Affordability, because the evaluation process in this context should focus on the nature of the service and because cost is not part of the equation in determining whether an available alternative service constitutes an adequate substitute for the service sought to be discontinued; and
- Connection persistence, because the Commission today takes other action to address that issue.<sup>29</sup>

NASUCA respectfully, but strongly, disagrees with this tentative conclusion. The four criteria above are central to the consideration of what constitutes an adequate substitute.

If they were excluded from the evaluation process and as a result a substitute service was

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<sup>29</sup> FNPRM at ¶ 234.

adopted that did not operate during emergencies, lacked adequate transmission capability and thus was unreliable, was unaffordable, and lacked connection persistence, all of these attributes that have defined the nature of telecommunications service for decades in this nation would be lost. From the perspective of retail customers, all of these criteria are essential. Customers need and deserve a service that operates during emergencies, that is reliable, that is affordable, that has adequate transmission capability, and that has connection persistence.

It should not matter whether the issues are being addressed in separate proceedings. If a service attribute is central to the evaluation of what constitutes an adequate substitute, it should be spelled out in the formal requirements for section 214 applications. For many decades Americans have been able to rely upon a public communications system that operated during emergencies and supported communications vital to the public health and safety. The Commission earlier asked for comment on three criteria that relate to operability during emergencies, network capacity and reliability, service quality and PSAP and 911 access. These criteria are important *precisely because* they support operability during emergencies, adequate transmission capability and connection persistence.

The reasoning given for not including adequate transmission capability as a criterion is that "end users and carriers should be free to reach agreement on services at a wide range of transmission capacities."<sup>30</sup> This may be true for data communication, *in places where there is competition*. But it does not apply to voice service – wireline or wireless – where lack of adequate transmission capacity can equate to unreliable service,

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<sup>30</sup> *Id.*

or data service where there are limited options. Moreover, the rationale assumes that the customers affected by a section 214 application have bargaining power and a true choice of competitive alternatives.

For many customers, that is not the case. There can be no dispute that both voice and data are now essential services. For customers in many rural areas, the ILEC is the only game in town (or unincorporated area). Cable companies may offer service in core areas, but rarely serve ubiquitously. Wireless service is unavailable in many rural areas due to topography and vegetation.<sup>31</sup> Rural customers do not have the ability to "reach agreement on services with a wide range of transmission capacities." Even for many customers in urban and suburban areas, the extent of true competition is debatable. The choice is generally between the ILEC and a cable company. Wireless voice is spotty in many places and wireline data is the preferred means of carrying out tasks such as researching and completing homework assignments, searching for employment and filling out job applications.

And, as noted earlier, ILECs are COLRs and ETCs. Most cable companies offering telephone service are not COLRs. Time Warner does have ETC status in states like California and New York, but that is the exception rather than the rule. Transmission capability is part and parcel of considering whether service is reliable and it should be part of the section 214 evaluation process.

As discussed earlier in these comments, NASUCA strongly supports including affordability as one of the criterion to be taken into consideration in the evaluation of substitute services. From the perspective of customers, whether a service is affordable *is*

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<sup>31</sup> *NASUCA Comments at 25.*

part of the nature of the service and affordability should be a criterion in the section 214 process.

### **III. CONCLUSION**

NASUCA appreciates the opportunity to comment on the criteria for evaluating section 214 applications. The Commission's objective in evaluating 214 applications should be to ensure that all retail and wholesale customers in a service territory continue to have non-discriminatory access to an affordable, reliable substitute with no diminution of functionality. Adopting the criteria proposed by CWA and Public Knowledge – but tentatively rejected by the FNPRM, is a major step towards ensuring the continuance of a national public communication system that has served the nation well.

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