Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	WC Docket No. 12-353
Policies and Rules Governing Retirement	)	
of Copper Loops by Incumbent Local	)	RM-11358
Exchange Carriers	)	
	)	

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INTRODUCTION AND SUMMARY

On behalf of a handful of competitive local exchange carriers ("CLECs"), Mpower has renewed a call to suspend and ultimately replace the current copper retirement rules in favor of broad and intrusive requirements that would put the Commission in the position of second-guessing decisions by incumbent local exchange carriers about how best to operate and manage their networks.[1] This proposal would amount to a new federal carrier-of-last-resort mandate for obsolete legacy facilities. That extreme regulatory intrusion would impose high costs and require substantial justification under any circumstances. But such relief is particularly inappropriate now, as ILECs stand at the cusp of a historic transition from legacy "telephone" systems to all-Internet Protocol ("IP") networks—a transition that will present "extraordinary opportunities to improve American life and benefit consumers,"[2] but will require billions of dollars of private investment and a massive infrastructure overhaul.

The consequences of regulatory missteps during this transition would be substantial. And the copper retirement rules requested by these CLECs would be just such a misstep. The operational challenges and complexities of the transition to all-IP networks are indisputable, and to manage this transition effectively, ILECs must be free to superintend their networks and to

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[1] On January 25, 2013, a group of CLECs led by Mpower requested that the Commission "refresh the record and take expedited action to update its copper retirement rules" in existing dockets. Letter to Ms. Dortch, Secretary, FCC, from Eric J. Branfman on behalf of Mpower Communications Corp. *et al.* (filed Jan. 25, 2013) ("Mpower letter"). On February 4, 2013, the Wireline Competition Bureau invited comments in response to the request. *See* Public Notice, *Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission's Copper Retirement Rules*, DA 13-147 (rel. Feb. 4, 2013). AT&T's comments here supplement comments that AT&T filed in 2007 in RM-11358. *See* Opposition of AT&T, *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358 (filed Mar. 1, 2007) ("2007 AT&T Comments").

[2] FCC, *Connecting America: The National Broadband Plan*, at 59 (2010) ("*National Broadband Plan*").

retire network elements that have been rendered anachronistic, that no longer perform optimally, or that are unduly costly. Public-utility-style regulation that would enable regulators to intervene in ILECs' network-management decisions and require ILECs to incur the substantial costs of maintaining two networks—one to provide next-generation services and a second simply to prolong the "completely synthetic competition" fostered by unbundling[3]—could delay or compromise the transition to all-IP networks. As the *National Broadband Plan* recognized, "requiring an incumbent to maintain two networks … reduce[s] the incentive for incumbents to deploy" next-generation facilities and "siphon[s] investments away from new networks and services."[4] Yet that is precisely what these CLECs seek in this proceeding.

For at least four reasons, the Commission should reject these CLECs' renewed advocacy for regulatory micromanagement of ILECs' decisions to retire copper network facilities. *First*, the relief these CLECs seek is a straightforward attempt to upend the well-founded conclusions of the *TRO*[5] and subsequent orders[6] in which the Commission rejected proposals to require ILECs to unbundle broadband networks. In those orders, the Commission declined to impose broad unbundling obligations for next-generation networks, finding both that CLEC access to such elements generally does not satisfy the Section 251(d)(2) impairment standards and that

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[3] *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) ("*USTA I*").

[4] *National Broadband Plan* at 49.

[5] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*TRO*").

[6] *See* Order on Reconsideration, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 20293 (2004) ("*TRO Recon. Order*").

forced sharing would undermine investment in next-generation networks and hinder facilities-based competition.

Although the CLECs in this proceeding seek compulsory access to copper loops and not to fiber facilities, they acknowledge that they seek to use copper loops to provide broadband services. And in areas where an ILEC has built out fiber-to-the-home ("FTTH"), fiber-to-the-curb ("FTTC"), or hybrid loop facilities—that is, the situations in which an ILEC likely would consider copper retirement—the Commission in the *TRO* generally refused to impose unbundling obligations for broadband-oriented facilities. Instead, an ILEC can retire its copper facilities and satisfy its obligations under those orders by providing CLECs a TDM or 64 kbps (*i.e.*, *narrowband*) transmission path over the ILEC's next-generation facilities.[7] The Commission's overall approach to broadband unbundling has proven enormously successful, as investment in broadband networks by ILECs and competitors alike has exploded. There is no justification for the Commission to reverse those policies now, particularly as ILECs navigate the challenges of the transition to all-IP networks.

Second, even if there were a policy case for adopting the CLECs' proposed rules—and there is none—the Commission lacks the legal authority to grant the relief CLECs seek. As the Eighth Circuit has held, the Telecommunications Act of 1996 gives the Commission certain

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[7] The *TRO* made clear that ILECs that upgrade their networks need not unbundle copper loops to enable CLECs to provide broadband service. Specifically, where an ILEC has overbuilt its legacy facilities with fiber loops, it may retire its copper loops and provide CLECs a 64 kbps voice grade transmission path over the fiber loop. Similarly, in the case of hybrid loops, an ILEC may retire its standalone copper loops and need provide only a TDM transmission path over the upgraded loops. *See TRO*, 18 FCC Rcd at 17145 ¶ 277, 17152-53 ¶ 294 & n.847, 17153-54 ¶ 296; 47 C.F.R. § 51.319(a)(2)(ii), (3)(iii).

authority to order unbundling of an ILEC's "*existing* network."[8] The 1996 Act does not give CLECs the right to insist that ILECs *construct* network elements that do not exist to promote artificial competition, nor does it give CLECs a right to insist that ILECs *maintain* network elements that ILECs otherwise would retire. Furthermore, even if the Commission's statutory unbundling authority somehow permitted it to force ILECs to maintain obsolete network elements, such an exercise of authority would require a finding that CLEC access to such network elements satisfies the gating criteria set forth in Section 251(d)(2).[9] Again, here, these CLECs effectively seek to reverse the Commission's Section 251(d)(2) analysis in the *TRO* with respect to broadband facilities, but there is no evidence in the record that could possibly justify such a finding.

Third, quite apart from the serious policy and legal problems with these CLECs' request, no relief would be workable until the Commission addressed the novel and complicated question of how ILECs would be compensated for maintaining obsolete facilities under the new copper retirement regime proposed by these CLECs. The TELRIC pricing methodology was established for facilities that ILECs wish to include in their networks in order to make them available to—and thus to receive compensation from—either retail or wholesale customers. And the wholesale leasing rates were based on that premise.

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[8] *Iowa Utilities Board v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997), *aff'd in part and rev'd in part, remanded*, 525 U.S. 366 (1999).

[9] Section 251(d)(2) provides that CLECs may not gain access to ILEC network elements unless the Commission determines, "at a minimum," that "the failure to provide access to such network elements would impair the ability of [a CLEC] to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

That same methodology simply does not work where an ILEC has no business use for obsolete facilities, yet is required to maintain them solely for the benefit of the very few CLECs that might potentially seek access to them. In these circumstances, basic principles of cost-recovery would require CLECs that *do* seek access to such facilities to bear the full costs of those facilities, given that the facilities are being maintained solely for the benefit of those CLECs. Here, ILECs would at a minimum be entitled to recover the full costs of all unused copper loops that regulation forces them to retain (along with the costs of all facilities, systems, and personnel necessary to support those loops) through rates set for the few loops that *are* leased. Of course, CLECs seeking these copper retention rules presumably do not wish to pay rates based on those full costs; instead, they wish to leave ILECs holding the bag for the costs of all copper loops not leased. But that proposal would violate statutory and constitutional principles of just compensation for these facilities.

Finally, these CLECs' request for regulatory intervention is premature. As part of its planning for the transition to an all-IP network, AT&T is now carefully studying alternatives for providing access to retired copper facilities. Because there may be market-based solutions that preserve ILECs' control over their networks while also addressing any legitimate concerns regarding the future accessibility of retired copper, the Commission should allow AT&T, and other ILECs, to complete internal analyses before undertaking any reforms to the Commission's copper retirement rules, much less making the precipitous and intrusive changes to the existing copper retirement rules proposed by these CLECs.[10]

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[10] As AT&T has discussed in prior comments in this proceeding and in the docket considering USTelecom's Petition for Forbearance from enforcement of certain legacy

DISCUSSION

I. THE COMMISSION'S MEASURED APPROACH TO THE UNBUNDLING OF BROADBAND FACILITIES HAS PROVEN HIGHLY SUCCESSFUL, AND THE COMMISSION SHOULD NOT REVERSE COURSE NOW BY EXPANDING CLECS' ACCESS TO COPPER FACILITIES FOR THE PURPOSE OF PROVIDING BROADBAND SERVICES

The Commission's unbundling framework for next-generation networks—consistent with its hands-off approach to broadband generally—has proven remarkably successful. A key part of the Commission's broadband unbundling framework was its decision generally not to require ILECs, after upgrading their networks by deploying fiber, to provide wholesale access to network elements, including copper loops, that would enable CLECs to provide *broadband* services. As AT&T explained in prior comments in this proceeding, there is no justification for the Commission to reverse course now by requiring ILECs to maintain copper facilities they otherwise would retire simply to allow CLECs to provide broadband services.[11] The case against such regulation is even stronger today in light of the overwhelming evidence that the Commission's unbundling decisions have spurred the very investment in next-generation facilities that the Commission predicted.

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regulations, the record supports one revision to the current rules that would smooth the transition to an all-IP ecosystem. Specifically, the Commission should eliminate the redundant round of public notices that is required before the clock may start running on carrier objections to the timing of a proposed change to an ILEC's network. *See* Reply Comments of AT&T, *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, at 19-21 (filed Apr. 24, 2012).

[11] *See* 2007 AT&T Comments at 10-16.

In the *TRO*, the Commission largely declined to impose unbundling obligations with respect to next-generation networks—namely, FTTH loops and hybrid loops.[12] The Commission instead imposed "limited" obligations principally designed to ensure CLEC access to ILECs' networks for the provision of *narrowband* services.[13] In the case of FTTH or FTTC, an ILEC may retire its copper loops and provide CLECs with only a 64 kbps voice grade transmission path over the fiber loop.[14] In the case of hybrid loops, an ILEC may retire its standalone copper loops and provide a TDM transmission path over its next-generation facilities.[15] In short, under the *TRO*, after an ILEC has upgraded its network, CLECs have no right to compel ILECs to lease them retired copper loops for their provision of broadband service.

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[12] *See TRO*, 18 FCC Rcd at 17142-48 ¶¶ 273-84 (FTTH loops); *id.* at 17148-54 ¶¶ 285-97 (hybrid loops). AT&T's prior comments set forth a detailed summary of the approach taken by the Commission to unbundling of next-generation facilities in the *TRO* (including for FTTH and hybrid loops). *See* 2007 AT&T Comments at 6-9. AT&T will not repeat that summary in full here.

[13] *TRO*, 18 FCC Rcd at 17145 ¶ 277; *see id.* at 17153-54 ¶ 296.

[14] *Id.* at 17144-45 ¶ 277; 47 C.F.R. § 51.319(3)(iii).

[15] *See TRO*, 18 FCC Rcd at 17151 ¶ 291, 17152-53 ¶ 294, 17153-54 ¶ 296; 47 C.F.R. § 51.319(a)(2)(ii), (iii); *see also TRO*, 18 FCC Rcd at 17152-53 ¶ 294 & n.847, 17153-54 ¶ 296 (retirement of standalone copper loops). With respect to certain high-capacity hybrid loops used in enterprise contexts, the Commission did require ILECs to provide unbundled access to the TDM-based features, functions, and capabilities of the loops (*e.g.*, DS1 and DS3 transmission). *See TRO*, 18 FCC Rcd at 17151 ¶ 291, 17152-53 ¶ 294, 17109 ¶ 209, 17149-50 ¶ 289. Significantly, however, the Commission specifically declined to require ILECs to add TDM functionality to hybrid loops to benefit CLECs if the ILECs would not otherwise deploy such functionality to serve their own customers. *See TRO Recon. Order*, 19 FCC Rcd at 20303-04 ¶ 20. Moreover, nowhere in its hybrid loop analysis did the Commission question its findings that CLECs have the proper incentives to self-deploy broadband facilities and that forced sharing would deter investment in next-generation facilities by ILECs. *See TRO*, 18 FCC Rcd at 16984 ¶ 3, 17124-25 ¶ 240, 17142-44 ¶¶ 274-76.

In adopting this unbundling framework, the Commission rejected, as "unnecessary," proposals that "would require affirmative regulatory approval prior to the retirement of any copper loop facilities" by ILECs.[16] In rejecting those proposals, which were virtually identical to those pushed by these CLECs now, the Commission acknowledged that requiring ILECs to maintain two redundant networks would impose additional costs on ILECs.[17] And, importantly, the Commission held that the limited obligation to provide access to the TDM features of hybrid loops did *not* prevent ILECs from retiring copper facilities.[18] The Commission subsequently extended this unbundling framework to FTTC loops.[19]

The framework established in the *TRO* governing the unbundling of next-generation facilities rested on several pillars. First, the Commission found that CLECs generally do not satisfy the Section 251(d)(2) impairment analysis with respect to broadband services in one of the most likely circumstances where copper retirement issues could arise: when an ILEC has deployed FTTH, FTTC, or hybrid loops (and may thus wish to retire some or all of its copper infrastructure).[20] The Commission explained that, in new developments (greenfield areas), ILECs and CLECs face "largely the same" "entry barriers";[21] and that, in overbuild situations

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16 *TRO*, 18 FCC Rcd at 17146-47 ¶ 281; *see also id.* at 17152-53 ¶ 294 n.847.

17 *Id.* at 17146-47 ¶ 281 n.823 (citing record evidence).

18 *See id.* at 17152-53 ¶ 294 n.847, 17153-54 ¶ 296.

19 *See TRO Recon. Order*, 19 FCC Rcd at 20297 ¶ 9.

20 The rules proposed by CLECs would thus require the Commission to reverse the impairment analysis it adopted in the *TRO* with respect to FTTH, FTTC, and hybrid loops. As explained in the text, there is no policy justification for doing so, and, in any event, the Commission would need a much more developed record to make the detailed findings necessary to support an impairment decision.

21 *TRO*, 18 FCC Rcd at 17143 ¶ 275.

(brownfield areas), "competitive and incumbent LECs" also "largely face the same obstacles in deploying" fiber.[22] In addition, the Commission found that, in any area, "the revenue opportunities are significantly greater for fiber-based construction," meaning that CLECs have the appropriate economic incentives to engage in facilities-based competition absent forced sharing.[23] Finally, the Commission predicted that its broadband unbundling framework would "stimulate facilities-based deployment in two ways": (1) by creating the proper incentives for ILECs to "expand their deployment of [next-generation] networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market" and (2) by motivating CLECs to "seek innovative network access options to serve end users," including through self-deployment of fiber facilities.[24]

The D.C. Circuit affirmed the Commission's broadband unbundling decisions across the board.[25] In particular, with respect to hybrid loops, the D.C. Circuit credited the Commission's explanation that declining to impose unbundling obligations would "stimulate … infrastructure investment" in next-generation networks.[26] And with respect to FTTH deployment, the D.C.

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22 *Id.* at 17144 ¶ 276.

23 *Id.* at 17124 ¶ 240; *see id.* at 17144 ¶ 276.

24 *Id.* at 17141 ¶ 272; *see id.* at 16984 ¶ 3 ("excessive network unbundling requirements tend to undermine the incentives of both incumbent LECs and new entrants to invest in new facilities and deploy new technology" and "[t]he effect of unbundling on investment incentives is particularly critical in the area of broadband deployment, since incumbent LECs are unlikely to make the enormous investment required if their competitors can share in the benefits of these facilities"); *id.* at 17149 ¶ 288 (unbundling of hybrid loops "would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs").

25 *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 578-82 (D.C. Cir. 2004) ("*USTA II*").

26 *See id.* at 580.

Circuit agreed that "[a]n unbundling requirement" would "likely [] delay infrastructure investment, with CLECs tempted to wait for ILECs to deploy FTTH and ILECs fearful that CLEC access would undermine the investment's potential return. Absence of unbundling … will give all parties an incentive to take a shot at this potentially lucrative market."[27]

The Commission's judgments, affirmed by the D.C. Circuit, have proven correct. The most telling evidence of this is that investment in next-generation facilities has skyrocketed. As AT&T recently explained to the Commission, the private sector has already invested well over $1 trillion in broadband networks, and AT&T itself has announced new plans to pour billions of dollars into next-generation networks.[28] And as AT&T has elsewhere demonstrated, the evidence is overwhelming that facilities-based broadband competition is robust, and certainly more vigorous than when the Commission issued the *TRO* in 2003.[29]

The relief these CLECs seek here, although focused on copper loops, would countermand the Commission's broadband unbundling framework and threaten to slow the extraordinary flow of capital into broadband investment since the *TRO*. These CLECs acknowledge that the copper

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[27] *Id.* at 584.

[28] *See* AT&T Petition, *AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353, at 6, 8-10 (filed Nov. 7, 2012) ("AT&T TDM-to-IP Petition"); *see also National Broadband Plan* at xi ("Fueled primarily by private sector investment and innovation, the American broadband ecosystem has evolved rapidly. The number of Americans who have broadband at home has grown from eight million in 2000 to nearly 200 million last year. Increasingly capable fixed and mobile networks allow Americans to access a growing number of valuable applications through innovative devices.").

[29] *See* Comments of AT&T, Inc., *Framework for Broadband Internet Service*, GN Docket No. 10-127, at 52-55 (filed July 15, 2010) (collecting evidence of robust broadband competition).

retirement rules they seek are aimed at enabling their provision of *broadband* services.[30] But the Commission rightly decided in the *TRO* that CLECs generally do not satisfy the Section 251(d)(2) analysis for access to broadband facilities where ILECs have upgraded their networks because incumbents and new entrants, in most ways, are similarly situated with respect to incentives to invest in broadband-capable facilities. And the Commission also rightly determined that forced sharing obligations, including with respect to copper loops in FTTH, FTTC, or hybrid loop build-out areas, could deter ILECs from investing in next-generation networks and also discourage CLECs from building out their own networks.[31] The copper retirement rules these CLECs seek here would upend those sound decisions by forcing ILECs to incur the substantial costs of maintaining—solely for the benefit of their competitors—copper facilities that are duplicative of other network facilities and that ILECs have made a business judgment that they would rather retire. And by giving CLECs the ability to rely on ILECs' retired copper facilities, such rules would discourage CLEC investment.

For those reasons, the proposed copper retirement rules were not justified when CLECs first suggested them, but they are far more indefensible today, as the communications industry is

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[30] *See, e.g.*, Mpower letter at 11 ("The Commission has an obligation to act … in order to preserve broadband competition.").

[31] *See TRO*, 18 FCC Rcd at 16984 ¶ 3, 17141-42 ¶ 272, 17149-50 ¶ 288. Courts have recognized the substantial costs of forced sharing as well. *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part) (compulsory sharing can undermine the incentives to "undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement"); *USTA I*, 290 F.3d at 424-25; *Verizon New England v. Maine Public Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) (forced sharing can "retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition in the long run").

transitioning from legacy to all-IP networks. In undertaking a massive overhaul of their legacy networks, ILECs must have the flexibility to make business and operational decisions about which network facilities to maintain and how and when certain facilities should be retired. Regulatory review and potential reversal of each retirement decision made by an ILEC would compromise the ability of ILECs to manage their networks effectively and efficiently. Moreover, regulations that would require ILECs to incur the substantial costs associated with maintaining facilities they no longer need would compromise network modernization, as it would divert scarce resources from broadband investment to maintaining unnecessary and redundant network facilities.[32] There was never a justification for requiring maintenance of antiquated or unnecessary network facilities solely to enable the "completely synthetic competition"[33] brought about by unbundling, but such a regime would have particularly harmful consequences now in light of the pressing need to focus all available resources on upgrading to next-generation facilities.

II. THE REQUESTED RELIEF WOULD EXCEED THE COMMISSION'S AUTHORITY

The request of these CLECs to extend access to obsolete copper facilities by regulatory fiat should also be rejected because the Commission lacks the authority to grant such relief for at least two reasons.

First, the Commission's unbundling authority does not include the ability to compel ILECs to *maintain* network elements solely for the benefit of CLECs when ILECs would otherwise retire them. Instead, the Commission's authority is properly limited to ensuring access

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32 *See* AT&T TDM-to-IP Petition at 19; *National Broadband Plan* at 49.

33 *USTA I*, 290 F.3d at 424.

to existing network elements that an ILEC would otherwise maintain for its own business purposes. Under Section 251(c)(3), ILECs are required to provide "nondiscriminatory *access* to network elements on an unbundled basis at any technically feasible point."[34] The concept of "access," of course, presupposes that a network element in fact exists and is a part of the network. Indeed, the phrase "network element" itself assumes that a facility is part of an ILEC's *network*, and not a facility an ILEC has retired or would like to retire. *Nothing* in Section 251 requires ILECs to maintain network elements that they would otherwise retire.

The Eighth Circuit's decision in *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997), drives home this point. In that case, the court of appeals, in striking down the Commission's superior network access rules, held that Section 251(c)(3) "implicitly requires unbundled access only to an incumbent LEC's *existing* network—not to a yet unbuilt superior one."[35] The Eighth Circuit reached that conclusion notwithstanding CLECs' argument that any "burden" on ILECs from a requirement to provide superior network facilities would be alleviated because a requesting carrier would have to pay for any such facility.[36]

To be sure, the Eighth Circuit's decision involved rules that would have required ILECs to provide "access to [network] elements at levels of quality that are superior to those levels at which the incumbent LECs provide the services to themselves."[37] And these CLECs here seek to force ILECs to *maintain* network elements they would otherwise retire. That difference is

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34 47 U.S.C. § 251(c)(3).

35 120 F.3d at 813.

36 *Id.* at 812.

37 *Id.*

immaterial: the core principle of the Eighth Circuit's holding—that Section 251(c)(3) "requires unbundled access only to an incumbent LEC's *existing* network" and thus that CLECs take ILECs' networks as they find them—applies fully in each circumstance. It is one thing to require ILECs to provide piece parts of their existing networks to competitors at regulated wholesale rates. It is another thing entirely to require ILECs to *build* new network elements or to *maintain* elements that ILECs no longer want or need simply for the sake of CLECs and their particular business plans. And nothing in Section 251(c) suggests that ILECs have any such duty, as the Eighth Circuit recognized.

Indeed, even were Section 251 ambiguous on this point, and it is not, it should be narrowly construed under the principle of constitutional avoidance.[38] Specifically, if Section 251 were read to permit the Commission to require ILECs to maintain network facilities, it would raise serious concerns under the Takings Clause, at least absent a practical mechanism to compensate ILECs for the substantial costs of that requirement, if such a mechanism even could be developed (discussed below). A regulatory taking occurs when government action causes significant economic harm that interferes with settled, investment-backed expectations, particularly where the action is extreme and unjustified.[39] Those standards would be readily

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[38] *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997) ("Federal courts, when confronting a challenge to the constitutionality of a federal statute, follow a 'cardinal principle': They will 'first ascertain whether a construction … is fairly possible' that will contain the statute within constitutional bounds.") (quoting *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)); *Bell Atl. Tel. Cos. v. FCC*, 24 F.3d 1441, 1445-47 (D.C. Cir. 1994) (applying this principle in the context of physical collocation requirements).

[39] *See Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984); *see also Brooks-Scalon Co. v. Railroad Comm'n of La.*,

satisfied were the statute read to permit the relief these CLECs seek: ILECs would be forced to expend significant resources on maintaining network facilities they would otherwise retire; the relief would plainly interfere with investment-based expectations because the industry has relied on the Commission's existing broadband unbundling framework and copper retirement rules in making multi-billion-dollar investment decisions with respect to next-generation networks; and such a requirement would be extreme because, unlike prior unbundling rules, it would compel ILECs to maintain facilities they no longer want *solely* for the benefit of CLECs.[40]

Second, these CLECs' requested relief cannot be granted without reversing the non-impairment findings that the Commission made in the *TRO* with respect to broadband and that the D.C. Circuit affirmed in *USTA II*. But CLECs have not even attempted to develop a record that would support such a reversal and a new determination that impairment exists.

The proposed copper retirement rules are based on CLECs' desire to provide broadband services.[41] As discussed above, the Commission found in the *TRO* that CLECs cannot satisfy the Section 251(d)(2) analysis with respect to broadband services where ILECs have upgraded their networks because ILECs and CLECs are largely similarly situated with respect to fiber build-out and because the potential return from fiber investments is substantial.[42] The Commission thus

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251 U.S. 396, 399 (1920) (regulated carrier "cannot be compelled to carry on even a branch of business at a loss").

[40] Contrary to the claims in the Mpower letter (at 16-17, 18-19), nothing in 47 U.S.C. § 271 or Section 706 of the 1996 Act provides the Commission the authority to require ILECs to maintain facilities solely for the benefit of CLECs. And even were those provisions ambiguous on this point—they are not—the same principles of constitutional avoidance would apply.

[41] *See, e.g.*, Mpower letter at 11 ("The Commission has an obligation to act … in order to preserve broadband competition.").

[42] *See TRO*, 18 FCC Rcd at 17124-25 ¶ 240, 17144 ¶ 276.

narrowly limited ILECs' broadband unbundling obligations in FTTH, FTTC, and hybrid loop situations.[43]

The copper retirement rules proposed by these CLECs would effectively expand unbundling requirements in those situations, and would thus require the Commission to undertake a new analysis under Section 251(d)(2).[44] But CLECs have not attempted to make a showing that meets the Section 251(d)(2) standard for access to broadband-capable facilities, nor could they. In view of the substantial growth in facilities-based intermodal competition since the *TRO*,[45] as well as the availability of tariffed special access services to serve enterprise customers,[46] there is simply no evidence in the record that could support the statutory finding necessary to justify the CLECs' proposed copper retirement rules.

III. ABSENT A PRACTICAL MECHANISM TO RECOVER ILECS' COSTS, THESE CLECS' COPPER RETIREMENT PROPOSAL IS NOT WORKABLE

In addition to the policy and legal case against the proposed regulations, there is a simple practical reason why these CLECs' proposed copper retirement reforms should be rejected: they are not workable unless and until the Commission tackles novel and complicated questions surrounding how to compensate ILECs for maintaining obsolete facilities solely for CLECs' benefit.

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43 *See id.* at 17144-45 ¶ 277, 17152-53 ¶ 294 & n.847, 17153-54 ¶ 296; *see also TRO Recon. Order*, 19 FCC Rcd. at 20297 ¶ 9.

44 *See Iowa Utils Bd.*, 525 U.S. at 388-89; *USTA I*, 290 F.3d at 425.

45 *See supra* p. 10 & n.29.

46 *See Covad Commc'n Co. v. FCC*, 450 F.3d 528, 545 (D.C. Cir. 2006) (affirming Commission's decision not to require national unbundling of DS1 loops based in part on CLECs' ability to obtain DS1 loops as special access services).

A decision by an ILEC to retire a copper loop is a decision not to use that facility for any purpose. The constitutional and statutory need to compensate the ILEC in that circumstance—that is, when an ILEC is barred from exercising its business judgment and is forced to maintain a facility in the uncertain event that a competitor might someday want access to that facility—raises difficult questions that are different in kind from rate issues the Commission has previously faced with respect to unbundled network elements.[47] In establishing TELRIC, for example, the Commission designed a rate methodology for a world in which a network element would be used by an ILEC for its own retail purposes if it was not being provided to CLECs on a wholesale basis—and where the ILEC would continue to use the facilities supporting that loop in its provision of service to retail customers.

When an ILEC makes a business or operational decision to retire a copper facility, by contrast, it will no longer receive any retail revenues in connection with the copper loop or the other obsolete facilities necessary to provide service over that facility. As a result, to avoid non-compensatory rates, the full costs that an ILEC incurs in retaining a class of obsolete facilities solely for the sake of CLECs would need to be paid by each requesting CLEC in proportion to the number of CLECs that seek to make use of such facilities. Because most facilities in the class will go *unused* by CLECs (and anyone else), that approach could result in rates for individual facilities that, while compensatory to ILECs, would be prohibitively high to the particular CLECs seeking access to them. In circumstances in which a CLEC leases a loop, for

[47] These CLECs' proposal would require ILECs to maintain a substantial number of copper facilities that would *never* be used. Based on AT&T's historical experience, CLECs are likely to purchase only a very small number of loops to serve business customers. The costs of maintaining those loops, even if unused, would be substantial—they include, for example, the costs of maintaining back-office systems to keep inventories of the loops.

example, that CLEC would need to pay a rate that reflects the full costs not only of the loop, but also of the central-office infrastructure[48] and other facilities necessary to support the loop. Just as important, because the vast majority of copper loops are unlikely to be used by any CLEC, the costs of those unused facilities too (and the facilities required to support them) would also need to be recovered through the rates set for the few loops that *are* leased, precisely because the complete set of would-be retired copper loops—both used and unused—would be kept in service solely for the benefit of those CLECs that ultimately seek access to any of them.

In short, there is no existing mechanism that would adequately compensate ILECs for the substantial costs of maintaining obsolete network facilities. And, assuming that a practical compensation mechanism even could be developed, any fair solution might result in rates for CLECs that would all but prevent them from leasing loops. Thus, even if revision of the existing rules were necessary—and there is no support in the record for such a conclusion—adoption of the scheme contemplated by CLECs would be neither workable nor sensible until the Commission addresses these novel compensation questions and makes a threshold determination whether it is even possible to establish a regime that sufficiently compensates ILECs for the burden of maintaining obsolete facilities.

IV. THE COMMISSION SHOULD NOT ADOPT THESE CLECS' PROPOSAL TO REVISE THE EXISTING COPPER RETIREMENT RULES WHILE ILECS STUDY ALTERNATIVE APPROACHES FOR ACCESS TO RETIRED COPPER FACILITIES

The transition to all-IP networks will be a complicated process, as the Commission is well aware. As part of its internal planning for this transition, AT&T is currently studying

[48] That infrastructure is another facility that an ILEC may decide to retire or reconfigure as part of the transition to an all-IP network.

possible alternatives for retired copper facilities, including options for CLECs to obtain access to those facilities. Because this internal reassessment may result in market-based solutions consistent with facilities-based competition, AT&T respectfully suggests that the Commission should await the results of its internal review—and review by any other ILECs contemplating similar transitions—before undertaking any reforms to its copper retirement rules, much less the precipitous and intrusive changes advocated by these CLECs.

CONCLUSION

The Commission should reject these CLECs' invitation to impose burdensome new copper retirement rules.

Respectfully submitted,

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