

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

REPLY COMMENTS OF AT&T

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March 20, 2013

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INTRODUCTION AND SUMMARY

The opening comments demonstrate convincingly why the Commission should reject the new copper retirement rules proposed by certain CLECs. The record shows that the Commission's approach to the unbundling of next-generation facilities—namely, its decision generally not to require forced sharing of next-generation facilities while also permitting ILECs to retire copper facilities in FTTH, FTTC, and hybrid loop areas—has succeeded. Private broadband investment is soaring, and facilities-based competition is strong.

The intrusive copper retirement regime proposed here could reverse that success and impede the deployment of next-generation facilities and services. As AT&T explained in its opening comments, that regime would undermine the Commission's broadband objectives by dampening the incentives of ILECs and CLECs to invest in next-generation facilities. In particular, forcing ILECs to incur the substantial costs of maintaining outdated or redundant network facilities solely for the benefit of a small number of competitors would weaken the business case for deploying next-generation facilities in many places. The record leaves no doubt that the wasteful extra costs of maintaining two networks are substantial; that those costs could result in significant stranded investment in obsolete facilities; and that the prospect of that outcome could chill future ILEC broadband investment. Even if new network facilities are more efficient and dynamic than the old ones, many carriers will think twice before investing in the new ones if, in addition to bearing the costs of *those* facilities, they must also indefinitely bear the costs of the obsolete facilities they wish to replace.

Of course, none of this should be news to the Commission, given that the *National Broadband Plan* made precisely these findings.¹ The record is equally clear that the relief sought here—which would prolong the “completely synthetic competition” fostered by unbundling to support particular business models adopted by certain CLECs²—would undermine CLECs’ otherwise strong incentives to invest in next-generation facilities themselves.³

Even if a policy case could somehow be made for restrictions on copper retirement, the Commission nonetheless would lack the legal authority to adopt the proposed rules. As the opening comments of AT&T and others explain, the Commission’s unbundling authority under 47 U.S.C. § 251 does not extend to requiring ILECs to maintain network facilities solely for the benefit of competitors. And any Commission action in this area would, at a minimum, require a detailed and granular Section 251(d)(2) analysis that could not be made on this record. Most of the parties supporting the new copper retirement rules do not even acknowledge, much less seriously address, the question of the Commission’s legal authority. A few such commenters maintain that the Commission may adopt the rules under Section 706 of the Telecommunications Act of 1996. But any authority granted by that provision is limited to *eliminating* barriers to investment to *promote* broadband deployment; the relief sought here would *raise* barriers to

¹ FCC, *Connecting America: The National Broadband Plan*, at 49 (2010) (“*National Broadband Plan*”) (“requiring an incumbent to maintain two networks—one copper and one fiber—would be costly, possibly inefficient and reduce the incentive for incumbents to deploy fiber facilities”); *id.* at 59 (“Regulations require certain carriers to maintain POTS—a requirement that is not sustainable—and lead to investments in assets that could be stranded. These regulations can have a number of unintended consequences, including siphoning investments away from new networks and services.”) (footnote omitted).

² *United States Telecom Ass’n v. FCC*, 290 F.3d 415, 424 (D.C. Cir. 2002) (“*USTA I*”).

³ *See, e.g.*, 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, 17124-25 ¶ 240, 17143-44, ¶¶ 275-76 (2003) (“*TRO*”).

investment and *throttle* broadband deployment. In any event, Section 706 cannot trump the specific analysis required under Section 251(d)(2).

Furthermore, as AT&T explained in its opening comments, restrictions on copper retirement would not be workable until the Commission addresses the complex question of how ILECs would be sufficiently compensated were they required to maintain their legacy facilities solely for the sake of a limited number of CLECs that, at best, will lease only a tiny percentage of ILECs' copper loops. The few comments that address the issue simply assume that traditional UNE rates would be sufficient. But that assumption is wrong, as AT&T has shown. As discussed below, the percentage of copper loops that CLECs actually lease is a small and declining percentage of AT&T's total copper facilities. A rule that ILECs must maintain all copper facilities that they would otherwise retire would require a compensation mechanism allowing ILECs to recover the full costs of maintaining all otherwise retired copper loops from those few CLECs that order such loops. Without such a mechanism, ILECs would be grossly undercompensated for their costs.

As before, the CLECs proposing copper retirement rules never face up to this issue and, in particular, offer no guidance to the Commission on how it could possibly ensure adequate cost-recovery for ILECs in these circumstances without imposing prohibitively high per-loop costs on requesting CLECs. The TELRIC methodology would be particularly ill-suited to this task. TELRIC was designed to measure the costs of a hypothetical most-efficient carrier that deploys its network today on the basis of the most current technologies available. Here, however, the CLECs' copper retirement regime would require an ILEC to maintain two sets of network facilities: one based on next-generation technologies, and one based on yesterday's copper technologies, in circumstances where *no* efficient provider would ever deploy the latter

technologies today. TELRIC was simply not designed to address how to provide adequate cost-recovery in those circumstances, and the Commission would need to launch a full-blown cost inquiry to determine how to fill this methodological vacuum.

Finally, the proposed copper retirement rules are unnecessary because there is no record evidence of any harm to consumers from the current rules, much less evidence of the significant harm that would be necessary to justify the intrusive and burdensome regulations advocated here. Instead of adopting rules that would fetter ILECs' ability to superintend their networks, the Commission should instead permit ILECs and CLECs to evaluate possible market-based solutions to copper retirement.

DISCUSSION

I. THE COMMENTS CONFIRM THAT THE COMMISSION'S BROADBAND UNBUNDLING POLICIES HAVE BEEN SUCCESSFUL AND THAT CHANGING COURSE NOW WOULD UNDERMINE THE COMMISSION'S BROADBAND OBJECTIVES

AT&T explained in its opening comments how the Commission's broadband unbundling framework, as set forth in the *TRO* and subsequent orders, has proven tremendously successful.⁴ That framework—in particular, the Commission's decisions generally rejecting forced unbundling of next-generation facilities and allowing ILECs to retire copper facilities in fiber or hybrid loop overbuild areas—has led to sustained and massive private investment in next-generation facilities and contributed to strong facilities-based competition.⁵ As AT&T also explained, the copper retirement rules proposed here would effectively reverse the Commission's determinations in the *TRO* and would undermine the Commission's broadband objectives by

⁴ See Comments of AT&T, WC Docket No. 12-353 et al., at 6-9 (filed Mar. 5, 2013) (“AT&T Comments”).

⁵ See *id.* at 10.

dampening the incentives of ILECs *and* CLECs to invest in next-generation facilities.⁶ As the *National Broadband Plan* found (*see* note 1, *supra*), the proposed rules would saddle ILECs with substantial costs that would divert resources from broadband investment. And they would give CLECs every reason to continue relying on the synthetic competition promoted by forced sharing rather than to invest themselves in next-generation facilities.⁷

The other comments filed in this proceeding amply support all of these conclusions. The record leaves no serious question, for example, that post-*TRO* broadband investment has been sustained and massive.⁸ As CenturyLink notes, “[o]ver the past decade, ILECs have invested billions upon billions of dollars to extend fiber deep into their networks, bringing new, life-changing services to consumers.”⁹ And the record makes clear that this investment has paid off, as there has been an explosion in the number of high-speed lines since the Commission adopted the *TRO*.¹⁰

The record also demonstrates concretely how the proposed copper retirement rules would frustrate the Commission’s broadband policies and objectives. As Verizon explains, the “costs of maintaining copper facilities are substantial,” and the proposed rules thus “would threaten national broadband goals because reducing the anticipated cost savings associated with copper

⁶ *See id.* at 11.

⁷ *See* AT&T Comments at 11.

⁸ *See, e.g.*, Comments of Verizon and Verizon Wireless, WC Docket No. 12-353 et al., at 4-6 (filed Mar. 5, 2013) (“Verizon Comments”) (noting, among other things, that Verizon has invested \$23 billion in FTTP deployment).

⁹ Comments of CenturyLink, WC Docket No. 12-353 et al., at 2 (filed Mar. 5, 2013) (“Century Link Comments”); *see id.* at 7-9 (describing the success of the Commission’s measured approach to regulation of broadband facilities and services).

¹⁰ *See* Comments of Independent Telephone & Telecommunications Alliance, WC Docket No. 12-353 et al., at 3 (filed Mar. 5, 2013) (“ITTA Comments”) (explaining that, in 2003, there were 23.5 million high-speed lines, while in 2011 there were more than 206.1 million high-speed lines).

retirement would undermine the future business case for investment to deploy new and expand the capabilities of existing next generation networks.”¹¹ The Fiber-to-the-Home Council, moreover, states that “[k]eeping copper lines in place after fiber is built imposes substantial additional costs on LECs, materially harming the business case for fiber deployment.”¹² And, as CenturyLink explains, the relief sought here would “dampen both ILECs’ and CLECs’ incentive to deploy” next-generation facilities.¹³ Finally, imposing such substantial costs on ILECs would also undermine competitive neutrality because it would put them at an artificial disadvantage against cable operators and other competitors, which may upgrade their networks as they wish without incurring any obligation to keep obsolete facilities in place.¹⁴

The parties advocating a substantial overhaul of the Commission’s existing copper retirement rules all but ignore the investment-incentive rationale that was adopted in the *TRO*, affirmed by the D.C. Circuit, and that underlies the Commission’s existing—and successful—broadband policies. The scattershot arguments they do make are unconvincing.

COMPTEL, for example, asserts that “[t]he ILECs have not put forth any evidence of substantial harm, in terms of operational costs, to the ILEC by maintaining and making copper available to competitors.”¹⁵ But the fact that maintaining legacy facilities that an ILEC would otherwise retire imposes costs on the ILEC is both self-evident and amply supported by the

¹¹ Verizon Comments at 10-11.

¹² Comments of Fiber-to-the-Home Council, WC Docket No. 12-353, at 3 (filed Mar. 5, 2013) (“FTTH Council Comments”); *see id.* at 9; *see also* Comments of United States Telecom Ass’n, WC Docket No. 12-353 et al., at 7, 9 (filed Mar. 5, 2013) (“USTelecom Comments”) (describing the substantial costs of maintaining copper facilities).

¹³ CenturyLink Comments at 12.

¹⁴ *See* Verizon Comments at 3; ITTA Comments at 6-7.

¹⁵ Comments of COMPTEL, WC Docket No. 12-353 et al., at 9 (filed Mar. 5, 2013) (“COMPTEL Comments”).

record. The *National Broadband Plan*, for example, made explicit findings on this point: “requiring an incumbent to maintain two networks – one copper and one fiber – would be costly ... and reduce the incentive for incumbents to deploy fiber facilities.”¹⁶ The costs of maintaining redundant legacy facilities include, for example, paying for the central-office infrastructure and back-office systems necessary to support the loop, as AT&T has explained.¹⁷ And a declaration filed by Verizon sets forth a concrete and detailed description of some of the costs ILECs would face in maintaining copper facilities.¹⁸

II. THE COMMISSION HAS NO LEGAL AUTHORITY TO ADOPT THE PROPOSED COPPER RETIREMENT RULES

Quite apart from these policy considerations, the Commission lacks the authority to adopt the CLEC’s proposed copper-retirement regime, as AT&T has explained.¹⁹ Specifically, 47 U.S.C. § 251 provides no authority for the Commission to force ILECs to *maintain* network facilities that they would otherwise retire.²⁰ And, in any event, such relief would require a detailed and granular Section 251(d) analysis, which could not possibly be established on this record.²¹ Even if there were a basis for a threshold impairment finding (there is not), the Commission could not adopt the proposed regime without further reversing two sets of findings:

¹⁶ *National Broadband Plan* at 49.

¹⁷ *See* AT&T Comments at 18.

¹⁸ *See* Decl. of Claire Beth Nogay (filed Mar. 5, 2013) (Exh. A to Verizon Comments). As the ILEC copper network grows older, maintenance costs will only increase. Copper may sometimes be retired due to factors outside of ILECs’ control, such as natural disasters or civic development projects. Other factors include service reliability and under-utilization of the copper—problems that worsen as copper gets older. In such circumstances, replacement of the copper with fiber is often the most efficient and economical response. The proposed copper retirement restrictions here would hamstring ILECs’ ability to respond to these factors.

¹⁹ *See* AT&T Comments at 12-16.

²⁰ *See 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); AT&T Comments at 12-15.

²¹ *See* AT&T Comments at 15-16.

first, its judicially affirmed determination in the *TRO* that the current rules encourage broadband investment;²² and, second, its findings in the *National Broadband Plan* that requiring ILECs to maintain two networks would discourage precisely that investment.²³

As Verizon explains, for example, the Commission lacks authority to require ILECs to maintain network facilities under Section 251, and in any event, the relief requested would require legal and empirical findings that the Commission rejected in the *TRO* and that the record does not support.²⁴ No party supporting the proposed rules seriously addresses these threshold legal obstacles.²⁵ Instead, those supporting the rules merely assert that Section 706 of the 1996 Act would supply the Commission with needed authority.²⁶ That is incorrect. To begin with, Section 706 cannot justify imposing unbundling requirements where, as here, the Commission has already applied the specific provisions of Section 251(d)(2) to withhold such requirements.

²² See, e.g., *TRO*, 18 FCC Rcd at 17124-25 ¶ 240, 17141-42 ¶ 272, 17144 ¶ 276, 17149 ¶ 288.

²³ See *National Broadband Plan* at 49, 59 (quotes in note 1, *supra*).

²⁴ See Verizon Comments at 22; USTelecom Comments at 2 (the proposed rules “run[] directly counter to both the factual and policy determinations reached by the Commission in the *Triennial Review Order*”); CenturyLink Comments at 15 (noting that CLECs here have not “even attempt[ed] to show that [the] request meets the section 251(d)(2) impairment standard”); ITTA Comments at 6.

²⁵ Indeed, certain parties go so far as to advocate new UNE requirements for fiber facilities, without even attempting to demonstrate how the Commission could reverse the Section 251(d)(2) analysis made in the *TRO*, and affirmed by the D.C. Circuit. See Comments of Midwest Ass’n of Competitive Commc’n, WC Docket No. 12-353 et al., at 8-9 (filed Mar. 5, 2013) (“MACC Comments”) (“If ILEC copper facilities are allowed to be retired ... the Commission should require that the ILEC provide, at a minimum, the functional and price equivalent wholesale services on fiber facilities.”); Comments of EarthLink, Integra, and TW Telecom, WC Docket No. 12-353 et al., at 2 (filed Mar. 5, 2013) (“EarthLink Comments”); Comments of MegaPath Corp, WC Docket No. 12-353 et al., at 2 (filed Mar. 5, 2013) (“MegaPath Comments”).

²⁶ See, e.g., MACC Comments at 5, 9; EarthLink Comments at 8; Comments of XO Commc’ns and Broadview Networks, WC Docket No. 12-353 et al., at 4-5 (filed Mar. 5, 2013) (“XO Comments”).

Just as important, Section 706—as relevant here—is a generally deregulatory provision that cuts *against*, not *for*, the type of intrusive market intervention certain CLECs propose here. In particular, Section 706(a) requires the Commission to “encourage” broadband deployment through “regulatory forbearance” and other “regulating methods that remove barriers to infrastructure investment.” The Commission adopted its broadband unbundling framework, including its existing copper retirement rules, to advance Section 706’s goal of broadband deployment,²⁷ and the D.C. Circuit upheld the rules in part on that basis.²⁸ By contrast, the copper retirement rules proposed here would frustrate the Commission’s broadband objectives, as the *National Broadband Plan* found, by deterring investment in and slowing the deployment of next-generation facilities.²⁹

Moreover, Section 706(b) is relevant only in those geographic areas in which the Commission has concluded that “advanced telecommunications capability is not being deployed ... in a reasonable and timely fashion.” No such finding would be possible in FTTH, FTTC, or hybrid loop areas—areas in which copper retirement is likely and in which the rules would have effect—because those are the very areas in which “advanced telecommunications capability” is necessarily “being deployed.”³⁰ In any event, as explained above, the copper retirement rules

²⁷ See *TRO*, 18 FCC Rcd at 17145 ¶ 278, 17150 ¶ 290; see also Verizon Comments at 20-22.

²⁸ See *United States Telecom Ass’n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) (“*USTA II*”) (“Section 706(a) identifies one of the Act’s goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment. The Commission thus acted reasonably in its interpretation of the ‘at a minimum’ clause.”).

²⁹ See *National Broadband Plan* at 49, 59; see also AT&T Comments at 10-11.

³⁰ See Verizon Comments at 21-22.

advocated here would undermine investment in next-generation facilities, a result at odds with the aim of Section 706(b). Section 706(b) thus provides no basis for the proposed rules either.³¹

III. THE CLECs' COMMENTS FAIL TO ADDRESS THE COMPENSATION ISSUES THAT WOULD NEED TO BE RESOLVED BEFORE ANY COPPER RETIREMENT RESTRICTIONS WOULD EVEN BE WORKABLE

Policy and legal obstacles are not the only impediments to the proposed copper-retirement rules. There is a substantial practical barrier as well. No such rules would be workable unless the Commission first devised a rational mechanism to compensate ILECs for maintaining network facilities solely for the benefit of CLECs.³² As several commenters note, this problem independently undermines the CLECs' proposed overhaul of the current rules.³³

No party supporting restrictions on copper retirement even begins to grapple with the complex compensation issues that the proposed revisions to the current rules would raise.

³¹ COMPTTEL contends that by not adopting new copper retirement rules, the Commission is engaging in "de facto forbearance." COMPTTEL Comments at 11. This argument does not withstand even cursory scrutiny. COMPTTEL acknowledges, as it must, that the Commission's existing rules permit ILECs to retire copper in FTTH, FTTC, or hybrid loop overbuild areas. *See id.* at 12-13 & n.44. Because the procedures for forbearance in 47 U.S.C. § 160 "obviously come[] into play only for requirements that exist," *USTA II*, 359 F.3d at 579, the Commission by definition cannot forbear from existing rules by maintaining those same rules. Similarly, to the extent that COMPTTEL argues that the current rules represent an improper forbearance from Section 251(c)(3), that argument, too, lacks merit. In the *TRO*, the Commission explained in detail why impairment principles generally do not require continued CLEC access to copper facilities for broadband purposes in FTTH, FTTC, or hybrid loop areas. *See AT&T Comments* at 6-9. In undertaking its analysis, the Commission was free to consider the adverse effects on investment from the forced sharing of next-generation facilities or from requirements that ILECs maintain copper facilities they would otherwise retire. Indeed, the D.C. Circuit in *USTA II* made clear that the Commission may, and indeed *must*, consider factors such as the "impact [of unbundling] on investment" in applying Section 251(c)(3), soundly rejecting a similar argument to COMPTTEL's here that "failing to impose unbundling in the face of an impairment finding amounts to an unlawful decision to 'forbear' from applying the requirements of § 251(c)." 359 F.3d at 579-80.

³² *See AT&T Comments* at 16-18.

³³ *See FTTH Council Comments* at 9 n.22; *Verizon Comments* at 11; *USTelecom Comments* at 9-10.

COMPTEL, for example, confidently asserts that “[t]he cost to maintain the copper facilities is recovered ... in the UNE prices that ILECs would receive for any copper leased to an entrant.”³⁴

But this ignores that any rational and constitutional cost formula would need to account for the significant network-wide costs that ILECs would incur in maintaining legacy copper facilities and the back-office systems and facilities necessary to make such copper facilities available for the few CLECs that potentially would lease only a small fraction of them.

This problem is substantial. Copper loops that are leased as UNEs are an exceptionally small percentage of the total copper facilities that ILECs maintain today. Indeed, AT&T estimates that in 2012 less than 1% of its total copper loops in service were leased as UNEs. And the number of copper loops CLECs have been leasing from AT&T has been steadily declining for a number of years. Yet, under the regime proposed here, ILECs would be required to maintain *all* copper loops based on the assumption that a *few* CLECs might someday lease a *few* facilities. That makes little sense as a policy matter, but for present purposes it highlights why it will be challenging, if not impossible, to set up a compensation mechanism that would adequately compensate ILECs for the full, network-wide costs they would incur in maintaining otherwise retired copper facilities. ILECs cannot be left holding the bag for all the costs they would incur in keeping tens of millions of unused and otherwise retired copper loops in service for the few CLECs who might someday wish to lease some exceptionally small percentage of those facilities. Yet CLECs give no indication that they are prepared to cover all of those costs in the form of per-loop rates that reflect the gross disconnect between (1) the large number of otherwise unused loops that might be kept in place solely at CLECs’ behest and (2) the relatively

³⁴ COMPTEL Comments at 9; *see also* XO Communications Comments at 11.

few loops that some small number of CLECs ultimately choose to lease. If this problem cannot be solved, there is no point in considering new copper retirement restrictions at all.

COMPTEL suggests that existing UNE rates must be sufficient “because if the ILEC was not fully compensated it certainly would be submitting revised cost studies to state commissions.”³⁵ But the premise of this claim—that the absence of new TELRIC-based cost studies shows that existing compensation mechanisms can be applied straightforwardly to the copper retirement regime proposed here—is simply wrong. To begin with, there has been no reason for the ILECs (or the state commissions that would have considered such cost studies) to undertake this analysis, in no small part because the ILECs have never before been subject to substantial restrictions on their ability to retire obsolete network facilities. There thus is not now, nor has there been, a need for ILECs to submit cost studies based on that counterfactual regulatory requirement.

Just as important, the cost-recovery dilemma posed here is different in kind, not simply in degree, from the typical cost-recovery problem addressed in the TELRIC proceedings traditionally used to set UNE rates, and it would be meaningless to apply a conventional understanding of TELRIC to this unique cost-recovery problem. In its traditional formulation, TELRIC bases the cost of a network element on “the use of the most efficient telecommunications technology currently available” and asks what it would cost a hypothetically most-efficient carrier, which deploys an all-new network today, to offer service by means of that maximally efficient technology.³⁶ Here, however, the CLECs’ copper-retirement regime would

³⁵ COMPTEL Comments at 10 n.34.

³⁶ 47 C.F.R. § 51.505(b)(1). The theory underlying TELRIC is that “[p]rices based on the least-cost, most efficient network design and technology replicate conditions in a highly competitive marketplace by not basing prices on existing network design and investments unless they represent the least-cost systems available for purchase.” First Report and Order,

pose a very different question: how much it would cost an ILEC to maintain a wastefully redundant set of network facilities embodying yesterday's technologies, in circumstances where no efficient provider would ever deploy those technologies today. In many ways, the ILEC that the proposed copper-retirement rules would create would be the precise opposite of the hypothetical most-efficient carrier envisioned in TELRIC, and the rules themselves would be the reason. TELRIC was not designed to measure such costs, and it would be nonsensical to rely on it for that purpose.

In any event, even if this were the type of cost-recovery problem that TELRIC was designed to address, it would still make no sense to launch a new round of cost proceedings for copper-retirement issues, given the unresolved misgivings the Commission itself has expressed about the TELRIC methodology. In 2003, the Commission recognized that the TELRIC methodology is deeply flawed and instituted a still-pending proceeding to reform it.³⁷ As the Commission observed, "key internal tensions" in the TELRIC methodology, together with the "black box" nature of TELRIC-based cost studies in the states, may well lead TELRIC-based UNE rates to "understat[e] forward-looking costs."³⁸ Given that backdrop, there is no sound reason to trigger the first major round of state-level TELRIC proceedings in a decade while this TELRIC-reform proceeding remains pending before the Commission, because the states would

Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15848 ¶ 683 (1996) ("*Local Competition Order*"). The traditional TELRIC methodology makes one concession to reality: rates should reflect the existing locations of ILEC wire centers, not some reimagined geographic design. *Id.* at 15848-49 ¶ 685.

³⁷ See Notice of Proposed Rulemaking, *Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, 18 FCC Rcd 18945 (2003).

³⁸ *Id.* at 18947-48 ¶¶ 3-4, 18949 ¶ 7; see also *id.* at 18948-49 ¶ 6 (expressing concern that TELRIC rates "might not . . . achieve fully the Commission's goal of sending appropriate economic signals").

be asked to apply a methodology whose soundness the Commission itself has drawn into serious question.

IV. THE RECORD DOES NOT COME CLOSE TO DEMONSTRATING A PROBLEM IN NEED OF COSTLY REGULATORY INTERVENTION

Finally, the Commission should reject the proposed copper retirement rules because they are unnecessary. Although this proceeding has been open for years, and despite the Commission's recent call for comments to refresh the record, there remains *no* record evidence of a problem that would justify regulatory intervention in the marketplace.³⁹ At most, the record suggests that certain CLECs have adopted business plans designed principally to serve lucrative business customers in highly concentrated areas (where competition is already intense) and that these CLECs, rather than investing in next-generation facilities themselves, would prefer indefinite access to ILECs' facilities at regulated, wholesale rates. The record is devoid of evidence of an actual harm to *consumers* absent copper retirement restrictions, much less a level of harm that would justify the intrusive and burdensome regulations sought here.⁴⁰

To begin with, there is no evidence that the Commission's existing copper retirement rules are inadequate to protect the interests of consumers, or that ILECs are retiring copper for anticompetitive reasons. Under the Commission's current rules, CLECs are entitled to file objections to the timing of proposed copper retirement set forth in ILECs' notices, but not the

³⁹ See *National Fuel Gas Supply Corp. v. FERC*, 468 F.3d 831, 843 (D.C. Cir. 2006) (holding that “[p]rofessing that an order ameliorates a real industry problem but then citing no evidence demonstrating that there is in fact an industry problem is not reasoned decisionmaking,” and vacating order where there was “zero evidence of actual abuse”).

⁴⁰ Only a showing of harm to *consumers* could justify Commission action under Section 251; the preference of certain *competitors* to provide particular services is insufficient, as the D.C. Circuit has made clear. See *USTA I*, 290 F.3d at 429.

fact of retirement itself.⁴¹ Despite those rules being in effect for a decade, CLECs point to no actual evidence that this regime is insufficient. Instead, as USTelecom explains, only a handful of objections have been filed under those existing rules, and those few issues have been resolved by the parties without regulatory mandates.⁴²

Parties supporting the rules also suggest that a lack of regulatory certainty about copper retirement is hampering investment in Ethernet over Copper (EoC).⁴³ But the record contradicts this claim. Other parties supporting new copper retirement rules, for example, point to substantial investment and growth in EoC.⁴⁴ In any event, the competitive marketplace for providing Ethernet means⁴⁵ that ILECs have the proper incentives to invest in and deploy EoC where doing so meets customer demand and is consistent with network and operational demands. It is only harm to consumers (which is not present here), and not to the interests of competitors, that could justify regulation.⁴⁶

⁴¹ See *TRO*, 18 FCC Rcd at 17147 ¶ 282. By requiring that any oppositions to copper retirement are deemed denied after 90 days unless the Commission acts, *see id.* at 17146 ¶¶ 281-282; 47 C.F.R. § 51.333, the current rules provide ILECs with a measure of certainty about necessary network modifications.

⁴² See USTelecom Comments at 3; *see also* CenturyLink Comments at 2 (“CenturyLink typically does not retire copper loops when it overbuilds them with fiber-based loops, and, in any case, those overbuilds typically occur in residential neighborhoods, where CLECs are unlikely to provide Ethernet-over-copper service.”); *id.* at 13-15.

⁴³ See, e.g., MACC Comments at 7; Comments of TEXALTEL, WC Docket No. 12-353 et al., at 4 (filed Mar. 5, 2013).

⁴⁴ See Comments of Overture, WC Docket No. 12-353 et al., at 4 (filed Mar. 5, 2013) (“the number of ports deployed for Ethernet over Copper services has been growing at over 20% per year, and this will continue to grow at this pace at least through 2016”).

⁴⁵ See, e.g., Verizon Comments at 15.

⁴⁶ See *USTA I*, 290 F.3d at 429; *see also Local Competition Order*, 11 FCC Rcd at 15812 ¶ 618 (finding that “Congress intended” the Commission to implement the 1996 Act “in a manner that is ... *pro-competition*” rather than “*pro-competitor*”).

In short, the absence of any evidence that the Commission's existing copper retirement rules are inflicting any harm strongly undercuts the case for the intrusive regulatory intervention sought here.⁴⁷ As AT&T and others have advocated, the Commission should instead permit ILECs and CLECs to consider possible market-based approaches to the retirement of copper facilities.⁴⁸ Precipitous regulatory changes would derail the possibility of market-based solutions that could facilitate, rather than undermine, facilities-based competition.

CONCLUSION

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

Respectfully submitted,

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March 20, 2013

⁴⁷ A handful of commenters contend that there are public safety benefits to requiring ILECs to maintain copper facilities. *See Comments of National Ass'n of State Utility Consumer Advocates*, WC Docket No. 12-353 et al., at 5 (filed Mar. 5, 2013); XO Communications Comments at 9. That is not correct. To begin with, AT&T already follows prudent engineering principles and maintains reasonable and appropriate network redundancies to address the risk of damage to its network. *See Opposition of AT&T, Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358, at 13 (filed Mar. 1, 2007). Beyond that, when AT&T deploys next-generation facilities in overbuild situations, it typically uses the same rights of way, conduits, and support structures through or on which existing copper is deployed. For that reason, if AT&T's next-generation facilities were damaged or destroyed, its copper facilities likely also would be damaged or destroyed. *See id.* at 14.

⁴⁸ *See* AT&T Comments at 18-19; Verizon Comments at 25.