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EXECUTIVE SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”), Maine Office of the Public Advocate, Maryland Office of People’s Counsel, New Jersey Division of Rate Counsel, Office of the Ohio Consumers’ Counsel, Pennsylvania Office of the Consumer Advocate, and The Utility Reform Network (collectively, “Consumer Advocates”) file these reply comments on the multiple questions presented by the Commission’s combined Notice of Proposed Rulemaking (“NPRM”), Notice of Inquiry (“NOI”), and Request for Comment (“RFC”).

With regard to Section III.A. of the NPRM on pole attachments, based on the filed comments (including from NASUCA members), Consumer Advocates agree that an approach that balances the needs of attachers and pole owners will best advance the deployment of broadband services. But the comments make clear that blanket preemption of the legitimate interests of state and local authorities, in particular in public safety, is not in the public interest.

With regard to the FCC’s proposals in NPRM Section III.B on copper retirement and III.C. on service discontinuation, the comments (including Consumer Advocates’) show that the proposals to “streamline” the processes are not in the public interest and will harm consumers. Like the FCC itself, the proponents of eliminating consumer protections have not shown that the protections cause inordinate costs or delays in broadband deployment.

With regard to the proposals in the NOI on preemption of state authority, the comments show that the FCC lacks the authority under 47 U.S.C. § 214(a) to broadly preempt state laws, including state laws that are authorized under that section.

Finally, with regard to the functional test for services discussed in the RFC, the comments show that the functional test should be retained in order to protect consumers. Carriers’ descriptions in their service agreements or their tariffs should not be determinative of the service’s characteristics when it is proposed to be discontinued.

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

In the Matter of Accelerating Wireline)
Broadband Deployment by Removing)
Barriers to Infrastructure Investment) WC Docket No. 17-84

REPLY COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES,
MAINE OFFICE OF THE PUBLIC ADVOCATE, MARYLAND OFFICE OF PEOPLE’S
COUNSEL, NEW JERSEY DIVISION OF RATE COUNSEL, OFFICE OF THE OHIO
CONSUMERS’ COUNSEL, PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE AND
THE UTILITY REFORM NETWORK
ON NOTICE OF PROPOSED RULEMAKING, NOTICE OF INQUIRY, AND REQUEST
FOR COMMENT

I. INTRODUCTION

Through the combined Notice of Public Rulemaking (“NPRM”), Notice of Inquiry (“NOI”), and Request for Comment (“RFC”), the Federal Communications Commission (“Commission” or “FCC”) has proposed numerous changes in statutory interpretation, elimination or revision to regulations, and changes in policy towards the goal of eliminating obstacles to the deployment of broadband. The National Association of State Utility Consumer Advocates (“NASUCA”)¹, Maine Office of the Public Advocate, Maryland Office of People’s

¹ NASUCA is a voluntary association of 56 consumer advocate offices. NASUCA members represent the interests of utility consumers in 42 states, the District of Columbia, Puerto Rico, Barbados and Jamaica. NASUCA is incorporated in Florida as a non-profit corporation. NASUCA’s full members are designated by the 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. 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 represent the interests of 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.

Counsel, New Jersey Division of Rate Counsel, Office of the Ohio Consumers' Counsel, Pennsylvania Office of the Consumer Advocate and The Utility Reform Network (collectively, "Consumer Advocates") support the Commission's goals of promoting the deployment of more wireline broadband facilities.

However, deployment of wireline broadband facilities is but a means towards assuring that the consuming public – which today may exchange voice and data communications over a variety of copper, fiber, and cable wireline facilities -- continues to have access to the voice and other advanced services over the ever-evolving, robust communications network. That access – which is universally available, of reasonable and adequate service quality, and reasonable and affordable cost – is the nation's public policy goal.² As AARP states in its Executive Summary,

How consumers experience the inevitable IP transition will influence the successful adoption of new technologies, and will have far reaching effects on technological progress. The legacy TDM-based network has provided reliable and affordable service for over a century, and while many consumers have voluntarily adopted new technologies, not all consumers have robust and affordable alternatives to legacy services. Additionally, many consumers continue to depend on technologies that ride "over-the-top" of legacy network facilities, limiting their ability to quickly switch to next-generation technology.³

Consumer Advocates believe that AARP has correctly characterized the current telecom environment, which drives the need for a "consumer-focused"⁴ transition process.

The Consumer Advocates' Comments supported continuation of the regulatory framework which the Commission established in recent years as part of the long arc of the inter-related technology trials and transition proceedings.⁵ The Commission adopted reasonable,

² 47 U.S.C. § 151; see also AARP Comments at 27.

³ AARP Comments at iii.

⁴ *Id.*

⁵ *In the Matter of Technology Transitions; US Telecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provisions of Switched Access Services; Policies and Rules Governing Retirement of Copper Loop by Incumbent Local Exchange Carriers*, GN Docket No. 13-5, WC Docket

needed regulations to protect consumers, businesses, and customer-carriers as incumbent local exchange carriers (“ILECs”) transition their networks from copper facilities to fiber-based services. The Commission also provided clarification and an optional, streamlined path for all certificated telecommunications carriers to apply for Commission approval of the proposed discontinuance, reduction or impairment of legacy voice services to communities under Section 214(a).⁶ As noted by Public Knowledge, the Commission should not ignore or set aside findings of those pertinent, previous proceedings without consideration of the full record and articulation of the Commission’s “rationale for choosing a different path.”⁷

Consumer Advocates, community advocates, state commissions, and others have provided sound reasons and legal analysis why the Commission should not reverse or reduce these still new regulations and consumer protections, reinterpret the Section 214(a) discontinuance process, or exercise forbearance or preemption as raised by the Commission’s current NPRM/NOI/RFC. As AARP notes, the NPRM/NOI/RFC recognizes that competitive entry for providers of wireline broadband facilities needs to be improved, yet the Commission proposes to simplify the ways in which existing providers of wireline voice and broadband

No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, , 31 FCC Rcd 8283 (rel. July 15, 2016) (“*2016 Tech Transitions Order*”). *In the Matter of Technology Transitions; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (rel. Aug. 7, 2015) (“*2015 Tech Transitions Order*”). See also, *In the Matter of Ensuring Customer Premises Equipment for Backup Power for Continuity of Communications, et al.*, PS Docket No. 14-174, Notice of Proposed Rulemaking and Declaratory Ruling , 29 FCC Rcd 14968 (rel. Nov. 25, 2014) (“*2014 Tech Transitions NPRM/DR*”).

⁶ *2016 Technology Transitions Order*, ¶¶ 5, 60-70.

⁷ Public Knowledge at 3-4 (citation omitted); see also Consumer Advocates Comments at 16, 19-20 (noting that the Commission rejected in 2015 and 2016 adoption of a blanket policy that Section 214(a) discontinuance will not adversely affect communities, yet in this NPRM the Commission proposes to adopt such a blanket policy).

internet services could exit the provision of those services for which there is no or weak competition.⁸

In the context of pole attachment reform, AT&T supports changes but asks the Commission to recognize the “practical realities” of AT&T’s large footprint.⁹ The Commission should likewise recognize that both legal and “practical realities” weigh against the regulatory changes, forbearance, and preemption contemplated by the NPRM/NOI/RFC. Consumers subject to copper to fiber migration need timely, neutral information about the change and how to preserve the services which they value and rely upon. Consumers should not be deprived of quality of service and other regulatory oversight of local exchange carriers by states. Competition for wireline voice and broadband services is not uniformly robust within markets or geographic areas. Many of the changes contemplated by the NPRM/NOI/RFC would require the Commission to foreclose individualized state review of the impact on the needs of each community facing a reduction, impairment, or discontinuance of specific services. This would threaten the provision of continuous, reliable telecommunications services in many communities. This is not in the public interest. The FCC should not head down that path.

The information provided in reply to the NPRM/NOI/RFC does not support the Commission’s premise that the elimination or reduction of regulation – apart from possible reforms to pole attachment processes – will unleash spending and investment in wireline broadband networks which will meet all future needs of the consuming public and be affordable. Consumer Advocates support the Commission’s goal of promoting the expansion and upgrading of wireline broadband networks.¹⁰ However, local exchange carriers and cable providers will

⁸ AARP Comments at vi-xi.

⁹ AT&T Comments at 2, 9-10.

¹⁰ Consumer Advocates Comments at 1-2.

still only invest in wireline facilities to deploy broadband where it is in their economic interest.¹¹ Market forces alone have not assured that all consumers are served with broadband meeting the Commission's standards.¹² Regulatory changes do not alter the challenges of distance and low density. Indeed, consumers in underserved areas may need the protections of Section 214(a)'s discontinuance and network change provisions the most, in conjunction with any state law regulation of the availability and quality of telecommunications services.

The Commission should recognize that the deployment of wireline networks which support universally available and affordable voice and broadband internet access services requires a more nuanced and cooperative effort by the Commission, states, consumer interests, and industry. This is necessary to assure that all resources – both private and public capital such as universal service fund support – are put to best use for the benefit of all consumers.¹³

Through these Reply Comments, the Consumer Advocates address some of the arguments and information provided by industry, other public interest parties, the states, and others. It is not possible, in the time allowed, for the Consumer Advocates to respond to each change to the wording of the Commission's regulations regarding notice and time frames proposed by other parties. Consumer Advocates agree with the legal analysis of the National Association of State Utility Regulatory Commissions ("NARUC"), Public Knowledge, and others that the Commission's authority to eliminate perceived obstacles to deployment of wireline broadband is subject to limits.¹⁴ State interests in regulation of local exchange carriers, including carrier of last resort ("COLR") and service quality, and other areas must continue to be

¹¹ *Id.*, at 32-33; Baldwin Declaration, ¶¶ 24-30.

¹² AARP Comments at vi-xi.

¹³ Consumer Advocate Comments at 32-33 (Role of state incentives, federal universal service support).

¹⁴ NARUC Comments at 5-11; Public Knowledge Comments at 2-18. *See*, 47 U.S.C. § 253(c).

respected.¹⁵ Consumer Advocates oppose any elimination of protections for consumers who face migration of their voice and low speed data services from copper to fiber. Consumer Advocates, AARP, and Public Knowledge oppose the two separate but related threads of the Commission’s proposed reinterpretation of Section 214(a) – blanket presumption of available alternative services over other technologies and describing “services” based on tariff or service agreements, in place of the “functional test.”

II. NOTICE OF PROPOSED RULEMAKING

A. THE FCC SHOULD ADOPT A BALANCED APPROACH FOR POLE ATTACHMENTS.

The Consumer Advocates did not address in comments the specific questions raised by the NPRM concerning whether and how to improve the ability of telecommunications carriers, cable providers, and other wired broadband network providers to attach to existing public utility and other poles. Based on the breadth of comments filed, this field of inquiry may best deserve further Commission consideration and judicious changes to effect the goal of promoting further deployment of wireline broadband infrastructure.

Consumer Advocates agree with the Initial Comments of NARUC urging the Commission to act within its authority under Section 224, which carves out protections for municipal owned utilities and electric utilities.¹⁶ Consumer Advocates echo the concern expressed by the Texas Office of Public Utility Counsel that any future changes by the

¹⁵ “[T]he Commission’s Section 214 authority applies only to interstate telecommunications services; wholly intrastate services such as local telephone service are excluded from its reach. Moreover, the Section 214 process is not intended to preempt or displace carrier of last resort (COLR) or other service obligations that states may impose on incumbent LECs. Section 214 authority to discontinue an interstate switched access service does not carry with it relief from any COLR or other state law obligations that require a carrier to provide local service.” *2016 Tech Transitions Order*, ¶ 52.

¹⁶ NARUC Initial Comments at 5.

Commission with regard to the time line and ability of telecommunications carriers to attach facilities to electric utility poles may impact other state regulatory and consumer interests:

TXOPUC agrees that accelerating deployment of next generation infrastructure to support high speed Internet access benefits the public. Availability of and access to these services is an important part of daily life and the backbone of commerce, education, medicine, and other important civic and commercial initiatives. However, pole attachment reform proposals must be balanced against the need to keep the electric grid safe and reliable and to prevent cross-subsidization of competitive telecommunications services by consumers of regulated electric services.¹⁷

As NARUC notes:

The electric industry is already highly regulated by both NARUC's State Commission members and several federal agencies. Congress, through this Section 224(f) exemption, explicitly recognized that the FCC must consider the potential impact of its regulations on safety as well as the reliability and security of the electric grid and electric ratepayers.¹⁸

As NARUC further explained, the FCC should balance its exercise of Section 224 with the legitimate interests of the states:

On its face, the FCC's [Section 224] jurisdiction is limited to adjudication of disputes over whether a utility has applied its safety, reliability, and engineering standards in a non-discriminatory manner. Practically, the FCC should reaffirm that many State laws that impact pole attachment safety and reliability issues, e.g., state occupational safety and health, high voltage line, and storm hardening laws/regulations, are entitled to deference.¹⁹

Consumer Advocates further concur with NARUC's analysis of the limits on the Commission's legal authority under Sections 224 and 253 related to promotion of pole attachments in response to the NOI, as addressed below.

¹⁷ TXOPUC Comments at 1-2.

¹⁸ NARUC at 5-6, citing 47 U.S.C. § 244(f).

¹⁹ *Id.* at 6-7.

B. THE COPPER RETIREMENT NOTICE AND RELATED REGULATIONS SHOULD BE PRESERVED TO PROTECT CONSUMERS, COMPETITION, AND SMOOTH THE PATH TOWARDS CONTINUED SERVICES OVER NEW NETWORK FACILITIES.

Through the NPRM, the Commission questions its own authority to have adopted the definition of de facto copper retirement, Sections 51.332, 51.325(c), and 68.110(b), and other regulations related to the process by which ILECs transition services provided to retail and wholesale consumers from copper network facilities to fiber-based facilities. Consumer Advocates urge the Commission to refrain from undoing the regulations and balanced consideration of the needs of consumers, carriers, competitors, and government and tribal interests as reflected in *2015 Tech Transitions Order* and *2016 Tech Transitions Order*. Consumer Advocates' Comments with the supporting Declaration of Susan Baldwin provide the legal, policy, and factual grounds in favor of maintaining the existing regulatory framework.²⁰

1. Copper Retirement (NPRM ¶¶ 56-65)

Unsurprisingly, many ILECs have seized the opportunity presented by the NPRM to argue for repeal and/or amendment of these regulations.²¹ AT&T criticizes the copper retirement rules as unnecessary given that “less than 17% of all households continue to purchase voice service from an ILEC...”²² Some ILECs criticize the customer notice periods as too long.²³ They say customers supposedly already have a general awareness of the migration process and any need for education could just happen when they call to schedule their appointment to migrate.²⁴ Some say that the regulations governing the copper to fiber change have hurt their

²⁰ Consumer Advocates Comments at 1-3, 8-14; Baldwin Declaration, ¶¶ 8-78.

²¹ CenturyLink Comments at ii, 28-34; AT&T Comments at 29-41.

²² AT&T Comments at 1, 30-31 (citations omitted).

²³ Verizon Comments at 18-19; AT&T Comments at 33.

²⁴ Verizon Comments at 18, 22; CenturyLink Comments at 31-33.

plans to provision new fiber facilities.²⁵ Many ILECs oppose the Commission’s addition of “de facto” copper retirement to the regulatory definition.²⁶

In contrast Windstream opposes elimination of most of these recent changes that are beneficial to Windstream’s provision of last-mile access as a competitive LEC.²⁷ Windstream defends the Commission’s authority to adopt the copper retirement rules based on consideration of Sections 214, 215(c)(5), and 201(b), as well as Section 706(a) of the 1996 Telecommunications Act.²⁸ Windstream refutes the Commission’s and Verizon’s premise that general knowledge that the tech transition is underway could justify short notice periods. To the contrary, for a competitive LEC, transferring retail customers can be an “onerous process.”²⁹ Windstream supports continuation of the regulation definition of copper retirement as including de facto copper retirement.³⁰

The need for these consumer notification rules and protections is not diminished by the fact that more households, businesses, and competitive providers have transitioned their services from copper-based to fiber technology where the ILEC has upgraded their wireline facilities. As summarized in the Baldwin Declaration, the FCC’s 2016 Voice Report shows that “48.6 million residential customers continue to rely on ILEC’s copper-based voice service, a magnitude that underscores the importance of ensuring that consumers have reliable access to adequate copper-

²⁵ CenturyLink Comments at 27. As a result, CenturyLink states the payback period for fiber builds are extended and might chill future fiber builds. Frontier states that its confusion regarding the 2015 copper retirement process have lead its engineers to consider installing copper instead of fiber. Frontier Comments at 2, 22-23. But, at least as to California, in 2015 Frontier did not even have plans to expand the FiOS network acquired from Verizon. Rather, Frontier stated that it would invest in repair and upgrade of the copper network using “the latest technology available including ADSL.2+ bonding” Baldwin Declaration, ¶¶ 29-30, fn. 25, 26, 27, 28 (citations omitted).

²⁶ See, e.g., Verizon Comments at 20-21.

²⁷ Windstream Comments at 3. Windstream explains “[b]ecause copper retirement is so impactful for [b]competitive LECs purchasing last-mile access, and for their end-user customers – and is vastly more onerous than most other network changes – it is appropriate for the Commission to have a differentiated, heightened notice process for copper retirements.”

²⁸ *Id.* at 4-5, citing 47 U.S.C. §§ 214(a), 215(c)(5), 201(b), and 1302(a).

²⁹ Windstream Comments at 5-6.

³⁰ *Id.* at 7-8.

based services.”³¹ Nationally, voice over Internet protocol (“VoIP”) service accounts for approximately 15% of the households served by ILECs, with state averages varying, such as California with 19% and Iowa ILECs providing no VoIP based services to their subscribers.³² The California Public Utility Commission (“California PUC”) Comments make clear that “[c]opper technology is not inherently obsolete” and ILECs can upgrade copper to provide high-speed services.³³ These regulation governing copper-to-fiber network change notices and retirement – including “de facto” copper retirement – are needed for areas where fiber has been or will be deployed as well as areas where ILECs are retaining their copper networks. The Commission should keep the definition of copper retirement as including “de facto retirement.”³⁴

The Commission should preserve the copper to fiber consumer notification rules, without modification of the time lines or reduction in the manner and information which the telecommunications carrier must provide.³⁵ The migration of customers and their existing voice and data services from copper to fiber technology is a uniquely different type of tech transition, especially because of the change from central office powered lines to requiring a consumer power source.³⁶ The Commission’s regulations are directed at protecting consumers who had not voluntarily asked to switch to fiber-based service, where available. The Baldwin Declaration describes real situations in which the ILECs’ communications regarding this technology change have given rise to customer confusion as to whether their services – the functionality and price – will be changing.³⁷

³¹ Consumer Advocate Comments at 2; Baldwin Declaration, ¶ 64.

³² Baldwin Declaration, ¶¶ 71-73.

³³ California PUC Comments at 20, citing May 25, 2017 news report of Frontier’s plans to use *G.fast* protocol over copper to serve multi-dwelling units. (citation omitted).

³⁴ Consumer Advocates Comments at 8-9; Pennsylvania PUC Comments at 5.

³⁵ Consumer Advocates Comments at 2-4, 8-22.

³⁶ Consumer Advocates Comments at 1-4, 8-14; California PUC Comments at 26.

³⁷ Baldwin Declaration, ¶¶ 41-48, 60-61. *See* NPRM ¶ 61.

Customers need notice of the proposed change in technology in print, with sufficient time to make inquiries to improve their understanding of the process – including the battery back-up arrangement – and make an informed choice as to how to assure they continue to receive voice and data services.³⁸ The Comments of the Maryland Office of People’s Counsel (“Maryland OPC”) document that copper to fiber migration notices can give rise to customer confusion when marketing of upgraded fiber-based services is mixed in.³⁹ The information provided in the notices regarding the date for action by that consumer can also cause confusion.⁴⁰ Elderly consumers and consumers with health problems may feel particularly threatened and confused by the steps needed to preserve continuous telephone service with features similar to the copper-based services.⁴¹ As noted by AARP, older households are more likely to rely on wireline services and are part of “the 20 percent of the population that views landline telephone service as the most important telecommunications service.”⁴²

Rather than eliminate these important customer notice regulations for unquantified savings, the Commission should recognize that such notifications can be improved through cooperation and review between the ILECs and state interests, such as occurred in Maryland.⁴³ ILEC copper retirement notices sent to states allow states to help with such oversight and consumer education.⁴⁴ Well-drafted and timely customer notices which provide necessary

³⁸ See, Consumer Advocates Comments at 8-18; Baldwin Declaration, ¶¶ 33, 42, 61. Pennsylvania PUC Comments at 2-3; AARP Comments at 1, 20-21, 26-27, 29-30; California PUC Comments at 20-21.

³⁹ Maryland OPC Comments at 2-6. Appendix A to the Maryland OPC Comments include examples of actual notices sent by Verizon. As explained by Maryland OPC, through the joint efforts of Maryland OPC, Verizon Maryland, and Maryland Public Service Commission staff, the content of the notices were improved. As a result, Maryland OPC reports that Verizon Maryland’s next round of copper-to-fiber notices appeared to result in fewer consumer calls.

⁴⁰ *Id.*; Baldwin Declaration, ¶ 61.

⁴¹ Maryland OPC Comments at 4; Baldwin Declaration, ¶ 61.

⁴² AARP at 13.

⁴³ Maryland OPC Comments 4-6.

⁴⁴ See, e.g., Pennsylvania PUC at 2; California PUC at 22-25.

information in neutral terms, without marketing, can help ILECs implement the copper to fiber transition more smoothly and so reduce post ante regulatory costs.

The Commission must also recognize that eliminating or shortening the time frame between notice to customer-carriers and retirement of ILEC copper facilities can materially impact the quality and continuity of the services provided by these competitors, as identified by Windstream and INCOMPAS.⁴⁵ Reduction in competitive alternatives, even within the wholesale or Business Data Services market, is a loss for the market for wireline voice and broadband services and for consumers.

Nor should the Commission scale back the list of entities which ILECs must notify as part of the copper retirement notification process. State commissions should receive notice as well as consumers, so state commissions may assist consumers in the transition process. Broad notice to other agencies and government interests is also important to the public safety and welfare. These concerns are expressed in comments filed by the City of New York which stress the need for state and local government agencies to continue receiving communications services that accommodate the agencies' communications systems throughout the agencies' equipment replacement schedule cycles.⁴⁶ As the City noted, the failure to do this will put at risk the ability of public agencies and other critical service providers to offer the public appropriate protection and services.⁴⁷

Other comments note that the replacement of copper and rapid transitions to broadband might risk stranding Federal Aviation Administration ("FAA") remote facilities, resulting in disruptions to air traffic control operations.⁴⁸ As discussed by the Harris Corporation, the FAA's

⁴⁵ See, INCOMPAS Comments at 12-17.

⁴⁶ City of New York Comments at 6.

⁴⁷ *Id.*

⁴⁸ Harris Corporation Comments at 5.

FTI communications system interconnects thousands of locations in order to support air safety operations and approximately 52% of those points of interconnection are rural in nature. Harris believes it is highly unlikely that copper interconnections will be replaced by fiber optic cable quickly in rural areas, if at all.⁴⁹

2. Network Change Notification Generally NPRM ¶¶66-69

The NPRM proposed to repeal or amend Section 51.325(c), which states that until the ILEC has provided notice as required by other sections the ILEC “may not disclose to separate affiliates, separated affiliates, or unaffiliated entities (including actual or potential competing service providers or competitors), information about planned network changes that are subject to this section.”⁵⁰ Consumer Advocates have recommended that Section 51.325(c) be preserved as implementing the pro-competitive policy of Section 251 and reflecting the Commission’s balancing of the interests of competitors, consumers and ILECs in the context of appropriate notice related to an ILEC’s planned retirement of copper facilities.⁵¹ The concerns raised by ILECs, that the regulation unreasonably restricts the free flow of information, mostly echo the NPRM’s proposed justification for repeal, without more specifics.⁵²

3. Section 68.110(b)

In the NPRM, the Commission seeks information regarding the costs and benefits of Section 68.110(b). The Commission also asks whether wireline telecommunications carriers could be spared the burden of certifying their compliance with the specific notice that Section

⁴⁹ *Id.*, at 4.

⁵⁰ 47 C.F.R. § 51.325(c).

⁵¹ Consumer Advocates Comments at 17-19.

⁵² *See, e.g.*, AT&T Comments at 37-38; CenturyLink Comments at 27, 33-34. *See* NPRM ¶ 66.

68.110(b) requires.⁵³ Section 68.110 addresses “Compatibility of the Public Switched Network and Terminal Equipment,” where subpart (b) states:

(b) Changes in the facilities, equipment, operations, or procedures of a provider of wireline telecommunications. A provider of wireline telecommunications may make changes in its communications facilities, equipment, operations or procedures, where such action is reasonably required in the operation of its business and is not inconsistent with the rules and regulations in this part. If such changes can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.⁵⁴

The Consumer Advocates,⁵⁵ as well as AARP,⁵⁶ the collective Consumer Groups and RERC,⁵⁷ the California PUC,⁵⁸ and others all support preservation of Section 68.110(b). Yet some ILECs seize on the NPRM query as an opportunity to eliminate an obligation. AT&T dismisses the regulation as serving no purpose.⁵⁹ Verizon chides that carriers cannot keep track of every type of customer premise equipment.⁶⁰ According to Verizon, customers – even apparently those with disabilities and the need for adaptive equipment – are only entitled to receive those features as spelled out in the relevant tariff or service contract.⁶¹

The Commission should heed the concerns of those organizations that represent vulnerable groups who depend on assistive devices. These groups would be harmed by the repeal of

⁵³ NPRM, ¶ 70.

⁵⁴ 47 C.F.R. § 68.110(b).

⁵⁵ Consumer Advocates Comments at 13-14.

⁵⁶ AARP Comments at 13-15.

⁵⁷ Telecommunications for the Deaf and Hard of Hearing, Inc., National Association of the Deaf, Communication Service for the Deaf, Inc., Hearing Loss Association of America, Cerebral Palsy and Deaf Organization, Deaf Seniors of America, and Association of Late-Deafened Adults (collectively, “Consumer Groups”) and Rehabilitation Engineering Research Center on Technology for the Deaf and Hard of Hearing (DHH-RERC) and Trace Research & Development Center (collectively, “RERCs”) Comments at 2.

⁵⁸ California PUC Comments at 31-34.

⁵⁹ AT&T Comments at 35-37.

⁶⁰ Verizon Comments at 26.

⁶¹ *Id.*

Section 68.110(b) and any reduction to the notice also required in case of a proposed service discontinuance under 47 U.S.C. §214(a).

The Commission should also not repeal this regulation when the TTY-to-Real Time Text (“RTT”) and Next Generation 911 (“NG-911”) transitions are underway. The Commission has recognized that some people – such as those who cannot afford high speed access, people in rural areas who do not have access to IP based service, and senior citizens who may be reluctant to try new technology – are still reliant on TTYs.⁶² The Consumer Groups and RERCs rightfully express extreme concern at the potential harmful impact that repeal of Section 68.110(b) could have on the ability of their members and client base as to the operability of their TTY devices and access to 911 services.⁶³ AARP also cites to the *RTT Order* and the Commission’s findings that unique technical challenges need to be resolved to implement RTT over wireline networks.⁶⁴ Some California residents still use TTY devices distributed by the state’s Deaf and Disabled Telecommunications Program and may be least likely to adjust to RTT technology.⁶⁵ Other California consumers using captioned telephones have lost this functionality when their phone line has changed from TDM to VoIP.⁶⁶ Repeal of this particular regulation could lead to disruptions in communications services for the most vulnerable consumers.

Additionally, as advocated by AARP: “It is essential that carriers seeking Section 214 discontinuance describe in their applications the specific alternative technologies that are available to individuals with disabilities, if existing technologies will no longer function.”⁶⁷ AARP identifies other elements to be included, noting “service discontinuance notice

⁶² *Transition from TTY to Real-Time Text Technology*, Report and Order and Further Notice of Proposed Rulemaking, FCC 16-196, CG Docket No. 16-145, GN Docket No. 15-178 (Dec. 16, 2016) (“RTT Order”).

⁶³ Consumer Groups and RERCs, at 2.

⁶⁴ AARP Comments at 13-17134-15.

⁶⁵ California PUC Comments at 33.

⁶⁶ AARP Comments at 14.

⁶⁷ *Id.* at 15.

requirements should reflect the impact that service discontinuance may have on all members of a community.”⁶⁸ Consumer Advocates agree.

C. Streamlining the Section 214(a) Discontinuance Process

In the NPRM, the Commission acknowledges that Section 214(a) “requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing, service to a community or part of a community.”⁶⁹ In response to carrier opposition to such exit regulation, the Commission has proposed what it describes as “targeted measures to shorten timeframes and eliminate unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue.”⁷⁰

Among the suggested measures are a streamlined process to allow carriers to grandfather low-speed legacy services (low-speed TDM and lower than DS1 speed services) for customers, with shortened “auto-grant” periods and possibly with no public comment period.⁷¹ Another, related proposed reform would allow telecommunications carriers to apply for authorization to discontinue grandfathered legacy services as early as 180 days after they were closed to new customers.⁷² Impacted customers would have a ten-day comment period and carriers could have auto-grant approval within 31 days.⁷³ A third change proposed by the Commission would reverse its 2015 determination that “community” includes consideration of the carriers’ end retail customers as well as end users of wholesale customers.⁷⁴ And the Commission invited comment on adoption of a blanket preemption, on the premise that “Section 214(a) discontinuances will

⁶⁸ *Id.*

⁶⁹ NPRM ¶ 71, citing 47 U.S.C. § 214(a).

⁷⁰ *Id.*, ¶ 71.

⁷¹ *Id.*, ¶¶ 73-84.

⁷² *Id.*, ¶¶ 85-89.

⁷³ *Id.*, ¶¶ 85-89.

⁷⁴ *Id.*, ¶¶ 90-94.

not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community.”⁷⁵

Consumer Advocates strongly oppose each of these proposals. They are antithetical to the purpose of Section 214(a) which is to protect communities from the loss of services – whether through degradation or outright cessation – without notice and without assurance that the Commission has reviewed and determined that issuance of a certificate authorizing the carrier’s application may be granted.⁷⁶

Forty-eight million Americans continue to rely on ILECs’ copper-based service.⁷⁷ The California PUC estimates that some six million customers rely on voice service at 64 kbps speeds, services which fall within scope of the Commission’s proposed fast track to discontinuance without any meaningful Commission review of the merits.⁷⁸ Public safety 911 circuits, business users, consumers with disabilities, and critical infrastructure connections depend on such low speed voice services provisioned by ILECs.⁷⁹ In many areas, services over copper-based connections are critical for monitoring facilities such as power plants, dams, and levee systems.⁸⁰ The Commission should not proceed to create a fast track for deemed approved grants of discontinuance of low-speed voice or data services without full consideration of the record developed in support of the *2015 Tech Transitions Order*.⁸¹

1. Adequate Customer Notice and Time to Object Coupled with Meaningful Commission Review Is Critical

⁷⁵ NPRM, ¶¶ 95-99.

⁷⁶ Consumer Advocates Comments at 1-9, 14-22.

⁷⁷ *Id.*, at 2.

⁷⁸ California PUC Comments at 35-36.

⁷⁹ *Id.*

⁸⁰ Consumer Advocate Comments at 2.

⁸¹ *Id.*

The Commission should not deny consumers and others impacted by any reduction, impairment, or discontinuance of service meaningful notice and an opportunity to be heard.⁸² A mere ten-day period for consumers to object to an application to discontinue the services they are receiving – whether grandfathered or not – is patently unreasonable.⁸³ Consumers require adequate notice to consider whether and how to object, as well as whether they actually have a meaningful alternative, taking into account functionality, reliability, and affordability among those considerations.⁸⁴

To illustrate, when Sprint filed in June 2015 an application to discontinue the provision of certain wireline consumer long-distance services, eleven comments or objections were filed, including from a tribal commission, within the 31-day public notice comment period.⁸⁵ The objections expressed by the tribal commission and individual consumers were subsequently addressed. Sprint reached out to assist the individual consumers with their transition to alternative services and provided “additional information regarding the numerous available options for obtaining replacement services at acceptable rates from alternative providers.”⁸⁶ The Wireline Competition Bureau granted Sprint’s application after careful consideration of the comments and relevant factors.⁸⁷

The NPRM and industry comments fail to justify why consumers, businesses, communities, tribal interests, and others who may be impacted by the discontinuance of low-speed voice services and/or low-speed data services should be denied the same time frame for public notice and comment as was accorded the Sprint wireline long distance consumers. Like

⁸² *Id.* at 4, 14-16, 19-22.

⁸³ *Id.* at 14-16, 19-22. *See also*, AARP Comments at xiii, 4-5.

⁸⁴ Consumer Advocates Comments at 14-16; AARP Comments at xiii-xiv, 2-17, 20-21, 23-30.

⁸⁵ *In the Matter of Section 63.71 Application of Sprint Communications Company LP*, WC Docket No. 15-186, Comp. Pol. File No. 1230, Order (DA 15-1098)(rel. Sept. 29, 2015) (“*Sprint Long Distance Order*”), ¶¶ 1, 2, 3.

⁸⁶ *Id.*, ¶ 5.

⁸⁷ *Id.*

the Sprint customers, these customers' individual concerns regarding the availability, suitability, and affordability of alternative services should be addressed *before* the services are discontinued under the authority of Section 214(a).

Nonetheless, AT&T, CenturyLink, and others encourage the Commission to adopt streamlined processes.⁸⁸ For example, AT&T proposes a time line comprised of a pre-filing notice period followed by a rigid 25-day regulatory period from filing to deemed approved, with just a ten-day window for public objections.⁸⁹ Consumer Advocates oppose such alternatives. A pre-filing notice period allows the carrier to imply to the consumer that the carrier has a legal right to discontinue while keeping the Commission, state commissions, consumer advocates, and others in the dark until the filing of the actual discontinuance application. Yet somehow, AT&T posits that during the pre-filing phase consumers and consumer advocates would sort out whether there are grounds to object.⁹⁰ AT&T's proposed ten-day comment period, which would close 15 days or earlier after the application is filed, is similarly unreasonable and inadequate.⁹¹ The public interest is not served through hurried processes that allow ILECs to discontinue service at the expense of consumer participation. The Commission should not adopt the modified streamlined timelines as proposed by the ILECs, which would apply to voice and data services still relied upon by consumers, businesses, public safety agencies, and others.

2. The Commission Should Not Narrow What Consumer Interests Are Within the Scope of "Community" Under Section 214(a)

Consumer Advocates also oppose the NPRM's suggestion that the scope of the "community" which may be entitled to notice and consideration when a discontinuance of

⁸⁸ AT&T Comments at 42-47; CenturyLink Comments at 40-47; Verizon Comments at 28-36; Frontier Comments at 22-26.

⁸⁹ AT&T Comments at 45.

⁹⁰ AT&T Comments at 44-45.

⁹¹ See AT&T Comments at 42-43.

service application is filed should be reduced to just the carrier’s own end-user customers.⁹² The Commission should not reverse the *2015 Tech Transitions Order* determination on this point and repeal Section 51.332, for the reasons set forth in the Consumer Advocate Comments, the California PUC Comments, and others.⁹³ Narrowing the scope of what interests merit consideration a Commission review of a Section 214(a) discontinuance application may harm competition and result in the loss of connections by end-users served by competitors.

3. The Commission Should Not Adopt A Blanket Presumption That The General Availability Of Wireless, VoIP, Or Other IP-Based Services Suffice to Secure Grant of an Application for Discontinuance

Consumer Advocates oppose the Commission’s “Other Part 63” reforms proposed in the NPRM. These proposals are harmful to consumers, particularly the possible decision “that Section 214(a) discontinuance will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community.”⁹⁴ This extreme approach is one that the Commission previously rejected⁹⁵ and could reduce Section 214 review to a mere formality. Consumer Advocates’ Comments address in detail the legal, policy and factual reasons why the Commission should not render a mere

⁹² Consumer Advocate Comments at 19-22.

⁹³ *Id.* See also Windstream Comments at 11-15. ; California PUC Comments at 36-40. As the California PUC explains, the Commission’s *2015 Tech Transitions* determination is consistent with the Commission’s prior *Western Bell* and *BellSouth* orders regarding the breadth of “community” as used in Section 214(a). California PUC Comments at 36-40 (citations omitted).

⁹⁴ Consumer Advocate Comments at 14-20. See, NPRM ¶ 95. The Commission proposes that the mere overlap between the discontinuing providers service and one of these alternatives services could obviate the need for a Section 214(a) filing. Alternatively, the Commission suggests that some grant of “limited blanket discontinuance authority” or forbearance may be appropriate. NPRM ¶¶ 95-99.

⁹⁵ *2015 Technology Transitions Order*, 30 FCC Rcd at 9452, ¶ 145 (“We also decline to adopt a presumption in favor of approving discontinuance of a retail service if at least one competitive alternative is available. Under our precedent, the Commission evaluates a range of factors to determine whether to grant a discontinuance application.”); See also, *2016 Technology Transitions Order*, 31 FCC Rcd at 8308, ¶ 74 (“We reject calls from incumbent LECs to presume that particular technologies, by their nature, represent an adequate replacement for legacy voice services in all instances.”)

formality the Section 214(a) requirement for Commission authorization before a carrier may discontinue interstate services to a community.⁹⁶

Consumers, businesses, customer-carriers and their end users should be provided with effective notice and opportunity to be heard so that the Commission may make a reasoned determination of the present and future needs and convenience of that community.⁹⁷ Importantly, the Commission should not use its forbearance authority to preempt its obligations under Section 214(a) to consider whether the needs of the particular community for reliable, continuous, quality, and affordable telecommunications services will be still be met before grant of a carrier's discontinuance application.⁹⁸ Consumer Advocates have addressed in comments and below the overlapping issues regarding Section 214(a) presented in the RFC.

Still, many ILECs encourage the Commission to streamline the discontinuance process through a grant of forbearance based on the presumption of competition sufficient to satisfy the "public interest" consideration, or through adoption of a blanket presumption that the wireless, over-the-top VoIP, IP-based or other services are both available and adequate alternatives for the low speed services to be discontinued.⁹⁹ In such streamlined paradigms, only "substantial, evidence-based objections" by consumers could deter automatic grant of the discontinuance application.¹⁰⁰

Consumer Advocates oppose the adoption of a presumption or some list of supposed alternative services which the discontinuing provider need only check off. As illustrated by the consumer objections in the Sprint case discussed above, the first goal of the objecting consumers is to have sufficient information and time to make a decision as to whether there are alternative

⁹⁶ Consumer Advocates Comments at 5-8, 19-22.

⁹⁷ *Id.*, at 6-8, 19-29. 47 U.S.C. § 253(b).

⁹⁸ *Id.*, at 6-8.

⁹⁹ *See, e.g.*, CenturyLink Comments at 40-43; AT&T Comments at 4, 44-45, 47-50.

¹⁰⁰ *See*, AT&T Comments at 45.

services available which meet their particular needs. The Commission should preserve processes for notice and review of Section 214(a) discontinuance applications which allow for consideration of the specific needs of the affected communities and consumers.

The comments favoring Commission forbearance to eliminate the need for a Section 214(a) application or shorten the path to grant of authority presume the presence of competitive alternatives. As the premise goes, if there is competition, then competitive forces will protect the public interest and so the Commission may forbear from requiring Section 214(a) applications or may otherwise reduce the Section 214(a) application to discontinuance to a mere formality, blocking consideration of the particular convenience and needs of the community.¹⁰¹ Consumer Advocates oppose this as a legal theory.¹⁰²

Nor is there evidence to support the premise that competitive alternatives are uniformly available to each customer who still depends on ILEC legacy voice services.¹⁰³ Thus any presumption must be location-specific. As stated in the Baldwin Declaration: “Consumers living in rural areas often lack reasonably comparable substitutes for their landline services and consumers in more densely populated communities typically are served by a duopoly consisting of the incumbent telephone company and the cable company that has been awarded the franchise to serve the area.”¹⁰⁴ During his June 2017 travels in Iowa, FCC Chairman Ajit Pai was quoted as saying:

There’s a big and growing divide, a ‘digital divide,’ in this country between those who have high-quality Internet access and those who don’t. Disproportionately, rural Americans find themselves on the wrong side of that divide.¹⁰⁵

¹⁰¹ *Id.*, at 47-51.

¹⁰² Consumer Advocates Comments at 5-8, 19-22. .

¹⁰³ See AT&T Comments at 47-51.

¹⁰⁴ Baldwin Declaration, ¶ 22.

¹⁰⁵ “FCC Chairman visits Iowa, discusses rural broadband access,” *Sioux City Journal*, June 7, 2017. http://siouxcityjournal.com/news/local/fcc-chairman-visits-iowa-discusses-rural-broadband-access/article_90754cf6-e35c-5120-9e4b-9c5ce1bcff44.html

The FCC's *2016 Broadband Progress Report* showed that 374,318 rural Iowans, or 37 percent of all rural Iowans, are without access to fixed advanced telecommunications capability.¹⁰⁶ As of June 2016, only 25% of residential Iowans subscribed to VoIP provided by non-ILECs.¹⁰⁷ Similarly, according to the Broadband Opportunity Council's January 2017 progress report, ten percent of Americans (34 million people) and 39 percent of rural Americans (23 million people) lack access to fixed broadband at the FCC's currently defined speeds of 25 Mbps down and 3 Mbps up.

Although New Jersey is not also thought of as a rural state, not all New Jersey communities have access to fiber-based broadband, wireless, cable, or other possible alternatives to basic wireline service. New Jersey has two ILECs (Verizon and United Telephone d/b/a/CenturyLink) and at present has approximately 100 CLECs, and various wireless providers. The number of carriers may lead to a false assumption that viable alternative voice and broadband providers are present throughout the State. However, New Jersey's Cumberland County's comments and New Jersey's recent investigation of Verizon's maintenance of its infrastructure in the 17 South New Jersey towns demonstrate that is not the case.¹⁰⁸

Unfortunately, New Jersey's experience is not unique. There are similarly situated rural areas across the country that have pockets of alternative voice and broadband service for some residents while residential customers – sometimes situated as close as across the street – have no viable competing service providers. These practical realities must be recognized and weigh against blanket presumptions that all consumers have adequate and reasonable access to wireless voice and broadband services, wireline broadband, or VoIP services whether over cable or over-the-top.

¹⁰⁶ FCC 16-6, "*2016 Broadband Progress Report*," GN Docket No. 15-191 (Jan. 2016), Appendix D.

¹⁰⁷ Baldwin Declaration at 40 (citations omitted).

¹⁰⁸ Cumberland County NJ Comments at 1-6.

As explained in Consumer Advocates' comments, wireless services are not necessarily a substitute for wireline voice services provided by ILECs.¹⁰⁹ Indeed, the forced substitution of wireless for wireline services would reduce the service options in that community.¹¹⁰ As explained by AARP, even when possible services are identified as available to the consumers in the community affected by a discontinuance application, the question of whether any service is an acceptable substitute should be more nuanced and addressed to best protect the interests of the consumers.¹¹¹

III. THE FCC SHOULD NOT ADOPT THE BROAD PREEMPTION PROPOSED IN THE NOTICE OF INQUIRY.

The NOI invites comment on whether state and local laws, in specific or in general, pose a barrier to broadband development or deployment and so should be subject to preemption on Section 253.¹¹² Consumer Advocates' Comments explain why the provisions of Section 253, specifically Section 253(b), restrict the Commission's authority to use preemption as a tool to interfere with legitimate state and local interests, including preservation and promotion of telecommunications universal service, service quality and public safety.¹¹³

In the *2016 Tech Transitions Order* the Commission expressly recognized the legal divisions between the Commission's jurisdiction over interstate telecommunications services and the jurisdiction and interests of the states over intrastate telecommunications services:

[T]he Commission's Section 214 authority applies only to interstate telecommunications services; wholly intrastate services such as local telephone service are excluded from its reach. Moreover, the Section 214 process is not intended to preempt or displace carrier of last resort (COLR) or other service obligations that states may impose on incumbent LECs. Section 214 authority to discontinue an interstate switched access service does not carry with it relief from

¹⁰⁹ Consumer Advocates Comments at 4, 20-22, 29-31.

¹¹⁰ *Id.*, at 20-22, 29-31.

¹¹¹ AARP Comments at vi-xi, 5-12.

¹¹² NOI ¶¶ 100-113.

¹¹³ Consumer Advocates Comments at 22-29.

any COLR or other state law obligations that require a carrier to provide local service.¹¹⁴

As a matter of administrative law, the bar is set high for an administrative agency to reverse or change course from such a fundamental recognition of the division of jurisdiction between the Commission and states. The NOI proposes to shift the focus from regulation of exit authority to promotion of deployment of broadband infrastructure, through preemption of state regulation of intrastate telecommunications services. This shift still cannot justify blanket preemption by the Commission of state regulation of intrastate telecommunications services and their providers. Indeed, through Section 706(a), Congress has charged both the Commission and the states to act within their regulatory jurisdiction to promote deployment of broadband networks, using regulatory tools in a manner consistent with the public interest, convenience and necessity towards that goal.¹¹⁵ An argument that the public interest, convenience, and needs of consumers who rely on ILEC services for their basic local calling needs must give way so that the FCC may promote deployment of broadband networks is utterly contrary to the balance set in Section 706(a). Nor is such an outcome required or justified under Section 253.¹¹⁶

Nonetheless, some ILECs ask the Commission to find that compliance with such fundamental COLR and service obligations as imposed on state certificated providers should be considered barriers to deployment of future broadband networks.¹¹⁷ For example, AT&T states that the FCC must preempt state regulation of intrastate telecommunications service and carrier

¹¹⁴ 2016 *Technology Transitions Order*, ¶ 52.

¹¹⁵ Section 706(a) of the 1996 Telecommunications Act states: “In general. The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.” 47 U.S.C. § 1302(a).

¹¹⁶ 47 U.S.C. § 253. See, Consumer Advocates Comments at 22-29.

¹¹⁷ See, e.g., AT&T Comments at 75-76; CenturyLink Comments at 49-50; Frontier Comments at 3, 34-35.

of last resort obligations “because every dollar spent on legacy TDM networks and services is another dollar stranded in obsolete facilities that cannot be invested in next-generation broadband networks.”¹¹⁸

This ILEC statement incorrectly implies that the states dictate what type of wireline technology a local exchange carrier must use to provide telecommunications services. To the contrary states, Consumer Advocates, and many others want the public to receive voice and broadband internet access services over upgraded, fiber-based or other wireline networks.¹¹⁹ The decision whether to invest in upgrades to fiber-based services is largely within the control of AT&T and other ILECs.¹²⁰ In 2017, Verizon announced that it was buying 37 million miles of fiber to boost its wireless network, piloting what it calls 5G wireless home Internet with customers in 11 markets in the first half of 2017, as it is cheaper not to bring fiber to each home.¹²¹ Therefore, contrary to what ILECs may say in comments to the Commission, the trajectory of fiber deployment by ILECs has largely been based on economic considerations regardless of copper retirement rules or state and local oversight.¹²²

The ILECs’ inference that consumers served by legacy TDM facilities should accept degraded quality of voice and/or data services as the trade-off to incent their investment in next-generation facilities *in other areas* is also wrong. A consumer whose line is regularly out of service or only intermittently reliable gains no benefit from knowing that someone in a

¹¹⁸ AT&T Comments at 76.

¹¹⁹ Consumer Advocates Comments at 1-4. See, also NARUC Comments at : Pennsylvania PUC Comments at 2; California PUC Comments at 9; PUC Ohio Comments at 4-5; Cumberland County NJ Comments at 1-2.

¹²⁰ For example, AT&T currently deploys fiber in 51 metro areas across 21 states within its service territory and says it has plans to reach at least 12.5 million locations across 67 metro areas through its 100% fiber network by 2019. See, “AT&T expands their 100% fiber network to nearly 50 cities nationwide bringing an ultra-fast gigabit internet connection.” (March 23, 2017). http://about.att.com/newsroom/att_fiber_expands_to_17_metro_areas.html

¹²¹ *ARS Technica*, “Verizon buys fiber from Corning with a focus on wireless internet not FiOS,” by Jon Brodtkin, (April 18, 2017). <https://arstechnica.com/information-technology/2017/04/verizon-spends-1b-on-fiber-but-its-for-5g-wireless-not-more-fios/>

¹²² Verizon Comments at 1, 30-36. *But see*, Consumer Advocates Comments at 32-33.

neighboring community is about to receive fiber-based IP services. As Ms. Baldwin spelled out in detail in her support of the Consumer Advocates' Comments, consumers whose ILEC has allowed copper outside plant to deteriorate, without either adequately maintaining those facilities or replacing them, have appealed to regulators in multiple states to intervene. Ms. Baldwin has given specific examples from New York, New Jersey, Pennsylvania, Maryland, Iowa, and California of service quality lapses affecting customers, both in locations where no facilities upgrades were under way or planned and in locations where upgrades were occurring but consumers had not yet received notice of service-affected network transitions.¹²³ The County of Cumberland, New Jersey Comments also document that this concern about service quality and the need for ongoing maintenance of copper facilities is very real.¹²⁴

As the Pennsylvania Public Utility Commission ("Pennsylvania PUC") has aptly explained with respect to its law governing the facilities maintenance supporting adequate service quality:

The Pennsylvania General Assembly enacted Section 1501 to require carriers to adequately maintain their *current* networks while they are in use and to require carriers to provide reasonably continuous services to the public regardless of the network technology used. As a technologically agnostic statutory provision, Section 1501 does not inhibit or prohibit an ILEC from transitioning its current network facilities to an all-fiber configuration providing various services including broadband access.¹²⁵

The Public Utilities Commission of Ohio ("PUC Ohio") opposes blanket preemption. It described the legislative and regulatory steps taken to facilitate the transition from legacy copper

¹²³ See Baldwin Affidavit at 13-34.

¹²⁴ See, e.g., County of Cumberland, NJ Comments at 1-6. The County of Cumberland and the 17 South Jersey Towns requested an investigation before the New Jersey Board of Public Utilities, regarding service and service quality issues voiced in hundreds of complaints filed by South Jersey municipal offices, emergency responders, schools, libraries, businesses, and resident customers. The investigation resulted in a stipulation of settlement affirming Verizon's COLR obligation to maintain and repair the copper infrastructure in places where Verizon indicated it would not deploy its fiber facilities. *I/M/O Verizon New Jersey Discontinuance of Landline Telecommunications Maintenance, Facilities and Infrastructure*, Order Approving Stipulation, BPU Docket No. TO15121325, May 31, 2017. <http://www.state.nj.us/bpu/pdf/boardorders/2017/20170531/5-31-17-4A.pdf>

¹²⁵ Pennsylvania PUC Comments at 4 (emphasis in original).

networks to advanced communications networks, while endeavoring to assure that consumers and communities are protected and retain access to basic telephone service and emergency access.¹²⁶

State quality of service regulation and the Commission's definition of "de facto copper" retirement are important, complementary protections to assure that ILECs do not neglect to invest in their networks to the point that the ability of communities to receive reliable telecommunications service is impaired.¹²⁷ These state regulatory protections assure that communities have reliable telecommunications services, including access to emergency services. But they do not prohibit the ILECs providing these important telecommunications services from also upgrading their networks.

The claims of burden advanced by some ILECs and claims that the Commission can and should preempt state and local regulation based on Section 253 are not supported.¹²⁸ As NARUC succinctly states:

The NOI asks if State laws governing "state legacy service quality and copper facilities maintenance regulations" can be preempted. The answer is clearly not.

Both fall squarely within the explicit reservation of State authority in Section 253(b) to "impose on a competitively neutral basis, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."¹²⁹

Nor do the provisions of Section 253(a) and (d) support preemption of state and local laws as a broad, unspecified class based on the possibility that they inhibit or limit the ability of any competitor or potential competitor to provide telecommunications services. AT&T asks the

¹²⁶ PUC Ohio Comments at 4-5, 7-9.

¹²⁷ Consumer Advocates Comments at 8-9, 22-29; Baldwin Declaration ¶¶ 9-10, 18-23.

¹²⁸ AT&T Comments at 69-76; CenturyLink Comments at 49-50; Frontier Comments at 29-35.

¹²⁹ NARUC at 12.

Commission to promulgate a regulation stating such preemption.¹³⁰ Consumer Advocates, NARUC, the California Public Utilities Commission, and others contend that such action would be inconsistent with the language and structure of Section 253.¹³¹ Whether state or local actions are competitively-neutral under Section 253(a), so as to merit Commission review and preemption under Section 253(d), is a fact-based inquiry as illustrated by the Commission’s recent Sandwich Island decision.¹³²

IV. THE FCC SHOULD RETAIN THE FUNCTIONAL TEST FOR SERVICE REPLACEMENT DISCUSSED IN THE REQUEST FOR COMMENT.

Section 214(a) states in pertinent part that “No carrier shall discontinue, reduce, or impair *service* to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby....”¹³³ Through the RFC, the Commission opens the door to an adjudication that the Commission’s 2014 clarification, that “service” is based on a “functional test,” alternatively summarized as the totality of the circumstances, should be reversed and replaced.¹³⁴ Some carriers support the Commission’s proposal that the carrier’s tariff or customer service agreement description should define and constrain the Commission’s

¹³⁰ AT&T Comments at 69-70.

¹³¹ Consumer Advocates Comments at 22-29; NARUC Comments at 8-12; California PUC Comments at 9-11.

¹³² California PUC Comments at 9-11. See, *In the Matter of Connect America Fund, Sandwich Island Communications, Inc.*, WC Docket No. 10-90, CC Docket No. 96-45, (DA 17-85), Memorandum Opinion and Order (rel. July 3, 2017) (Exclusive license to provide telecommunications services, granted by Department of Hawaiian Home Lands to Waimana Enterprises, Inc. violates Section 253(a), is not saved by the exceptions of Section 253(b) or (c), and so the FCC is required by Section 253(d) to preempt enforcement of the license.).

¹³³ 47 U.S.C. § 214(a)(emphasis added).

¹³⁴ RFC, ¶¶ 115-123. See, *2014 Tech Transitions NPRM/DR* at ¶114 (“In this Declaratory Ruling, we clarify that the analysis under section 214 of whether a change constitutes a discontinuance, reduction, or impairment of service is a functional test.”); *2015 Tech Transitions Order*, ¶¶ 5, 181-201 (“[S]ection 214’s discontinuance provisions apply to a service based on a totality-of-the-circumstances functional evaluation.”) In the *2015 Tech Transitions Order*, the Commission denied USTelecom’s petition for reconsideration of the functional test decision. *Id.*, ¶ 187. As the Commission notes, USTelecom’s appeal to the U.S. Court of Appeals for the D.C. Circuit is pending. NPRM/NOI/RFC, fn. 168.

consideration of what and whether a “service” is covered by a Section 214(a) application to discontinue.¹³⁵

Consumer advocacy groups and others,¹³⁶ urge the Commission to adhere to the guidance provided in 2014 and affirmed in 2015 that “[S]ection 214’s discontinuance provisions apply to a service based on a totality-of-the-circumstances functional evaluation.”¹³⁷ The Commission’s clarification is consistent with the statutory language of Section 214 in general and Section 214(a) in particular.¹³⁸ “Service” is used repeatedly in Section 214, whereas there is no mention of tariffs. There is no basis to read into the provisions of Section 214(a) the substitution of “tariff” for “services.”¹³⁹ Section 214(a) provides the Commission with authority over the entry and exit of telecommunications carriers.¹⁴⁰ Once a carrier holds that federal certificate of public convenience, Section 214(a) allows that the carrier may – without further Commission approval - - make “changes in plant, operation, or equipment” so long as the changes “will not impair the *adequacy or quality* of service provided.”¹⁴¹ The “adequacy or quality of service” is best judged from the perspective of the consumer. The next passage in Section 214(a) states that “[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community”

¹³⁵ AT&T Comments at 61-63; Verizon Comments at 39-40; CenturyLink Comments at 45-46.

¹³⁶ Consumer Advocates Comments at 5-9, 29-31; Public Knowledge Comments at 8-13; AARP Comments at 23-26; Greenlining Comments at 10; *see also*, Pa PUC Comments at 22-24; Ohio Commission Comments at 9-13; CWA Comments at 28-37; INCOMPAS Comments at 16.

¹³⁷ *2015 Tech Transitions Order*, ¶¶ 5, 181-201 (“[S]ection 214’s discontinuance provisions apply to a service based on a totality-of-the-circumstances functional evaluation.”) In the *2015 Tech Transitions Order*, the Commission denied USTelecom’s petition for reconsideration of the functional test decision. As the Commission notes, USTelecom’s appeal to the U.S. Court of Appeals for the D.C. Circuit is pending. NPRM/NOI/RFC, fn. 168.

¹³⁸ Consumer Advocates Comments at 5-8, 20-21, 29-31.

¹³⁹ Pennsylvania PUC Comments at 24. (“Had Congress intended to limit the impair standard set forth in Section 214 to tariff specifications, it would have used the term “schedule of charges” as set forth in Section 203(a)”). *See*, AARP Comments at 23. (“[T]here is no indication in the language of Section 214(a) that Congress intended to allow the carrier to define the scope of a discontinued ‘service’ via its tariff.”); *see also*, Public Knowledge Comments at 9-13.

¹⁴⁰ *National Association of Regulatory Utility Comm'rs v. FCC*, 746 F.2d 1492, 1496 (D.C. Cir. Oct. 26, 1984).

¹⁴¹ 47 U.S.C. § 214(a). *See*, Pennsylvania PUC Comments at 23-24.

without Commission authorization. The Commission should accord “service” a consistent, commonsense interpretation based the context and its repeated use in Section 214(a).

Consumer Advocates disagree that the “functional test” is a novel approach.¹⁴² The Commission’s 2003 decision regarding Verizon’s request to discontinue certain interstate collocation services illustrates the broad scope of the Commission’s consideration of the services and needs of the community – in that case, interconnecting competitors.¹⁴³ Verizon’s discontinuance application did reference specific tariff provisions.¹⁴⁴ Yet, the Commission did not limit itself to a Boolean “yes” or “no” decision, constrained by a tariffed description. The Commission examined “the need for the service in general, and need for the particular service in question.”¹⁴⁵ The Commission considered the “public interest benefits of expanded interconnection” and the role and types of collocation services used by the interconnected competitors.¹⁴⁶ The Commission considered the complex ways in which the various interconnecting competitors would be able to obtain similar services and functionality from Verizon, through state tariffs, commercial agreements, and interconnection agreements. The Commission granted Verizon’s application for discontinuance, but subject to specific, enforceable conditions pursuant to Section 214(c).¹⁴⁷

The Commission should not reverse the 2014 and 2015 summary of its review of the services to be discontinued as based on a functional test. Whatever the label, the Commission has not confined its past reviews to the strict language of a tariff or four corners of a customer

¹⁴² See, e.g., Verizon Comments at 39 (referring to the Commission’s functional approach as “novel”).

¹⁴³ *Verizon Tel. Cos., Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737 (2003) (“Verizon Expanded Interconnection Discontinuance Order”).

¹⁴⁴ *Id.*, ¶ 4.

¹⁴⁵ *Id.*, ¶ 13.

¹⁴⁶ *Id.*, ¶¶ 12, 13.

¹⁴⁷ *Id.*, ¶¶ 39,40.

service agreement. Nor should the Commission adopt such a narrow and confining interpretation of “service” as based on the carrier’s viewpoint rather than the needs of the community. Section 214(c) grants the Commission the “power to issue such a certificate, as applied for, or to refuse to issue it, or to issue it for a portion [of the] ... discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.”¹⁴⁸ The Commission should not adopt any narrow, constraining concept of “service” which nullifies this explicit, discretionary power to be exercised for the public convenience.

As part of the RFC, the Commission questions whether the interests of consumers who have attached third-party devices should be considered in a review of a discontinuance application, given the inherent risk of obsolescence as telephone network technology may change as recognized in the *Carterfone* decision.¹⁴⁹ Consumer Advocates and others support continuation of the functional test, as broad enough to include consideration of how consumers use and rely upon the services proposed to be discontinued – such as the potential loss of home alarm security services, medical monitoring services, credit card processing and the like which Fire Island, New York residents and businesses opposed when Verizon proposed to substitute fixed wireless Voice Link service for damaged and impaired copper connections.¹⁵⁰

Consumer Advocates reject the ILECs’ reliance on the Commission’s 60-year-old *Carterfone*¹⁵¹ decision as justification for a tariff-delimited application of Section 214.¹⁵² The

¹⁴⁸ 47 U.S.C. §214(c).

¹⁴⁹ RFC, ¶¶ 118, 120.

¹⁵⁰ Baldwin Declaration, ¶¶ 64-69.

¹⁵¹ *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968) (“*Carterfone*”); *In re Amendment of Section 64.702 of the Commission’s Rules and Regulations* (“Computer Inquiry II”), 77 F.C.C. 2d 384 (1980).

¹⁵² AT&T Comments at 61-62; Verizon Comments at 40.

Commission’s consideration of the discontinuance of service based on a functional test is completely consistent with the principle, as set forth in *Carterfone* (and more expansively in the Commission’s *Computer Inquiry* line of cases), that activities at the network’s “edge” should be permitted to develop independent of network transmission capabilities, so long as the activity does not harm the operation of the network.¹⁵³ In fact, if customers are not entitled to rely on the obvious functionalities of the service platform for beneficial uses not explicitly described in the carrier’s tariff, it will have a chilling effect on innovation in edge applications. As addressed above, there are a variety of specialized devices use by those with disabilities or for public safety communications which may or may not be inter-operable with proposed substitute service that use different technologies than the services proposed for discontinuation. In applying Section 214(a) and Section 214(c), the Commission has ample discretion to assess the relative importance of various functional capabilities in determining the impact of a proposed discontinuance.

¹⁵³ AARP Comments at 23; *see also*, CWA Comments at 33.

V. CONCLUSION

For the reasons set forth in the Consumer Advocates Comments and these Reply Comments, Consumer Advocates encourage the Commission to refrain from appealing or amending the important copper-retirement and consumer notice regulations and other reforms proposed by the NPRM and Appendix A. The Consumer Advocates oppose any reinterpretation of all or parts of the Section 214(a) discontinuation of services process and how the Commission reviews such applications. The Consumer Advocates oppose the Request for Comment's proposed action to enter a declaratory order reversing the Commission's use of the functional test.

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