

## DISSENTING STATEMENT OF COMMISSIONER AJIT PAI

Re: *Technology Transitions*, GN Docket No. 13-5, *Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593.

The IP Transition represents opportunity for all Americans. Fiber is the fastest, most reliable way to transport data, whether across a city or around the world. Fiber networks transmit data at the speed of light and fail at only one-eighth the rate of copper networks. Next Generation 911, telemedicine, and distance learning will all be delivered over IP networks. This means that the most resilient emergency communications, the highest-quality medical images, and the best educational conversations are within our reach. The all-IP future brings with it exactly the high-quality, high-speed technologies and services that consumers are demanding.

The private sector knows this, which is why the 4,462 broadband operators across the United States have embraced it. Packet switching has usurped circuit switching. Carriers are pushing fiber further into their networks and upgrading from DSL to IP-based technologies like carrier-grade Ethernet. Mobile companies are vying to improve upon LTE's baseline for greater speed and resiliency while satellite providers are offering high-speed broadband to the most rural parts of our nation. Cable operators are upgrading to DOCSIS version 3.1, and IEEE has standardized the next-generation protocol for Wi-Fi (802.11ac). Together, these developments promise 1 Gbps throughput for millions of consumers.

So why is the FCC dead set on slowing it down?

It appears that Chicken Little rules the roost. As I warned nine months ago when we commenced this proceeding, lobbyists are claiming that the sky will fall if fresh fiber replaces aging twisted pairs of copper. (Ironically, these are the same lobbyists who lambaste bottlenecks in the broadband marketplace, lecture us that "broadband" means fiber-delivered 25 Mbps connectivity, and lament wireline transactions that they believe will delay fiber deployment.) Corporate interests have told us these new services threaten their business models. Companies are seeking to force their competitors to keep spending money on networks that those competitors no longer want to maintain. Why? So that these companies can continue to use their competitors' networks! To state the argument is to reveal its absurdity. But today the FCC has put the interests of these corporate middle-men over the welfare of consumers.

I respectfully dissent for several reasons.

*First*, by dragging out the copper retirement process, the FCC is adopting "regulations that deter rather than promote fiber deployment."<sup>1</sup> The *Order* tacks three months of delay onto the copper retirement process,<sup>2</sup> slowing down the speed of fiber deployment. And the *Order* tells companies to spend more capital maintaining the legacy copper plant,<sup>3</sup> even when fiber can cure any failures of that

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<sup>1</sup> *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15038 (2014) (*Tech Transitions NPRM*) (Statement of Commissioner Ajit Pai).

<sup>2</sup> *Order* at para. 29. Ironically, the *Order* does so even though it admits that interconnecting companies "rarely" request such a waiting period before copper is retired under our existing rules. *Order* at para. 28.

<sup>3</sup> *Order* at para. 90.

fading infrastructure. It's an iron law of economics that you can't spend a dollar twice, so diverting scarce capital from new networks to old will only slow next-generation deployment and deepen the digital divide.

*Second*, the FCC is adopting “rules that frustrate rather than further the IP Transition”<sup>4</sup> by again expanding the scope of section 214 of the Communications Act. For those not steeped in telecom arcana, section 214 is the mother-may-I provision of Title II. It was adopted by Congress to guard against loss of service during wartime, such as “abandonment of existing telegraph offices” or “discontinuance of service to military establishments and industries.”<sup>5</sup> Traditionally, the Commission has interpreted the section to apply only when a carrier discontinues service to a particular community entirely, such as by the “severance . . . of physical connection,” the “dismantling . . . of any trunk line,” or the “closing . . . of a telephone exchange.”<sup>6</sup>

But not anymore. The Commission now requires carriers to seek permission before discontinuing almost “every [network] feature no matter how little-used or old-fashioned.”<sup>7</sup> That means the FCC gets to micromanage each and every change that a carrier makes to its network. The Commission now says carriers must get permission before discontinuing “wholesale voice inputs” even if the carrier continues to serve that same community with the same service.<sup>8</sup> That means the FCC gets to flyspeck each and every

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<sup>4</sup> *Tech Transitions NPRM*, 29 FCC Rcd at 15038 (Statement of Commissioner Ajit Pai).

<sup>5</sup> *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC.2d 293, 295 n.4 (1979).

<sup>6</sup> See 47 C.F.R. § 63.60(b)(1), (4), (5).

<sup>7</sup> *Tech Transitions NPRM*, 29 FCC Rcd at 15018, para. 118. Most curious is the *Order*'s insistence that “tariffs cannot define the scope of a ‘service’ under section 214(a) given that there are circumstances in which the Commission has forbore from tariffing requirements but in which section 214 obligations remain intact.” *Order* at para. 189. For one, for the first 62 years of section 214's existence, the Communications Act required that every common carrier service be tariffed, *MCI Telecommunications Corp. v. AT&T Co.*, 512 U.S. 218 (1994). By definition, then, the *only* services that could be discontinued were tariffed services. Absent some indication that Congress intended the creation of section-10 forbearance authority in 1996 to alter the scope of section 214, the existence of detariffed services today is irrelevant to the question of how section 214 applies to still-tariffed services. For another, the Communications Act specifically prevents a common carrier from “extend[ing] to any person any privileges” with respect to a tariffed service *except as specified in the tariff*. Communications Act § 203(c). This venerable principle, known as the filed rate doctrine, means that no person (and consequently no community) can enforce or rely on any aspect of a tariffed service that isn't described in the tariff. See *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214, 221–24 (1998) (explaining that the doctrine applies not just to rates because rates “have meaning only when one knows the services to which they are attached”). Yet the *Order* concludes that common carriers not only may “extend” such untariffed “privileges,” they *must* do so until the FCC says otherwise. I cannot comprehend how the *Order* squares this circle.

<sup>8</sup> *Order* at para. 117. The *Order* shreds pages of precedent to reach this result. For example, hornbook law says a carrier needs FCC approval only to discontinue *interstate* service. See Communications Act § 2(b) (“[N]othing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier . . . .”); *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). And yet the *Order* asserts section 214 authority over commercial platform services that offer wholesale local exchange service (an intrastate service). As another example, the Commission has held that the concern of section 214 is “the ultimate impact on the community served rather than on *any technical or financial impact on the carrier[-customer] itself*.” *Graphnet, Inc. v. AT&T Corp.*, 17 FCC Rcd 1131, 1140, para. 29 (2002) (emphasis added). And yet the *Order* reverses course, focusing on “financial and technical factors affecting the carrier-customer” such as whether the carrier-customer can “readily obtain a replacement input that would allow it to maintain its existing service without reduction or impairment” and do so “without material difficulty or costs.” *Order* at para. 117. Such disregard for our past decisions suggests that future Commissions may not respect the radical departures blessed today.

change a carrier makes to its business model—all in the name of enhancing competition in the already competitive *voice* market. And the Commission now leverages its discontinuance authority to get a foothold in the Ethernet market,<sup>9</sup> exporting its legacy economic regulations into an all-IP world. That means the FCC will intervene in the enterprise broadband services market even though our staff still have not analyzed the extensive data we just finished collecting about whether that market needs regulation at all.

In sum, the *Order* opts for command-and-control regulation instead of permissionless innovation. That deprives entrepreneurs of the freedom to take a risk and try something new—even if it trenches on the turf of regulatory incumbents. Could Uber have revolutionized transportation if it had to ask the City of New York permission before innovating? No. Could Airbnb have gotten the sharing economy off the ground if the government had to approve every rental? Of course not.

And heavy-handed regulation is also unnecessary. The American people aren't asking Washington to “slow rather than expedite the availability of high-speed broadband throughout our nation.”<sup>10</sup> They demand more competition, faster deployment, and better service. They ask when their homes are going to be connected with fiber, not why the FCC isn't doing more to promote copper. From Nebraska to Alaska, California to Texas, Americans have told me that they want 21<sup>st</sup> century connectivity—not 20<sup>th</sup> century technology and 19<sup>th</sup> century regulation.<sup>11</sup>

Instead of pausing the IP Transition, we should be embracing it. That means getting rid of the tariffs, the cost studies, the hidden subsidies, and the other economic regulations that were the foundation of the old regulatory system. That means ending the *Computer Inquiry* requirements designed to protect narrowband, legacy industries, which have no place in an era of ubiquitous broadband and mobile apps. That means reopening the spectrum pipeline to get more of the airwaves out of the federal government's hands and into the commercial marketplace. That means rejuvenating the 5 GHz proceeding so that wireless Internet service providers and consumers nationwide can put another 195 MHz spectrum to unlicensed use. That means adopting a targeted stand-alone broadband plan so that rate-of-return carriers can offer rural residents the same options found in cities. And that means refocusing our efforts on eliminating regulatory barriers to infrastructure investment—whether it's preempting municipal moratoria or lowering pole attachment rates—so that companies can deploy the small cells, the towers, the new fiber, and the new services that consumers are demanding.

I can't summarize my views any better than by quoting FCC leadership from this past September:

It's important to understand the technical limitations of the twisted-pair copper plant on which telephone companies have relied for DSL connections. Traditional DSL is just not keeping up, and new DSL technologies, while helpful, are limited to short distances. Increasing copper's capacity may help in clustered business parks and downtown buildings, but the signal's rapid degradation over distance may limit the improvement's practical applicability to change the overall competitive landscape. . . . We welcome, and we must encourage, the development of new technologies that can bring greater

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<sup>9</sup> *Order* at para. 132. This use of discontinuance authority necessarily creates a tilted playing field for next-generation services since the Commission cannot apply these new rules to competitive local exchange carriers, to cable companies, to wireless operators, to satellite providers, or to any other company that did not at some point offer legacy services. Of course, the *Order* implicitly recognizes this, and perhaps letting the FCC pick winners and losers is the whole point.

<sup>10</sup> *Tech Transitions NPRM*, 29 FCC Rcd at 15038 (Statement of Commissioner Ajit Pai).

<sup>11</sup> *Cf.* Communications Act § 7(a) (“It shall be the policy of the United States to encourage the provision of new technologies and services to the public.”).

competition and more choices to consumers. In the end, at this moment, only fiber gives the local cable company a competitive run for its money.<sup>12</sup>

I couldn't agree more. But because the majority today has instead decided to turn its back on the future, I respectfully dissent.

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<sup>12</sup> Prepared Remarks of Chairman Tom Wheeler, "The Facts and Future of Broadband Competition" (Sept. 4, 2014), available at <http://go.usa.gov/3sgR4>.