

**DISSENTING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

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.

Throughout the communications industry, technological breakthroughs and transitions are occurring at a rapid pace. As a Commissioner, I try my best to ensure that nothing this agency does will impede that progress or otherwise discourage innovation and investment. While history has proven that almost every major technological change, no matter how disruptive, eventually benefits businesses and consumers, some seem to fear the unknown. Let's not lose sight of the big picture: we are talking about superior technologies and better choices. Yes, there will be adjustments, and yes, the FCC should monitor developments, but no, we should not assume that the regulatory constructs of the past should automatically apply to services of the future.

I have heard and understood the arguments that certain protections need to remain in place longer because building out access to the last mile may be uneconomical in some circumstances. At the same time, we cannot simply extend the old rules to new services because it will dampen incentives for further investment. After all, without that investment, there is nothing to transition to. We can't bemoan the lack of high-speed broadband in the section 706 proceeding, only to erect new barriers to deployment in this proceeding. Nonetheless, I tried to approach this item with an open mind.

Early indications on the thorniest issue—wholesale access—gave me reason to believe that we could find common ground. In particular, I was heartened by reports that the Commission would be moving away from a proposed requirement that incumbent local exchange carriers (LECs) provide competitive carriers with wholesale access on “equivalent” rates, terms, and conditions, in favor of a “reasonably comparable” standard. To me, that implied that incumbent LECs would have some flexibility in how they structure their replacement offerings, which may be necessary to help recoup the substantial cost of deploying modern networks. After all, it's been acknowledged numerous times in Commission precedent that such a standard rightfully permits variability, namely in the universal service context.

Upon reading the text of the Order, however, I discovered that the factors are described in a way that leaves little room to maneuver, and the standard of review provides staff with a great deal of discretion to weigh the factors as they see fit. Staff will even examine evidence concerning the motivation for an incumbent LEC's actions. I tried to get clarity from staff and stakeholders about how to interpret this new standard. However, the vaguely reassuring conversations never seemed to match up with the language in the item or the sentiments in the ex parte filings.

Adding to my discomfort, the requirement is framed as an “interim” measure pending completion of the special access proceeding. But there is no timeline as to when that proceeding will be completed. To put it in perspective, I have worked on the issue of special access for over a decade, and we are little closer to any resolution in either direction. While I may have been willing to consider a rational, time-limited structure, it is another matter to lock in an already troubling standard for an indefinite period of time.

Putting it all together, this results in an inflexible regime where providers' decisions will be questioned at every turn. Moreover, it starts to resemble a scheme to insulate backdoor rate regulation

from litigation, rather than a benign effort to preserve the status quo. I cannot agree to that. Supporters point out that these requirements only kick in if a provider files to discontinue service. But the order seems designed to force carriers to file in order to subject them to the problematic pricing regime. Specifically, carriers will have to engage in a “meaningful evaluation of the impact of actions that will discontinue, reduce, or impair services used as wholesale inputs and ... obtain Commission approval if their actions will discontinue service to end users.” That has since expanded to include a requirement to consult with wholesale carriers—as if they have any incentive to ever agree. All of this puts carriers between a rock and a hard place. Either they defer their discontinuances, forcing them to maintain legacy services, or they file for discontinuances and are subject to the new conditions.

I was even more troubled to learn that commercially-negotiated UNE-P replacement services would now be regulated. Providers that had voluntarily agreed to offer a commercial wholesale platform service to ease the transition for competitive carriers after the obligation to provide UNE-P was struck down by the Courts are now being forced to carry it forward into an IP world for a to-be-determined duration.

There are several problems with this approach, but let me focus on the most disturbing. There does not appear to be any limiting principle to the Commission’s expansive interpretation of section 214(a). Under this new interpretation, as soon as a carrier starts offering ANY telecommunications service, regulated or not, it has to seek permission to discontinue it and may have to provide an alternative. I am stunned by the breadth of this overbearing regulatory power grab. I hope all participants in the supposed “virtuous circle” will see how dangerous this reading actually is. Every communications and edge provider better think long and hard before introducing new services because you may be locked in to providing them for a very long time. Instead of promoting “Permissionless Innovation”, we are creating a regime of “Permission and Less Innovation”.

I also have concerns with the copper retirement discussion. The silver lining is that the Commission preserves the notice regime for retirements, rather than creating an approval process. But the Order imports a “good faith” standard with the details to be worked out later. Without commenting on its broadcasting use, it’s completely vague how it would be applied here. So much for providing clear rules of road to promote the transitions. Again, this item is being portrayed as balanced when instead it is merely deferring to the staff ways to add layers upon layers of bureaucracy, followed up by applications eventually being delayed or rejected. Doesn’t anyone follow our forbearance proceedings?

Another source of concern is the dubious “de facto retirement” section. To the extent this is actually a problem, the item does not explain why our current rules are insufficient to address it. As one commenter explained: “It just makes sense that when a superior network is available, which provides more and better services to consumers and also requires less maintenance, that the provider would not devote scarce resources to maintaining the current legacy network. When that network no longer is able to provide reliable service, it is appropriate for it to be retired.”<sup>1</sup> At that point, providers would presumably follow the Commission’s retirement rules. There is no evidence in the record of systematic neglect or non-compliance with the rules, so it is unclear why additional requirements are necessary.<sup>2</sup> To the contrary, there is evidence that providers are meeting applicable standards for network upkeep, which

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<sup>1</sup> Comments of GVNW Consulting, Inc., PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 17 (filed Feb. 5, 2015).

<sup>2</sup> See, e.g., Letter from Frank Simone, AT&T to Marlene Dortch, FCC, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 1 (filed July 31, 2015).

acknowledge that no network is perfect.<sup>3</sup> But now, a single complaint could subject a provider to an enforcement action, further diverting resources away from fiber investment.

I also disagree with the restrictions on how providers market new services that will be available when copper is retired. Based on the section 706 proceeding, I was under the impression that we wanted consumers to adopt broadband, to the tune of 25/3 Mbps, which currently means fiber. Yet here in this proceeding, the message from the Commission seems to be “Warning: Fiber Ahead. Sorry for the Convenience.” Incredibly, the Commission found a way to be for and against fiber at the same time.

Finally, I have deep reservations about the Further Notice on measuring the adequacy of substitute services. Here again, this is written from the perspective that new or different services should be viewed with suspicion, even though many consumers have already transitioned to such services on a voluntary basis. For example, why would we hold up progress for fax machines when perfectly adequate substitutes have been available for over a decade? I also take issue with particular criteria, such as cybersecurity, as we have no statutory authority in that space.

I am disappointed that we were not able to reach consensus on this item. Everyone supports technology transitions but the details matter. In this item, the Commission opts to micromanage those details. I’m not suggesting that the Commission turn a blind eye to issues that may arise during the proceeding. But I cannot support intrusive meddling in virtually every aspect of carriers’ business decisions. I respectfully dissent.

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<sup>3</sup> See, e.g., Letter from Maggie McCready, Verizon, to Marlene Dortch, FCC, GN Docket No. 13-5, RM-11358, at 1 (filed July 28, 2015) (“Since 2008 Verizon has spent more than \$200 million on its copper network. And our network-trouble-report rate of just over two reported troubles per 100 lines—well below the benchmarks generally set by states that in engage in service-quality regulation—reflects a healthy network.”).