No. 17-73283

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREENLINING INSTITUTE, PUBLIC KNOWLEDGE, THE UTILITY REFORM NETWORK, AND NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order of
the Federal Communications Commission

BRIEF FOR THE RESPONDENTS

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Administrative Decisions

Statutes and Regulations

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

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BRIEF FOR THE RESPONDENTS

INTRODUCTION

Our nation's telecommunications networks are undergoing a vital and fundamental transformation: To enable new and better digital services, carriers have begun to deploy fiber and other modern network infrastructure to replace legacy copper networks that historically transmitted voice calls using circuit-switched technology. The order under review in this case reflects the Federal Communications

Commission's considered, expert judgment of how best to foster that transition for the benefit of consumers.

The Communications Act of 1934 (Communications Act or Act) and the FCC's implementing rules allow carriers to modify their network architecture without seeking permission from the agency. But when a carrier wishes to discontinue, reduce, or impair a "service" that it provides, over whatever network facilities, the carrier must first obtain the agency's approval. 47 U.S.C. § 214(a). This distinction between the rules governing network changes and service discontinuances is longstanding; the order under review neither created nor disturbed it.

The Commission instead took three actions relevant to this case: First, it revised its interpretation of when carriers must obtain the agency's approval to discontinue, reduce, or impair a service, concluding that "service" is an ambiguous statutory term best defined by how carriers describe what they offer their customers in tariffs and service agreements. Second, the Commission repealed the "de facto retirement" rule, which formerly required carriers to provide notice when they allowed a copper network to degrade to a degree functionally equivalent to removing or disabling that network (but which did not affect the

separate requirement of obtaining FCC approval if that retirement had the effect of discontinuing, reducing, or impairing the customer's service). And third, the Commission repealed rules that required incumbent carriers to provide direct notice to retail customers and state governments when those carriers implemented a network change.

The Commission took these actions to reduce regulatory uncertainty, promote the deployment of modern networks, and establish clear lines of accountability to ensure that devices and services such as fax machines and security systems are compatible with modern networks. Because the Commission's actions were reasonable, reasonably explained, and procedurally proper, the petition for review should be denied.

JURISDICTIONAL STATEMENT

The FCC actions that the petitioners challenge were adopted in an order and declaratory ruling released together on November 29, 2017. *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 11128 [SER 1] (2017) (*Order, Declaratory Ruling*, or *Combined Order*). A summary of the *Order*, which promulgated revisions to certain FCC rules, was published in the Federal

Register on December 28, 2017. 82 Fed. Reg. 61453. The *Declaratory Ruling*, an adjudicatory decision not published in the Federal Register, took effect upon release. *Combined Order* ¶ 193 [SER 70].

The petitioners sought review in this Court on December 8, 2017. *See* 28 U.S.C. § 2344. In their review petition, they challenged the *Declaratory Ruling* and a narrow portion of the *Order*: three paragraphs concerning the FCC's decision to repeal the de facto retirement rule. *See* Pet. 2 (Dkt. Entry 1-6). This Court has jurisdiction over those issues if the petitioners can meet their burden to establish Article III standing. They have not yet done so. *See infra* Part I.

On April 24, 2018—well over 60 days from the *Order*'s publication in the Federal Register—the petitioners filed a "supplemental" petition for review seeking to challenge the Commission's repeal of the retail customer and state government direct notice rules. Supp. Pet. 1 (Dkt. Entry 23). Because the initial petition for review did not identify those claims, the Court lacks jurisdiction to reach them. *See infra* Part IV-A.

STATEMENT OF THE ISSUES

1. Do the petitioners have standing to bring this case?

If so:

2. Did the FCC exceed its authority, or act arbitrarily and capriciously, by (i) deciding that what constitutes a "service" for which carriers must seek discontinuance approval under Section 214(a) of the Communications Act, 47 U.S.C. § 214(a), turns on how carriers have described their service offerings in tariffs or service agreements; and (ii) repealing the de facto retirement rule?

3. Does this Court have jurisdiction to reach the petitioners' untimely challenges to the FCC's repeal of rules requiring direct notice of copper retirements to retail customers and state governments, and, if so, were the agency's actions arbitrary or capricious?

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the statutory addendum bound with this brief.

COUNTERSTATEMENT OF THE CASE

A. Statutory and Regulatory Background

1. Title II of the Communications Act authorizes the FCC "to regulate common carrier services, including telecommunications services like landline telephone services." *Cellco P'ship v. FCC*, 700 F.3d 534, 537–38 (D.C. Cir. 2012). Within Title II is Section 214(a), which provides in

relevant part that, before a carrier may "discontinue, reduce, or impair service to a community, or part of a community," it must obtain approval from the FCC. 47 U.S.C. § 214(a). That provision of Section 214(a) was enacted during World War II, when competitive forces threatened domestic telegraph carriers and Congress allowed for them to merge. *See* H.R. Rep. No. 78-69, at 3 (1943).

The legislative history of Section 214(a) reflects "a strong desire" on the part of Congress "to protect Americans' continued access to the nation's communications networks while also preserving carriers' ability to upgrade their services without the interruption of federal micromanaging." *Declaratory Ruling* ¶ 133 [SER 50]. In adopting the bill that became Section 214(a), for example, the House of Representatives struck language from an earlier Senate draft that would have required FCC approval for a carrier to "abandon[]" any "line, plant, office, or other physical facility." H.R. Rep. No. 78-69, at 2 (quoting the Senate bill). In the words of a conference committee manager, the negative consequence of that language would have been to require a company that sought merely to "move a wire from one House Office Building to the other . . . to

go through the endless red tape" of obtaining pre-approval from the Commission. 89 Cong. Rec. 766, 787 (1943) (Statement of Rep. Boren).

Under the Commission's rules implementing Section 214(a), a carrier applying for the Commission's approval to discontinue a service must assemble information concerning (among other things) the areas and types of service affected; other carriers that serve the affected area; any prior discontinuance, reduction, or impairment of the carrier's service to the affected area; and any plans the carrier may have for such changes in the future. *See* 47 C.F.R. §§ 63.71(a),[1] 63.505. The carrier must also provide written notice to "all affected customers," the affected state's "public utility commission and . . . Governor," "any federally-recognized Tribal Nations with authority over [affected] Tribal lands," and "the Secretary of Defense." *Id.* § 63.71(a).

Unless the Commission notifies the carrier-applicant otherwise, a discontinuance application will "be automatically granted" after either

[1] For convenience, we cite the version of Section 63.71 currently contained in the e-CFR. This version contains additional provisions not included in the version of the rule in place at the time of the *Combined Order*, because of later, unrelated amendments. The relevant rule parts remain unchanged.

31 or 60 days.[2] 47 C.F.R. § 63.71(f)(1). But the Commission's rules provide for interested persons to object to discontinuance applications. *Id.* § 63.71(a)(i), (ii). And if, based on such objections or for other reasons, the Commission opts to prevent automatic approval, there is no set period within which the Commission must act.

2. Historically, "administrative ratesetting at the federal level" required regulated utilities to submit their rates "in proposed tariff schedules." *Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467, 478 (2002). In Title II, the tariff-filing requirement is set forth in Section 203(a). 47 U.S.C. § 203(a).

Section 203(c) codifies the longstanding "filed-rate" (or "filed-tariff") doctrine. 47 U.S.C. § 203(c); *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Under that doctrine, "the rate of the carrier duly filed is the only lawful charge," and "[d]eviation from [that rate or other terms of the tariff] is not permitted upon any pretext." *Id.* (internal quotation marks omitted); *see id.* at 223. Thus, under Section 203(c), a

[2] The shorter time applies to applications from carriers classified as "non-dominant," the longer to applications from "dominant" carriers. 47 C.F.R. § 63.71(f)(1); *see also Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 906 (D.C. Cir. 2009) (describing the FCC's treatment of dominant and non-dominant carriers).

carrier is "prohibited from 'extend[ing] to any person any privileges' with respect to a tariffed service except as specified in the tariff." *Declaratory Ruling* ¶ 141 [SER 53] (alteration in original) (quoting 47 U.S.C. § 203(c)(3)).

Pursuant to authority conferred in the Telecommunications Act of 1996, Pub. L. No. 104-104, § 401, 110 Stat. 56, 128–29 (codified at 47 U.S.C. § 160), the FCC has in recent years elected to forbear from requiring carriers to tariff certain types of services. *E.g.*, *Ad Hoc*, 572 F.3d at 904–05. Where the FCC has exercised its forbearance authority to "detariff" services, carriers are permitted (or required) to enter into service agreements (i.e., contracts) with individual customers instead. *See Declaratory Ruling* ¶ 143 [SER 53–54].

B. Transition to Modern Technologies and Infrastructure

For most of the last century, carriers provided telephone service over copper networks using time-division multiplexing technology.[3]

[3] Time-division multiplexing allows multiple voice signals to be "transmitted over a single circuit by taking turns in individual time slots created on that circuit." David Gabel & Steven Burns, *The Transition from the Legacy Public Switched Telephone Network to Modern Technologies*, National Regulatory Research Institute Report No. 12-12,

More recently, however, "[t]echnological innovation and private investment have revolutionized American communications networks, . . . making possible new and better service offerings, and bringing the promise of the digital revolution to more Americans than ever before." *Combined Order* ¶ 1 [SER 2]. "As part of this transformation, consumers are increasingly moving away from traditional telephone services provided over copper wires and towards next-generation technologies using a variety of transmission means, including copper, fiber, and wireless spectrum-based services." *Id.*

Modern fiber networks offer significant advantages over traditional copper-based ones. Among other things, they are more readily scalable and better suited to the transmission of Internet protocol (IP) data packets, which are now routinely used to provide voice service and an increasing array of data services. *See Business Data Services in an Internet Protocol Environment*, 32 FCC Rcd 3459, 3461–62 ¶ 3 (2017), *aff'd in relevant part*, *Citizens Telecomms. Co. v. FCC*, 901 F.3d 991 (8th Cir. 2018).

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at 1.n1 (Oct. 2012), http://nrri.org/download/nrri-12-12-telephone-transition/.

In addition to providing IP-based services, carriers use fiber networks to provide voice service by time-division multiplexing. *See Order* ¶ 46 [SER 20–21]; 06/15/2017 Comments of Verizon 29 [SER 276] (Verizon Comments). When carriers abandon time-division multiplexing technology, however, customers sometimes need to replace equipment or services, such as fax machines or medical alert systems, that do not work using IP-technology. *Declaratory Ruling* ¶ 150 [SER 57].

C. History of the FCC's Technology Transitions Proceedings

Since at least 2014, the Commission has been actively overseeing the "historic technology transitions that are transforming our nation's voice communications services." *Technology Transitions*, 29 FCC Rcd 1433, 1435 ¶ 1 (2014) (*2014 Notice*). Throughout that time, the Commission has made clear that its "over-arching purpose . . . is to speed technological advances," while also protecting consumers. *Id.* at 1441 ¶ 23; *see Order* ¶ 41 [SER 18–19]; *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, 32 FCC Rcd 3266, 3267 ¶ 1 [SER 288] (2017) (*2017 Notice and Request for Comment*); *Technology Transitions*, 30 FCC Rcd 9372, 9373 ¶ 1 (2015) (*2015 Order*); *Ensuring Customer Premises Equipment Backup Power for*

Continuity of Communications Technology Transitions, 29 FCC Rcd 14968, 14969 ¶ 1 (2014) (*2014 Order*).

1. 2014 Order

As of 2014, the Commission required incumbent carriers to comply with certain "network change" disclosure rules before retiring copper network facilities, but those rules did "not define 'copper retirement.'" *2014 Order*, 29 FCC Rcd at 14993 ¶ 50. The Commission therefore sought comment on the term's definition. *Id.* at 14994 ¶ 52. In particular, given reports that incumbent carriers were effectively depriving consumers of basic telephone service by failing to maintain legacy copper facilities, the Commission asked whether it should "define retirement to include *de facto* retirement, i.e., failure to maintain copper that is the functional equivalent of removal or disabling." *Id.* at 14994 ¶ 53. The Commission also proposed to require incumbent carriers to provide notice of copper retirements directly to their affected retail customers, *id.* at 14997 ¶ 61, and to state governors and public utilities commissions, *id.* at 15002–03 ¶ 79.

At the same time—by a 3-2 vote, with then-Commissioner Pai and Commissioner O'Rielly dissenting—the Commission issued a declaratory

ruling that the determination "whether a change constitutes a discontinuance, reduction, or impairment of service" for purposes of Section 214(a) of the Act, 47 U.S.C. § 214(a), should be made using a "functional test." *2014 Order*, 29 FCC Rcd at 15015 ¶ 114. The Commission reached that conclusion based largely on the language in Section 214(a) that "prohibits a carrier from discontinuing, reducing, or impairing service to 'a community, or part of a community' without prior Commission authorization." *Id.* at 15015–16 ¶ 115 (quoting 47 U.S.C. § 214(a)). The Commission interpreted that language to mean that a carrier's description of its services is only one factor relevant to whether a carrier must file a discontinuance application. *Id.* The analysis of what constitutes a service, the Commission concluded, is properly governed by "a functional approach that evaluates the totality of the circumstances," including what a carrier's customers "reasonably would view as the service provided." *Id.*

2. 2015 Order

The United States Telecom Association (USTelecom) petitioned for agency reconsideration of the Commission's functional test. *2015 Order*, 30 FCC Rcd at 9471 ¶ 181. The Commission denied that petition in 2015,

continuing to interpret "service" from the functional perspective of a carrier's customers. *See id.* at 9471–78 ¶¶ 181–201. Then-Commissioner Pai and Commissioner O'Rielly again dissented.

The Commission simultaneously adopted various changes to its network change disclosure rules, also by a 3-2 vote. Among other things, the Commission adopted in modified form its proposed rules requiring carriers to give direct notice of copper retirements to retail customers and state governments. *See 2015 Order*, 30 FCC Rcd at 9394–410 ¶¶ 38–67 (retail customers); *id.* at 9411–13 ¶¶ 69–71 (state governments). The Commission also adopted the de facto retirement rule, defining copper retirements for which carriers must provide notice to include "any failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling." *Id.* at 9421 ¶ 90 (internal quotation marks omitted); *see id.* at 9421–23 ¶¶ 89–92.

USTelecom sought judicial review of the FCC's reaffirmation of the functional test (and other aspects of the *2015 Order* not now relevant). *U.S. Telecom Ass'n v. FCC*, No. 15-1414 (D.C. Cir.). In view of later developments, including the litigation here, that case is in abeyance.

3. 2017 Notice and Request for Comment

Following the 2016 presidential election, the leadership and composition of the Commission changed. Two of the three commissioners who had supported the *2015 Order*, including the then-chairman, departed the agency.

In April 2017, under the new leadership of Chairman Pai, the Commission voted unanimously to issue a combined notice of proposed rulemaking, notice of inquiry, and request for comment concerning whether to revise policies related to those orders. *See generally 2017 Notice and Request for Comment* [SER 287–350]. Among other things, the Commission sought comment on "how best to handle incumbent [carrier] copper retirements going forward to prevent unnecessary delay and capital expenditures on this legacy technology while protecting consumers." *Id.* ¶ 58 [SER 305]. The Commission also asked whether the agency's 2015 amendments to its network change disclosure rules had "been effective in protecting competition and consumers" or had "hindered next-generation network investment." *Id.* And the Commission sought comment on retaining the de facto retirement rule. *Id.* ¶ 60 [SER 305].

The Commission further proposed to "revisit" its "functional" approach to interpreting Section 214(a), *2017 Notice and Request for Comment* ¶ 115 [SER 323], in favor of judging what constitutes a service in this context by the carriers' description of their offerings in tariffs or service contracts, *id.* ¶ 116 [SER 323]. The Commission designated its questions on this subject "as a 'Request for Comment,'" rather than a notice of proposed rulemaking, because its contemplated action "would be adjudicatory in nature"—like the 2014 declaratory ruling that first announced the functional test. *Id.* ¶ 115 n.167 [SER 323].

D. Order under Review

The proceeding initiated by the *2017 Notice and Request for Comment* resulted in the *Combined Order*, adopted in a 3-1 vote.

1. *The* Declaratory Ruling *Revising the Commission's Interpretation of Section 214(a)*

The Commission determined in the *Declaratory Ruling* that "a carrier's description in its tariff—or customer service agreement in the absence of a tariff—is dispositive of what comprises the 'service' being offered by that carrier for purposes of determining whether . . . discontinuance authority" under Section 214(a) of the Act, 47 U.S.C. § 214(a), "is required." *Declaratory Ruling* ¶ 128 [SER 49]. In

reaching that determination, the Commission acknowledged that it was "revers[ing]" the agency's prior interpretation of that ambiguous statutory term. *Id.* And the Commission explained in detail why its revised view is more consistent with the text and purposes of the Act.

The Commission looked first to the language of Section 214(a). "The statute," the Commission explained, "refers to a *carrier*'s service," not "the uses of the service by customers." *Declaratory Ruling* ¶ 131 [SER 50] (emphasis added); *see* 47 U.S.C. § 214(a). That implies, the Commission reasoned, "that such uses cannot be used to proscribe or restrict the limits of such service." *Declaratory Ruling* ¶ 131 [SER 50].

The Commission also explained why the structure of Title II of the Act supports the agency's revised view. *Declaratory Ruling* ¶¶132–136 [SER 50–51]. To begin with, the Commission observed, Title II never uses the term "service" to describe third-party services transmitted over the carrier's service. *Id.* ¶ 132 [SER 50]. And importantly, Title II contains Section 203(c), which codifies the filed-rate doctrine and must be read in concert with Section 214(a). *Id.* Because Section 203(c) bars customers from demanding features or functionalities not included in their carriers' tariffs, the Commission reasoned, "carriers need not apply for

Commission authorization under [S]ection 214(a) when seeking to discontinue services that are absent from their tariffs." *Id.* ¶ 135 [SER 51].

The Commission further explained why eliminating the functional test is consistent with the seminal "*Carterfone*" decision, in which the Commission first held that customers may attach third-party devices (e.g., telephones not supplied by their carrier) to their carrier's network. *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420 (1968); *see Declaratory Ruling* ¶¶ 137–140 [SER 51–53]. As the Commission emphasized here, the agency made clear in *Carterfone* that when "telephone network technology and standards change[]," third-party attachments "must be rebuilt to comply with the revised standards," or customers must "discontinue [the attachments'] use"—"for such [is] the risk inherent in the private ownership of any equipment to be used in connection with the [carrier's] telephone system." *Id.* ¶ 137 [SER 51] (internal quotation marks omitted). The Commission explained that the agency had not given proper weight to that holding when adopting the functional test. *Id.*

The Commission next explained why "[t]raditional principles of contract law also support [its] decision." *Declaratory Ruling* ¶ 143 [SER 53]. Under those principles, "the terms of the contract control, regardless of the parties' subjective intentions as shown by extrinsic evidence." *Id.* (internal quotation marks omitted). Thus, for detariffed services—consistent with Section 203 and the filed-rate doctrine for tariffed services—it is "the terms of a carrier's service agreement with a customer [that] define its obligations to that customer." *Id.*

Finally, the Commission predicted that its revised interpretation of Section 214(a) would improve clarity for carriers and customers, *Declaratory Ruling* ¶ 148 [SER 56], eliminating the "substantial uncertainty" that the functional test had generated, *id.* ¶ 155 [SER 60]. The Commission deemed it unreasonable to expect carriers to anticipate "all of the myriad ways in which their services are used by customers." *Id.* ¶ 148 [SER 56]. The "objective interpretive approach" adopted in the *Declaratory Ruling*, the Commission predicted, will "free[]" carriers to take "funds and resources" formerly allocated to regulatory compliance and devote them instead to "next-generation networks and services [for] more Americans." *Id.* ¶ 149 [SER 57].

2. The Order *Adopting Rule Revisions*

In the accompanying *Order*, the Commission determined that "consumers receive[d] no . . . benefit from" notice under the de facto retirement rule, because the notice of network changes required by the terms of that rule was not prospective. *Order* ¶ 37 [SER 17]. Rather, the Commission recognized, that notice requirement arose only once a carrier's "failure to maintain copper [wires]" caused deterioration to a degree "functional[ly] equivalent" to "remov[ing] or disabling" them. *2015 Order*, 30 FCC Rcd at 9501 (Appendix A); *see Order* ¶ 37 [SER 17]. The Commission saw "no practical way" to compel incumbent carriers to provide notice of that circumstance ahead of time. *Id.* And "[i]f copper deterioration is causing service quality issues," the Commission reasoned, after-the-fact "notice that copper deterioration is the reason . . . provides no benefit to . . . customers." *Id.* ¶ 38 [SER 17].

Moreover, the Commission explained, because the Communications Act gives carriers "the authority to design their networks and choose their own architecture," the agency's network change disclosure rules have never required carriers to seek permission for network changes. *See Order* ¶ 39 [SER 17–18]. Pre-approval from the agency is required only

when service is discontinued (or reduced or impaired), and that requirement stems from Section 214(a), 47 U.S.C. § 214(a), not from the agency's definition of copper retirement, *Order* ¶ 39 [SER 17–18]. Thus, in the Commission's view, the de facto retirement rule offered no meaningful benefit to customers who would prefer to continue receiving their service over legacy copper facilities when a carrier wished to modernize its network by replacing copper facilities with fiber. *See id.* And if a carrier wished to discontinue providing service altogether, or to "impair" service by failing to maintain its copper facilities, the protection for customers came from Section 214(a)—not from the de facto retirement rule. *See id.*

The Commission also decided that any benefit from the retail customer and state government direct notice rules was not worth the associated burden. *See Order* ¶¶ 44–51 [SER 20–23]; *id.* ¶¶ 56–57 [SER 25]. The Commission found that the requirement of direct notice to retail customers had not, in fact, reduced consumer confusion and allowed for a smoother transition to modern networks, but instead had "caused confusion and delay." *Id.* ¶ 45 [SER 20]. And in the Commission's judgment, incumbent carriers do not need an FCC mandate to educate

their customers when those carriers face stronger pressure from competitors than ever before. *Id.* Moreover, the Commission explained, network changes do not necessarily involve the loss (or diminishment) of service, *see id.* ¶ 56 [SER 25], and states remain free to impose their own notice requirements if they choose, *id.* ¶ 57 [SER 25].

STANDARD OF REVIEW

1. Review of the Commission's interpretation of Section 214(a) of the Act, 47 U.S.C. § 214(a), is governed by *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, if, as here, a "statute is silent or ambiguous" on an issue, "the question" is whether the agency has adopted "a permissible construction of the statute." *New Edge Network, Inc. v. FCC*, 461 F.3d 1105, 1110 (9th Cir. 2006) (quoting *Chevron*, 467 U.S. at 843).

An agency is free to change its interpretation of an ambiguous statute so long as it "adequately explains the reasons for [its] reversal of policy." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). The agency "need not demonstrate to a court's satisfaction that the reasons for the new policy are *better* than the reasons for the old one." *FCC v. Fox Television Stations, Inc.*, 556 U.S.

502, 515 (2009). And an agency may shift course based not only on changed circumstances, but also on a re-weighing of policies after a "change in administrations." *Brand X*, 545 U.S. at 981; *see Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc) ("Elections have policy consequences.").

2. Review in this case more generally is governed by the "arbitrary and capricious" standard of the Administrative Procedure Act (APA). *See* 5 U.S.C. § 706(2)(A). In cases like this one, involving "competing policy choices" and "predictive market judgments," that standard "is particularly deferential." *Ad Hoc*, 572 F.3d at 908; *see FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 814 (1978).

3. The FCC's compliance with the APA's notice-and-comment requirements is reviewed de novo. *See Reno-Sparks Indian Colony v. EPA*, 336 F.3d 899, 909 n.11 (9th Cir. 2003).

SUMMARY OF THE ARGUMENT

1. The petitioners fail to carry their burden to demonstrate Article III standing. Their claim of "associational" standing—supported by only a single, unsubstantiated sentence in their brief—is insufficient. They also fail to identify any individual member who could show the required

elements of standing as to any one (let alone all) of the petitioners' claims. Accordingly, as the record now stands, the Court should dismiss the petition for review for lack of jurisdiction, without reaching any of the petitioners' claims on the merits.

2. Should the petitioners establish standing to bring one or more of their claims, those claims uniformly fail.

a. The Commission reasonably concluded in the *Declaratory Ruling* that what constitutes a "service" for purposes of the discontinuance provision of Section 214(a) of the Act, 47 U.S.C. § 214(a), should be determined from the perspective of how a carrier describes what it will provide customers in its tariff or service agreements. That interpretation best reconciles Section 214(a) with Section 203(c) of the Act, 47 U.S.C. § 203(c), under which carriers may not offer, and customers may not demand, features or functionalities not included in the carriers' tariffs. Likewise, the Commission reasonably understood *Carterfone* to support placing the burden of adapting third-party devices, when a carrier's network technology and standards change, on the makers and users of those devices.

The Commission's decision was procedurally proper. The agency routinely and appropriately issues declaratory rulings to "remov[e] uncertainty," 47 C.F.R. § 1.2, such as the confusion that the functional test engendered concerning when discontinuance applications are required. And because the *Declaratory Ruling* was an adjudication, the Commission was free to adopt it without adhering to the APA's notice-and-comment requirements, which apply only to rulemakings. *See* 5 U.S.C. §§ 553, 554. Even if the *Declaratory Ruling* could be considered a rulemaking, the Commission's revised interpretation of "service" in Section 214(a) was at most an "interpretive rule," not a "legislative" one—meaning the APA's notice-and-comment requirements would still not apply. The Commission's procedure, moreover, caused the petitioners no harm; they presented all arguments on which they now rely in challenging the *Declaratory Ruling* in their multiple responses to the FCC's "Request for Comment."

b. The agency's decision in the *Order* to repeal the de facto retirement rule was likewise reasonable and reasonably explained. The Commission rationally deemed the rule unnecessary when there was no practical way to require carriers to give notice of qualifying network

breakdowns ahead of time, and when incumbent carriers have incentives to keep customers well informed without need for an FCC-imposed notice requirement.

c. Regardless of the petitioners' standing, this Court lacks jurisdiction to review the Commission's repeal of the retail customer and state government direct notice rules. A petition for review must "specify the order or part thereof to be reviewed." Fed. R. App. P. 15(a)(2)(C). The original petition for review here designated the three paragraphs repealing the de facto retirement rule as the sole portion of the *Order* challenged. And the petitioners' mediation statement reaffirmed this case's narrow scope. Only months after the statutory window for review petitions closed did the petitioners raise the Commission's repeal of the copper retirement direct notice rules. Because the statutory window for challenging FCC orders is jurisdictional, the supplemental petition for review raising the copper retirement direct notice issues should be dismissed.

In any event, the FCC's repeal of the direct notice rules was sound. The Commission reasonably determined that the predicted benefits of mandating direct notice to retail customers had not come to pass, and it

reasonably explained its decision to repeal that rule as unnecessary. The Commission likewise sensibly explained why the state government direct notice rule is not needed. Among other things, as to both the retail customer and state government direct notice rules, the Commission observed that many states can and have adopted their own, state-level notice rules, which the *Order* does not preempt.

3. Finally, neither the petitioners nor their supporting amicus curiae has overcome the strong presumption of regularity that attaches to agency decisionmaking. The Commission solicited comment on the *Combined Order*, gave the public ample time to respond, and addressed the public input it received. Although two of the three commissioners who voted to adopt the *Combined Order* dissented from the Commission's earlier technology transitions orders, that does not show prejudgment. It is not inappropriate for agency decisionmakers to hold existing policy preferences or approach a proceeding with preconceptions regarding the proper application of relevant law; that is a routine feature of the administrative process.

ARGUMENT

I. THE PETITIONERS HAVE NOT MET THEIR BURDEN TO ESTABLISH STANDING.

"One of the essential elements of a legal case or controversy is that [a] plaintiff have standing to sue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018). The Supreme Court has repeatedly noted that "the 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.*

In all cases, the burden of demonstrating standing falls on the party who asserts jurisdiction. *E.g.*, *Spokeo*, 136 S. Ct. at 1547. Each element of standing "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). In cases like this, involving direct appellate review of an agency's order, "the petitioner's burden of production . . . is . . . the same as that of a plaintiff moving for

summary judgment in the district court: it must support each element of its claim to standing by affidavit or other evidence, including whatever evidence the administrative record may already contain." *Util. Workers Union v. FERC*, 896 F.3d 573, 577 (D.C. Cir. 2018) (internal quotation marks omitted); *accord Tenn. Republican Party v. SEC*, 863 F.3d 507, 517 (6th Cir. 2017); *Iowa League of Cities v. EPA*, 711 F.3d 844, 869–70 (8th Cir. 2013); *Citizens Against Ruining the Env't v. EPA*, 535 F.3d 670, 675 (7th Cir. 2008).

Under the doctrine of "associational," or "organizational," standing, an organization such as the Greenlining Institute that purports to sue on behalf of its members must show that "its members would otherwise have standing to sue in their own right," that "the interests at stake are germane to the organization's purpose," and that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). Unless "*all* . . . members of the organization are affected by the challenged activity," the organization must specifically identify at least one member who would have individual standing to sue. *Summers v. Earth Is. Inst.*, 555 U.S. 488, 499 (2009); *see*

id. at 498 ("[We] have required plaintiff-organizations to make specific allegations establishing that at least one *identified* member had suffered or would suffer harm." (emphasis added)); *Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) ("When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically identify members who have suffered the requisite harm." (citation and internal quotation marks omitted)).

Here, the petitioners purport to establish standing on the basis of a single sentence in their brief: They assert that "Greenlining . . . has standing . . . as a nonprofit advocacy organization that represents members in California currently subscribed to copper lines provided by incumbent . . . carriers."[4] Br. 13. That assertion not only lacks the required evidentiary support but also fails to identify any individual Greenlining member who can satisfy the constitutional requirements of injury in fact, causation, and redressability. *See Summers*, 555 U.S. at 498. We acknowledge that this Court has said there would be "no purpose

[4] The other petitioners make no claim of standing in their own right; they merely "join Greenlining in [its] petition for review." Br. 13.

to . . . requiring an organization to identify by name the member or members injured" by an agency's action when "it is relatively clear, rather than merely speculative, that one or more members have been or will be adversely affected by [that] action." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). But that is not the case here, where it is far from clear that Greenlining has members affected by the challenged FCC actions.

The petitioners' challenge to the FCC's repeal of the state government direct notice rule exemplifies this point. The petitioners have represented that "[t]he Greenlining Institute is a private, non-profit organization." Br. i. It is thus unclear why eliminating a required notice to state governments would injure Greenlining's members.

Similarly, it is unclear why Greenlining's "members in California" have standing to challenge the repeal of the de facto retirement rule. Br. 13. As the Commission observed in the *Order*, California is a jurisdiction with "state-level service quality requirements" that make the concept of de facto retirement redundant. *Order* ¶ 39 & n.141 [SER 18]; *see* 06/15/2017 Comments of CALTEL 8 [SER 216] (CALTEL Comments) (calling California's state-level requirements the "best defense" against

de facto retirement). It is the petitioners' burden to show why repealing the de facto retirement rule injured Greenlining's California members.

It is likewise not self-evident that any Greenlining member has suffered injury from the Commission's decisions to revisit the agency's functional test and repeal the retail customer direct notice rule. The petitioners assert that Greenlining has "members in California currently subscribed to copper lines provided by incumbent . . . carriers." Br. 13. But the petitioners never claim—let alone prove—that those members live in areas of California in which there is a substantial risk that a member's carrier will retire copper facilities or discontinue, reduce, or impair time-division multiplexed service in a manner that will prevent the member's third-party devices from functioning. Without such a showing, the petitioners cannot establish standing to challenge the *Declaratory Ruling* or the repeal of the retail customer direct notice rule. *See, e.g.*, *Mont. Envtl. Info. Ctr. v. Stone-Manning*, 766 F.3d 1184, 1189 (9th Cir. 2014) (no organizational standing where the petitioner failed to show that its members faced at least a "substantial risk" of harm (internal quotation marks omitted)).

As the record now stands, this Court must dismiss the petition for review in its entirety for lack of jurisdiction.[5] We explain below why each of the petitioners' claims nonetheless fails on the merits, and why their claims concerning the 2015 direct notice rules fail for lack of jurisdiction irrespective of standing.

II. THE FCC'S INTERPRETATION OF SECTION 214(a) WAS REASONABLE AND PROCEDURALLY PROPER.

In providing that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community," without first obtaining a certificate of authorization from the FCC, 47 U.S.C. § 214(a), Congress did not define "service"—as the petitioners recognize (Br. 45). The Commission has thus consistently viewed that term as ambiguous. *See Declaratory Ruling* ¶¶ 130–131 [SER 50]; *2015 Order*, 30 FCC Rcd at 9476 ¶ 198. When the Commission determined in the *Declaratory Ruling* that a "service" in this context turns on what carriers have agreed to provide in their tariffs or service agreements, it expressly acknowledged

[5] In cases challenging agency decisions, this Court has allowed petitioners "to establish standing anytime during the briefing phase." *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997). Should the petitioners seek to bolster their showing on reply, it would be appropriate to grant the respondents and intervenors an opportunity to respond by surreply.

that it was reversing the agency's prior "functional" interpretation of Section 214(a). *Declaratory Ruling* ¶ 128 [SER 49]. The agency's sound analysis of that change is entitled to *Chevron* deference. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016); *accord id.* at 2128 (Ginsburg, J., concurring).

A. The *Declaratory Ruling* Was Reasonable.

Neither Section 214(a) nor any other portion of Title II uses the term "service" to refer to anything other than a carrier's offering. *See Declaratory Ruling* ¶¶ 131–136 [SER 50–51]. The Commission acknowledged that Section 214(a) concerns service "to a community, or part of a community," 47 U.S.C. § 214(a)—the language on which the agency had previously relied in adopting a "functional" interpretation. *Declaratory Ruling* ¶ 134 [SER 50–51]. But in the Commission's revised judgment, that language merely "defines the scope of individuals affected before an application must be filed," and "does not modify 'service.'" *Id.* That view is reasonable, particularly given the legislative history of Section 214(a), which indicates that Congress rejected "language that would have required" carriers to wade through the "red tape" of seeking

Commission approval for a network change that did not affect the carrier's service. *Id.* ¶ 133 [SER 50] (internal quotation marks omitted).

It was likewise reasonable for the Commission to conclude that Section 203 "provides the best evidence of Congress's understanding of what constitutes a 'service'" in this context. *Declaratory Ruling* ¶ 135 [SER 51]. Because Section 203 bars carriers "from offering benefits which are absent from their tariffs," *id.*, customers cannot demand features or functionalities not included in the tariff—not even if a carrier has fraudulently misrepresented the capabilities of its tariffed service. *See AT&T*, 524 U.S. at 222; *Marcus v. AT&T Corp.*, 138 F.3d 46, 57–65 (2d Cir. 1998). As the Commission reasoned, it seems implausible that Congress "intended for carriers to seek authorization to discontinue services that they were prohibited from offering to customers." *Declaratory Ruling* ¶ 135 [SER 51]; *see id.* ¶ 141 [SER 53].

The Commission also reasonably relied on the seminal *Carterfone* decision, which first announced the requirement that carriers allow interconnecting third-party devices on their networks. *See Declaratory Ruling* ¶ 137 [SER 51–52]. *Carterfone* makes plain that when "telephone network technology and standards change[]," customers will have to

discontinue using any incompatible third-party equipment; "such [is] the risk inherent in the private ownership of any equipment to be used in connection with the telephone system." *Id.* [SER 51] (internal quotation marks omitted); *accord Carterfone*, 13 F.C.C.2d at 424. Consistent with *Carterfone*, the Commission reasonably concluded that placing the burden of adapting third-party devices (such as fax machines) on the devices' manufacturers, which operate in a highly competitive market, was an efficient way to "minimize the impact on consumers . . . of third-party [equipment] and service obsolescence." *Declaratory Ruling* ¶ 150 [SER 57].

The remaining aspects of the Commission's analysis were similarly rational and adequately explained. The Commission's assertion that, for detarriffed services, "the terms of a carrier's service agreement with a customer define its obligations to that customer and vice versa" is a routine application of contract law. *Declaratory Ruling* ¶ 143 [SER 53–54]. And the Commission's prediction that eliminating the functional test will promote investment in next-generation network facilities and services, *id.* ¶¶ 149–151 [SER 57–58], is well within the agency's

discretion, *see Ad Hoc*, 572 F.3d at 908; *National Citizens*, 436 U.S. at 814.

B. The Petitioners' Substantive Attacks on the *Declaratory Ruling* Fail.

The petitioners contend that what constitutes a service, for purposes of Section 214(a) discontinuance review, is "[u]nambiguously" a functional determination. Br. 45. In the alternative, they contend that the Commission did not adequately explain its contrary interpretation of the statute. Br. 63–65. Neither challenge has merit.

The petitioners first argue that dictionary definitions of service include no reference to tariffs, and that the Commission thus lacked discretion to interpret "service" in Section 214(a) the way that it did. Br. 45–46. But the Court's task at *Chevron* step one is to determine "whether Congress has directly spoken to the precise question at issue." 467 U.S. at 842. The petitioners concede that Congress has not defined "service" in Section 214(a). Br. 45. And they identify nothing in any dictionary that would preclude the Commission from defining that term from the perspective of the offering (rather than the purchasing) party.

Likewise, in arguing that the Communications Act "[n]owhere . . . equate[s] 'service' with 'tariff' (or service contract)," Br. 47, the

petitioners identify nothing in the Act that forecloses the Commission's view that "service" in this context should be determined from the perspective of what the offeror has agreed to provide. The petitioners cite various definitions from Title I of the Act. Br. 46. Their supporting amicus curiae, the California Public Utilities Commission (California Commission), gives particular emphasis to the definition of "telecommunications service." Amicus Br. 13–16. But none of those definitions removes the statutory ambiguity discussed above or forecloses the FCC's interpretation of "service" in the context of Section 214(a) discontinuance.

In particular, "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*." 47 U.S.C. § 153(53) (emphasis added). And the question of what regulatory classification should apply to a given service—e.g., whether something is a "cable service" or a "telecommunications service" as those terms are defined in 47 U.S.C. § 153—involves different considerations from determining what constitutes a service for which a carrier must obtain discontinuance approval under Section 214(a). *Declaratory Ruling* ¶ 147 [SER 55–56].

Taking account of a customer's perspective when making a regulatory classification, the Commission reasoned, would not implicate the filed-rate doctrine or "inject uncertainty in the same manner as here." *Id.* [SER 56]. Whereas a regulatory classification decision resolves the future treatment of a given service, applying a functional approach in the discontinuance context would leave carriers "guess[ing] at the regulator's view concerning subjective evidence every time they [made] a change to their services." *Id.*[6]

The petitioners further argue that, "[i]f Congress had intended to limit the scope of 'service' covered by Section 214(a) to the tariff, it would have said so explicitly." Br. 48. But the Commission reasonably determined that, because "carriers are prohibited under [S]ection 203(c) from offering benefits which are absent from their tariffs," there was no need for Congress to use the term "tariff" in Section 214(a). *Declaratory Ruling* ¶ 135 [SER 51]. In other words, "Congress could not plausibly

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[6] There is thus no merit to the California Commission's claim (Amicus Br. 14) that the Commission did not adequately address the definition of "telecommunications service." In addition, the California Commission's argument that the definition "does not expressly refer to a carrier's tariffs" (Amicus Br. 15) is one that the Commission rejected as unpersuasive concerning Sections 214(a) and 214(c). *See Declaratory Ruling* ¶¶ 135–136 [SER 51]; *infra* pp. 39–40.

have intended for carriers to seek authorization to discontinue services that they were prohibited from offering to customers." *Id.*

Insofar as the petitioners argue (Br. 47) that the Commission's reading of 'service' is inconsistent with the language of Section 214(c) because Section 214(c) does not use the word "tariff," the same logic applies. The Commission reasonably believed it was "unnecessary for Congress to separately use the term 'tariff' in [S]ection 214(c)" when Section 203(c) "clearly established[] tariff-based limits on what carriers may offer as part of their service." *Declaratory Ruling* ¶ 136 [SER 51].

In addition, the Commission properly concluded that the reference in Section 214(c) to the "discontinuance, reduction, or impairment of service, described in the application" indicates that Section 214(c) "is not referencing the carrier's service" generally, "but merely the planned discontinuance described in its [Section 214(a)] application to the Commission." *Declaratory Ruling* ¶ 136 [SER 51]. The petitioners are thus mistaken that Section 214(c) requires the Commission to interpret "service" for discontinuance purposes more broadly than what a carrier describes in its tariff or service agreement. Br. 47–48.

The Commission also reasonably rejected the related contention (Br. 64) that the Commission's interpretation of "service" in the *Declaratory Ruling* is inconsistent with its assertion of authority over detariffed services when reviewing mergers. *Declaratory Ruling* ¶ 140 [SER 53]. To begin with, Public Knowledge rested that argument before the agency on the premise that the words "line" and "service" in Section 214(a) mean the same thing. 06/15/2017 Comments of Public Knowledge 10 [SER 256] (Public Knowledge Comments); *see Declaratory Ruling* ¶ 140 [SER 53]. As the Commission recognized, there is no reason to adopt that view when those terms appear in "separate provision[s] of [S]ection 214(a)." *Id.* "Second and more importantly," the Commission explained, "the Commission can and does exercise authority over transactions *and* discontinuances involving detariffed services." *Id.* Thus, contrary to what the petitioners contend (Br. 63–64), there is no "unexplained inconsistency" in the Commission's interpretation of "service" for purposes of Section 214(a) discontinuance review and FCC precedent in the context of mergers.

Likewise, it is not true that the Commission "fail[ed] to explain why it reversed course and found persuasive the exact same industry

arguments" concerning the filed-rate doctrine that "it previously rejected." Br. 65. Agencies are free to change their minds, and the Commission plainly *did* explain why it found the filed-rate doctrine significant. *Declaratory Ruling* ¶¶ 141–142 [SER 53]. In particular, contrary to the petitioners' assertions (Br. 63, 65), the Commission addressed why its interpretation of Section 214(a) is consistent with applying the discontinuance process to detariffed services: "Where there is freedom to bargain, the contract takes the place of the tariff in providing the objective delineation of the bargain between the parties." *Declaratory Ruling* ¶ 146 [SER 55].

As to the petitioners' complaint that the Commission made "no mention of [its] experience with Fire Island" (Br. 57), there is no reason the Commission should have done so. The action Verizon took after Superstorm Sandy—filing a discontinuance application when it sought to substitute a wireless service for time-division multiplexed service over damaged copper facilities—is the same action that would be required today under the *Declaratory Ruling*. Nothing in the *Declaratory Ruling* obviates a carrier's duty to file a discontinuance application when it eliminates landline service. *See* 47 C.F.R. §§ 63.60(i), 63.71(f)(2);

Declaratory Ruling ¶ 43 [SER 19]. Indeed, although Verizon amended the discontinuance application it filed after Superstorm Sandy to remove Fire Island when it decided to deploy fiber there, that application remains pending as to areas in New Jersey where Verizon seeks to deploy VoiceLink to replace the legacy voice service it continues to provide there over an aging copper network. *See* Letter from Vice President for Federal Regulatory Affairs, Verizon, to Secretary, FCC at 1 (filed Nov. 15, 2013, in WC Docket. No. 13-150), https://ecfsapi.fcc.gov/file/7520957871.pdf.

To be sure, in the *2015 Order*, the Commission cited the Fire Island episode as evidence not only that network changes sometimes result in service discontinuance, *e.g.*, *2015 Order*, 30 FCC Rcd at 9382–83 ¶ 14—a conclusion that the *Declaratory Ruling* does not change—but also that modern networks "may not support certain third-party services and devices . . . that functioned well on the legacy network," *id.* at 9471 ¶ 182, and that consumers sometimes consider the functioning of such devices part of their carrier's service when the carrier does not, *see id.* But the Commission acknowledged those same points in the *Combined Order*. *See, e.g.*, *Order* ¶ 46 [SER 20] ("We recognize the reliance consumers place on the functioning of equipment that connect[s] to incumbent

[carriers'] legacy networks, such as fax machines, alarm systems, and health monitoring devices."); *Declaratory Ruling* ¶ 150 [SER 57] ("We recognize that some consumers may lose the ability to use some legacy customer premises equipment . . . and third-party services under the [revised interpretation of 'service'] without Commission approval."). Taking those considerations into account, and acknowledging its departure from the agency's previously announced view, the Commission in 2017 concluded for the reasons detailed above—including that the burden of ensuring the compatibility of third-party devices with modern networks is most appropriately placed on the devices' manufacturers—that a "service" for purposes of Section 214(a) discontinuance review is best judged from the offeror's terms. That reasonable and reasonably explained judgment is entitled to deference. *E.g.*, *Brand X*, 545 U.S. at 981.

C. The Petitioners' Procedural Attacks on the *Declaratory Ruling* Fail.

1. Notice and Comment Was Not Required.

The petitioners' principal procedural challenge to the *Declaratory Ruling* is that, because the Commission issued a "request for comment" on its proposed reinterpretation of Section 214(a)—rather than a notice

of proposed rulemaking—the agency failed to give interested parties adequate notice. Br. 61. The petitioners also charge that the Commission "went out of its way to obscure that it would use the record developed in the instant proceeding to reverse" the functional test. *Id.* at 60. These challenges are unfounded.

The APA requires notice and comment only for rulemakings under Section 553 of the APA. *See* 5 U.S.C. § 553. The *Declaratory Ruling* was not a rulemaking; it was an adjudication governed by Section 554 of the APA. *See* 5 U.S.C. § 554(e) ("[An] agency . . . may issue a declaratory order to terminate a controversy or remove uncertainty."); *accord* 47 C.F.R. § 1.2. Were it otherwise, the functional test itself could not have been adopted by adjudication—as the petitioners do not question it properly was. The Commission was thus not obliged to adhere to the APA's rulemaking procedures. *See, e.g.*, *MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1151 (9th Cir. 2008) ("A notice and comment period is generally required for agency rulemaking, but not for adjudications.").

The petitioners' assertion (Br. 61) that the Commission "strongly implied that [it] was gathering information for a . . . rulemaking" is not credible. In issuing its request for comment, the Commission expressly

stated that its contemplated action "would be adjudicatory in nature, unlike the proposals in the [accompanying] *Notice of Proposed Rulemaking*." *2017 Notice and Request for Comment* ¶ 115 n.167 [SER 323].

Even if the petitioners could show that the *Declaratory Ruling* was not adjudicatory, their notice argument would fail because the APA's notice-and-comment requirements do not apply to "interpretive rules." *See* 5 U.S.C. § 553(b)(A), 553(d)(2). Unlike substantive rules, which create law, interpretive rules merely state an agency's understanding of existing law. *E.g.*, *Chief Probation Officers v. Shalala*, 118 F.3d 1327, 1333 (9th Cir. 1997); *see id.* at 1336 (contrasting substantive rules).

The Commission's interpretation of "service" in the *Declaratory Ruling* could at most be characterized as an interpretive rule, because it clarifies, rather than creates, law. That is so notwithstanding that the Commission previously espoused a different reading of the statute. *See Perez v. Mortgage Bankers Assoc.*, 135 S. Ct. 1199, 1206 (2015) ("Because an agency is not required to use notice-and-comment to issue an initial interpretive rule, it is also not required to use those procedures when it

amends or repeals that interpretive rule."); *Chief Probation Officers*, 118 F.3d at 1337.

In any event, the petitioners have not shown that they lacked notice, let alone suffered any prejudice. *See* 5 U.S.C. § 706 (reviewing court must take "due account . . . of the rule of prejudicial error"); *Del Norte Cnty. v. United States*, 732 F.2d 1462, 1467 (9th Cir. 1984) ("[I]nsubstantial errors in an administrative proceeding that prejudice no one do not require administrative decisions to be set aside." (citing additional supporting authority)). Although the Commission did not conduct a rulemaking, it nonetheless invited, and received, public input on the proper interpretation of Section 214(a). The petitioners filed two sets of comments, and made multiple ex parte presentations, addressing all of the arguments on which they rely here. *See* 11/06/2017 Public Knowledge Letter re Ex Parte Meeting 2 [SER 140]; 09/08/2017 Public Knowledge Letter re Ex Parte Meeting 1–3 [SER 145–47]; 07/17/2017 Reply Comments of Public Knowledge 7–10 [SER 181–84] (Public Knowledge Reply); Public Knowledge Comments 8–13 [SER 254–59]. There is thus no basis to conclude that the petitioners were unable to make their views known to the agency or suffered any prejudice from the

agency's procedure. Moreover, as the petitioners acknowledge, other parties filed comments as well. Br. 61.

2. The FCC Acted to Resolve Uncertainty.

There is likewise no merit to the petitioners' claim that the Commission "violated its own procedural rules by proceeding with a Declaratory Ruling" rather than a notice-and-comment rulemaking. Br. 61. As the Commission explained, multiple commenters advised the Commission that its prior interpretation of Section 214(a) had "generated substantial uncertainty" as to when carriers must file discontinuance applications. *Declaratory Ruling* ¶ 155 [SER 60]; *see, e.g.*, 06/15/2017 Comments of AT&T Services, Inc. 67–68 [SER 208–09] (AT&T Comments). Resolving that uncertainty was a routine use of the Commission's declaratory ruling procedure. 47 C.F.R. § 1.2.

III. THE FCC REASONABLY REPEALED THE DE FACTO RETIREMENT RULE.

A. The FCC Reasonably Determined That the Rule Provided No Meaningful Benefit.

When adopting the concept of de facto retirement in 2015, the Commission expressly recognized the distinction between the FCC's network change disclosure rules and the statutorily prescribed process governing a carrier's discontinuance of service. *See 2015 Order*, 30 FCC

Rcd at 9382–83, 9423 ¶¶ 14, 92. As the Commission explained, when a carrier changed network facilities, the agency's rules "merely require[d] notice." *Id.* at 9423 ¶ 92. Only when a planned change stood to "result in a discontinuance, reduction, or impairment of service" was the carrier required to obtain pre-approval. *Id.* at 9382 ¶ 14. And that obligation, the Commission emphasized, was "fundamentally distinct" from the copper retirement notice regime. *Id.* at 9423 ¶ 92. It flowed from, and was governed by, Section 214(a) of the Communications Act. 47 U.S.C. § 214(a); *see 2015 Order*, 30 FCC Rcd at 9382–83 ¶ 14.

The distinction between the notice-based network change and approval-based discontinuance regimes was fundamental to the Commission's 2017 decision to abandon the de facto retirement rule. That rule, the record showed, had created considerable uncertainty for incumbent carriers; they complained that it constrained them to provide notice of copper deterioration on an "unmanageable[,] loop-by-loop" basis. Verizon Comments 20 [SER 272]; *see Order* ¶ 37 & n.129 [SER 16]. Yet "consumers receive[d] no notice benefit from [the de facto retirement] concept," the Commission explained, because the rule as drafted did not require notice of network changes on a prospective basis. *Id.* ¶ 37

[SER 17]. The requirement to provide notice was triggered only once a carrier's "failure to maintain copper [facilities]" caused the facilities to deteriorate to a degree "functional[ly] equivalent" to "remov[ing] or disabling" them. *2015 Order*, 30 FCC Rcd at 9501 (Appendix A); *see Order* ¶ 37 [SER 17]. The Commission saw "no practical way" to make carriers give notice of that circumstance ahead of time. *Id.* And the Commission believed that after-the-fact "notice that copper deterioration is the reason for . . . service quality problems provides no benefit to the customers." *Id.* ¶ 38 [SER 17].

Furthermore, customers had "other avenues for relief" if a carrier should "willfully or otherwise allow its network to degrade." *Order* ¶ 39 [SER 17–18]. "Loss of service" considerations, the Commission observed, are "properly addressed in the context of the discontinuance approval process established by [S]ection 214(a)." *Id.* ¶ 37 [SER 17]. And in many states—including California—carriers also "remain subject to state-level service quality requirements." *Id.* ¶ 39 & n.141 [SER 18]; *see* CALTEL Comments 8 [SER 216].

B. The Petitioners' Arguments Concerning De Facto Retirement Are Unavailing.

The petitioners repeatedly state that the de facto retirement rule required incumbent carriers that neglected their copper facilities either to "file [for] Section 214(a) discontinuance or repair [their] existing networks." Br. 66; *see id.* at 68–69. They are mistaken.

As explained above, even during the period when the Commission's network change disclosure rules included the concept of de facto retirement, the rules merely required carriers to give notice—not seek the Commission's approval. A carrier's duty to seek approval for deteriorating copper facilities that would impair service arose not from the de facto retirement rule but from Section 214(a) of the Act. 47 U.S.C. § 214(a). That statutory obligation remains in force.

Likewise, even when the Commission defined copper retirement to include de facto retirement, incumbent carriers were "free to resolve [service] issues by migrating [a] customer to fiber, as long as the nature of the service being provided to the customer remain[ed] the same." *Order* ¶ 38 [SER 17]. In other words, no approval under Section 214(a), or any other form of Commission approval, has ever been required for a carrier to switch a customer from copper to fiber. The petitioners are thus wrong

that the de facto retirement rule constrained carriers to choose between filing an application for discontinuance or repairing their copper facilities. Br. 66.

The petitioners' suggest that repealing the de facto retirement rule required the FCC to explain how "customers may still seek relief under Section 214(a)" going forward. Br. 69. But eliminating the rule had no effect on the statutory discontinuance process, including a carrier's obligation to file a Section 214(a) discontinuance application if its service is impaired because it fails to maintain copper facilities. As has always been true, customers may file complaints with the Commission if they believe a carrier has discontinued service without authorization. *See* 47 U.S.C. § 208. And when a carrier applies to the Commission for authority to discontinue service, customers may file objections. *E.g.*, 47 C.F.R. § 63.71(a)(5).

Unavailing, too, is the petitioners' claim that, in repealing the de facto retirement rule, the Commission improperly ignored material evidence. Br. 67. The petitioners contend that Public Knowledge submitted evidence that "carriers [have] continued to engage in *de facto* retirement" since the *2015 Order*. *Id.* But the pleading they cite presents

no such evidence. *See* 11/09/2017 Written Ex Parte of Public Knowledge 1–20 [SER 119–38].

The plaintiffs likewise misconstrue the significance of a footnote from comments of the Communications Workers of America. Br. 67. The petitioners claim that the footnote "provided evidence that . . . filing . . . a *de facto* retirement complaint with the Commission . . . facilitated securing a settlement with Verizon to repair certain dangerously degraded copper lines." Br. 67. But the complaint in question was filed before the New York Public Service Commission to enforce state-level quality of service requirements. *See* 06/15/2017 Comments of Communications Workers of America 16 & n.38 [SER 229–30]. It was not a complaint to the FCC concerning de facto retirement.

Finally, the petitioners are wrong in claiming that the Commission departed without adequate explanation from its prior view that carriers have an incentive to "stop serving" customers when "the cost of repair" for copper facilities "exceeds the [carriers'] anticipated revenue" from serving those customers. Br. 68. Yet again, that argument improperly conflates the notice-based network change disclosure rules with Section 214(a) discontinuance review.

A carrier's incentive to stop providing service is not germane to whether the Commission reasonably eliminated the de facto retirement rule. Irrespective of how the Commission defines "copper retirement," a carrier seeking to discontinue, reduce, or impair its service (rather than replace its legacy network with alternative facilities) must apply to the Commission for approval. *E.g.*, *Order* ¶ 39 [SER 17–18]. Thus, well before the advent of the de facto retirement rule, when Verizon initially sought to restore lost service to customers on Fire Island and the New Jersey Barrier Islands by offering the wireless VoiceLink service instead of legacy voice service over wireline facilities (which would take longer to build), it applied for the Commission's approval under Section 214(a). Verizon's later decision to withdraw the Fire Island portion of that application when it decided to deploy modernized wireline facilities to Fire Island (Br. 27) does not demonstrate a need for the de facto retirement rule; it shows that carriers abide by the Section 214(a) discontinuance process when the transition from copper to modern networks disrupts legacy services.

IV. THE COURT LACKS JURISDICTION TO REACH THE PETITIONERS' UNTIMELY CLAIMS CONCERNING THE FCC'S COPPER RETIREMENT DIRECT NOTICE RULES, WHICH IN ANY EVENT FAIL ON THE MERITS.

The Court should not address the petitioners' challenges to the repeal of the retail customer and state government direct notice rules, because the petitioners failed to raise those claims until long past the statutory cut-off for review petitions.[7] In any event, the claims are unavailing.

A. Jurisdiction Is Barred by Federal Rule of Appellate Procedure 15 and 28 U.S.C. § 2344.

"Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order." Fed. R. App. P. 15(a)(1). For FCC orders reviewable under the Hobbs Act, the time prescribed by law to file a petition for review is 60 days from an order's "entry." 28 U.S.C. § 2344. Moreover, that "time limitation is jurisdictional" and cannot be modified by judicial action. *E.g.*, *Cal. Ass'n of the Physically Handicapped, Inc. v. FCC*, 833 F.2d 1333, 1334 (9th Cir. 1987).

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[7] The Court denied the FCC's earlier motion to strike on this theory (Dkt. Entry 24) "without prejudice to [the agency's] renewing the arguments" here. Order Denying Mot. to Strike (Dkt. Entry 28).

A petition for review must contain the information set forth in Rule 15(a)(2) of the Federal Rules of Appellate Procedure. Among other things, the petition must "name each party seeking review," Fed. R. App. P. 15(a)(2)(A), and "specify the order *or part thereof* to be reviewed," Fed. R. App. P. 15(a)(2)(C) (emphasis added). In cases challenging FCC orders reviewable under the Hobbs Act, the jurisdictional nature of 28 U.S.C. § 2344 means that the requirements of Rule 15(a)(2) must be satisfied within 60 days.

The petitioners filed their initial petition for review on December 8, 2017. Pet. 1. In it, they chose—as Rule 15(a)(1)(C) allows—to limit their challenge to the *Declaratory Ruling* and specific portions of the *Order*, stating: "The petitioners specifically request the court to review paragraphs 37 to 39 of the . . . *Order* and paragraphs 128 to 155 of the *Declaratory Ruling* [i.e., the *Declaratory Ruling* in its entirety]." Pet. 2. In their mediation statement, filed on December 15, 2017, the petitioners again said that this case concerned those "specific parts of the Commission's decision." Mediation Questionnaire 1 (Dkt. Entry 8).

The petitioners did not file their supplemental petition for review until April 24, 2018—months past the 60-day cut-off for review petitions

challenging the *Order*. *See* Supp. Pet. 1. There, for the first time, the petitioners designated as subjects for review "previously omitted . . . paragraphs of the [*Order*] (paragraphs 40-66)." Supp. Pet. 1. Until that point, the FCC and members of the public had no indication that the petitioners would challenge the Commission's decision to repeal the retail customer and state government direct notice rules.

Having twice indicated that this case concerned only the *Declaratory Ruling* and those limited portions of the *Order* repealing the de facto retirement rule, the petitioners could not properly wait until months later—well outside the statutory filing window—to challenge the Commission's repeal of the copper retirement direct notice rules. Reaching those untimely claims would vitiate the jurisdictional limitation that Congress has prescribed. *See, e.g.*, *Goos v. ICC*, 911 F.2d 1283, 1288–89 (8th Cir. 1990) (holding that parties were jurisdictionally barred from challenging an agency order when their names were not individually included in a timely filed petition for review but were included in a motion to amend that petition filed beyond the Hobbs Act's 60-day cut-off for review petitions).

Although the original and supplemental petitions concern the same *Order*, this Court has squarely rejected the theory that, "as a jurisdictional matter, a petition for review of one aspect of [an agency] order opens the entire order up for review." *Wash. Utils. and Transp. Comm'n v. FERC*, 26 F.3d 935, 941 (9th Cir. 1994) (emphasis omitted). As the Court explained, that theory contravenes the "unambiguous dictates of [Federal Rule of Appellate Procedure] 15." *Id.* at 942.

Finally, given the jurisdictional nature of the Hobbs Act's 60-day filing window, the FCC need not show prejudice from the untimeliness of the petitioners' claims. We nonetheless note that, had the full scope of the intended claims been clear sooner, other parties might have filed protective petitions for review or intervened in this case on the FCC's behalf. *Cf. Washington Utilities*, 26 F.3d at 941 ("A party that was satisfied with an order as issued might easily become dissatisfied should some other party succeed, on review, in having some part of the order modified.").

B. The FCC Reasonably Repealed the Retail Customer Direct Notice Rule.

The petitioners' arguments concerning the retail customer direct notice rule also fail on the merits.

1. When first requiring direct notice of copper retirement to retail customers in 2015, the Commission predicted that doing so would prevent consumer confusion regarding the implications of carriers' transition to fiber facilities, "allow[ing] for a smoother transition." *2015 Order*, 30 FCC Rcd at 9396 ¶ 39. In 2017, the Commission reasonably determined that the predicted benefits of mandating direct notice to retail consumers had "not come to pass." *Order* ¶ 45 [SER 20]. Rather, the requirement of direct notice had "caused confusion and delay," without corresponding benefit to customers. *Id.*

These Commission findings of confusion and delay were well supported in the record. Multiple commenters pointed out, for example, that the required direct notice was "confusing to retail customers" because it required carriers to inform customers of the date "on which their provider [was] authorized to retire the copper," rather than the date on which the carrier would migrate that individual customer to fiber—which is the date that customers really care about. 07/17/2017 Reply Comments of CenturyLink 20 [SER 157] (CenturyLink Reply); *accord* Verizon Comments 22 [SER 274]; *see Order* ¶ 45 & n.160 [SER 20] (citing these and other supporting record materials). Other commenters advised

that "the requirements for notifying retail customers of planned copper retirement . . . 'drag[] out the copper retirement process,' rather than promote fiber deployment." 06/15/2017 Comments of the Fiber Broadband Association 11 [SER 241] (second alteration in original). AT&T, for example, explained that the retail customer direct notice rule obligated it to "customize each notice to address each type of service (or combination of services) available to each customer, including contact information for the different, discrete business units at AT&T that would provide customer service for each type of service." AT&T Comments 32 [SER 204].

The Commission also cited numerous reasons why it believed that the retail customer direct notice rule did not provide benefits that might outweigh the confusion and delay it engendered. The Commission found that, given the competitive pressure that incumbent carriers now face from "competitive [local telephone companies], cable providers, and wireless providers," incumbent carriers "do not require mandatory and prescriptive Commission-ordered notice to educate and inform their customers of network transitions from copper to fiber." *Order* ¶ 45 [SER 20]. "Rather, these communications must necessarily occur for the

incumbent [carrier] to continue providing the services to which its customers subscribe." *Id.*; *see id.* ¶¶ 48–49 [SER 22–23].

The Commission's determination on that point was not hypothetical. In comments to the Commission, the "three largest incumbent [carriers] that together serve approximately 74% of households purchasing legacy voice service from incumbent [carriers]" expressly "acknowledge[d] and embrace[d] their role in educating consumers of the effect of impending changes in the network over which their service is provided, not just of the benefits of advanced, IP-based services." *Order* ¶ 50 [SER 23] (footnote omitted) (citing comments from Verizon, CenturyLink, and AT&T, as well as 2016 and 2017 financial statements of those companies that established their market share). CenturyLink, for example, explained that incumbent carriers have "strong incentives to notify affected retail customers of a transition from copper to fiber" in view of intermodal competition for voice customers and the high revenue potential inherent in serving customers over fiber (because of the greater range of next-generation services that fiber enables carriers to offer). 06/15/2017 Comments of CenturyLink 31 [SER 222]; *see id.* at 31–32 [SER 222–23].

Furthermore, the Commission had evidence that third-party equipment will in many cases continue to function as well with fiber as with copper. *Order* ¶ 46 [SER 20–21]. For example, Verizon said that it "continues to offer customers over fiber the same [time-division multiplexed] voice service that they received over copper." 09/11/17 Letter from Verizon re Ex Parte Meeting 3 [SER 144]; *accord* Verizon Comments 18 n.54 [SER 270]. Likewise, USTelecom stated:

> Many [customers] can continue to receive the same [time-division multiplexed] services over fiber facilities at the same rates, terms, and conditions as over copper. Faxing, alarm monitoring services, and the like will continue to be available to consumers post-transition. 911 communications continue to work in the same manner.

07/17/2017 Reply Comments of the United States Telecom Association 17 [SER 189] (footnote omitted). In view of such evidence, the Commission reasonably found that concerns about whether third-party equipment would continue to function over fiber did not warrant continuing to mandate that carriers provide notice of copper retirements directly to individual retail customers. *Order* ¶ 46 [SER 20–21].

2. The petitioners argue that the direct notice rule was the "sole due process protection" for "ordinary consumers" to prevent "service changes . . . before the consumer has an adequate opportunity to react."

Br. 70. But as the Commission and numerous commenters explained, that argument improperly "conflate[s] copper retirement and service discontinuance." *Order* ¶ 46 [SER 21]. "[I]f an incumbent [carrier's] copper retirement will result in a discontinuance of service, the carrier must still go through the process of obtaining Commission authorization," which includes an FCC-issued public notice of the proposed discontinuance and an opportunity for customers to "object . . . and raise concerns regarding the adequacy of available alternative services." *Id.* ¶ 43 [SER 19]; *see* 47 C.F.R. § 63.71(a)(5). And as the Commission further explained, carriers and state public utilities commissions often engage in voluntary outreach efforts that are more effective than the FCC-mandated notice. *See Order* ¶ 50 [SER 23].

3. Also unavailing is the petitioners' claim that, in repealing the retail customer direct notice rule, the Commission silently "abandon[ed] the goal of consumer protection" and "replaced" it with "a core value of broadband deployment." Br. 72. In the 2017 *Order*, as before, the Commission advanced both policy objectives: promoting a transition to next-generation technologies while protecting customers who still receive service over copper during the transition. *See, e.g.*, *Order* ¶ 41 [SER 18–

19] (indicating a desire to promote incumbent carriers' "transition[] to next-generation networks" while simultaneously "addressing parties' needs for adequate information and consumer protection"); *2015 Order*, 30 FCC Rcd at 9373 ¶ 1 (pledging both to promote "consumer protection policies" and to "ensure that the deployment of innovative and improved communications services can continue without delay"). In repealing the retail customer direct notice rule, the Commission did not "abandon" the goal of consumer protection; it merely reached a different conclusion from the previous Commission regarding how best to balance, and advance, the agency's dual policy objectives. *Compare Order* ¶ 41 [SER 18–19], *with 2015 Order*, 30 FCC Rcd at 9398–99 ¶ 43.

4. Contrary to what the petitioners claim (Br. 74), the Commission has not "set aside findings of previous proceedings" without "articulat[ing] its rationale in choosing a different path." The Commission expressly acknowledged its former prediction that requiring direct notice to retail customers would reduce consumer confusion and promote a smooth transition to fiber networks. *See Order* ¶ 45 & n.159 [SER 20]. But the Commission found that the record in 2017 did not substantiate those predictions. *Id.* ¶ 45 [SER 20]. Accordingly, the

Commission concluded, the rule's burden on carriers is no longer warranted. *See supra* pp. 59–62.

Notably, the petitioners do not identify any specific finding of fact that they contend the Commission reversed without adequate explanation. *See* Br. 74–75. Nor do they deny that the Commission had new evidence in 2017.[8] The record included, for example, carrier comments concerning their "real-world experiences" under the 2015 notice regime. Verizon Comments 18 [SER 270]. Based in part on those comments, the Commission explained why it believed the 2015 rule confused customers and delayed network transitions. *See supra* pp. 59–60. The APA requires nothing more.

Indeed, the Commission was free to revise its earlier findings even without new evidence, so long as it reasonably explained why it disagreed with those findings. *Cf. Organized Village of Kake*, 795 F.3d at 968 ("The Department was required to provide a 'reasoned explanation . . . for disregarding' the 'facts and circumstances' that underlay its previous

[8] The petitioners appear to contend instead that the Commission was obligated to grant the retail customer direct notice rule a longer trial period, *see* Br. 72–73, or to gather additional evidence concerning its efficacy by means of a "task force, . . . trials, [or] workshops," Br. 74. The petitioners cite no authority to support those contentions.

decision." (quoting *Fox Television Stations*, 556 U.S. at 515)). If the 2017 *Order* contains findings that conflict with the Commission's earlier findings, the Commission gave well-reasoned and adequately explained grounds for changing its stance.

C. The FCC Reasonably Repealed the State Government Direct Notice Rule.

The petitioners' challenge to the Commission's repeal of its state government direct notice rule fails on the jurisdictional grounds already discussed: not only is it untimely, but the petitioners have not explained why they have standing to challenge the repeal of a rule that provided for notice to state governors and public utilities commissions, not private parties. *See supra* pp. 31, 55–58. But should the Court address the merits of the petitioners' challenge, it should hold that the Commission's decision was reasonable. *Order* ¶¶ 56–57 [SER 25].

1. The Commission adopted the state government direct notice rule in 2015 "to synchronize the notice requirements for copper retirements with those for [S]ection 214 discontinuances." *Order* ¶ 56 [SER 25]; *see 2015 Order*, 30 FCC Rcd at 9412 ¶ 70. But discontinuances, the Commission reasoned, "present a very different set of concerns because of the potential for loss of service and/or functionality, thereby justifying

greater notice than mere changes to the facilities over which an incumbent [carrier] provides its services." *Order* ¶ 56 [SER 25].

Given the lesser interests at stake for network change notices, as compared to notices of discontinuance, the Commission decided that the state government direct notice rule was not worth the burden it imposed on carriers. *See Order* ¶¶ 56, 57 [SER 25]. That was particularly so, the Commission concluded, because states "that have regulatory authority over copper and wish to mandate notice [of copper retirement] are able to do so without the need for an across-the-board Commission rule." *Id.* ¶ 57 [SER 25]. Moreover, the Commission explained, there is "no reason" to give notice to state entities that either lack, or elect not to exercise, regulatory authority over copper networks or network changes. *Id.*

2. The petitioners contend that "[t]he FCC failed to address . . . explicit arguments in the record that the reason for states' lack of regulation was the consistent reassurance from both the FCC and the carriers themselves that the FCC would continue to ensure adequate notice." Br. 76. But the record materials that the petitioners cite in support of that claim make no such argument—let alone in a manner sufficiently "explicit" that the Commission could be expected to have

addressed it. *See, e.g.*, *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003) ("As we have repeatedly held, the Commission need not sift pleadings and documents to identify arguments that are not stated with clarity by a petitioner." (internal quotation marks and alterations omitted)). As such, this argument is waived. *See id.* (citing 47 U.S.C. § 405(a)(2)).

The petitioners cite a portion of reply comments to the Commission in which Public Knowledge argued that "more and more states [are] passing legislation that allows incumbents to discontinue service," and thus that "the Commission's copper retirement rules [have] become a last line of defense for consumers." Public Knowledge Reply 7 [SER 181]. Nowhere in those comments did Public Knowledge argue or show that, in passing such legislation, states relied on the FCC's state government direct notice rule. *See id.* Likewise, the comments of the Illinois attorney general to which the petitioners allude (Br. 75) include no argument that Illinois relied on that rule. *See* 07/17/2017 Reply Comments of the People of the State of Illinois by Attorney General Lisa Madigan 6 [SER 175]. To

the contrary, the Illinois attorney general explained that Illinois has put in place its own state-level notice rules. *See id.*[9]

3. Finally, the petitioners contend that the FCC's purpose in adopting the state government direct notice rule in 2015 was to promote "consumer education and outreach efforts," Br. 76, and that the Commission failed to explain in the *Order* why that consideration no longer applies, *id.* at 77. But the Commission did explain its view on that issue, observing that states are free to institute their own notice requirements if they desire to do so. *See Order* ¶ 57 & n.207 [SER 25]. Moreover, insofar as the Commission has now eliminated the retail customer direct notice rule, the agency's former determination that providing direct notice to states would help them "field the calls that will come when consumers receive copper retirement notices" no longer pertains. *2015 Order*, 30 FCC Rcd at 9412 ¶ 70.

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[9] From a related news article on which the petitioners rely (Br. 76 & n.205), it appears that Illinois has elected not to bar or require state-level pre-approval for copper retirements—on the understanding that incumbent carriers will not be able to discontinue, reduce, or impair service without applying for approval from the FCC. That obligation remains in place, and a state's reliance on it has no bearing on the repeal of the state government direct notice rule.

V. THE FCC DID NOT PREJUDGE THE OUTCOME OF ITS PROCEEDING.

Finally, there is no merit to the claim that the FCC unlawfully prejudged the issues resolved in the *Combined Order*. Br. 78–79; Amicus Br. 4–11; *see* Br. 56–58.

There is a strong presumption of regularity in administrative decisionmaking, including against charges of prejudgment. *See, e.g.*, *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 509 F.3d 562, 571 (D.C. Cir. 2007) ("courts must tread lightly" in this arena); *accord* 2 Charles H. Koch, Jr. & Richard Murphy, *Administrative Law and Practice* § 6:10 (3d ed. 2010). As the Supreme Court has stated, administrative officials "charged by Congress with adjudicatory functions" are "assumed to be [individuals] of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *United States v. Morgan*, 313 U.S. 409, 421 (1941). The presumption of regularity is particularly strong for rulemakings, in which context the D.C. Circuit has required "a clear and convincing showing" that an allegedly disqualified decisionmaker had "an unalterably closed mind" on "critical" matters. *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

The petitioners and their supporting amicus curiae cite separate statements of Chairman Pai and Commissioner O'Rielly showing that they disagreed with earlier rulings. But "[a] party cannot overcome [the] presumption" of administrative regularity "with a mere showing that an official has taken a public position, or has expressed strong views, or holds an underlying philosophy with respect to an issue in dispute"—not even when the official "speak[s] vigorously" or "colorfully" to "spark debate." *Nuclear Information and Resource Service*, 509 F.3d at 571 (internal quotation marks omitted). And "preconceptions regarding the law no more invalidate agency action than they do the action of a court." *City of Charlottesville v. FERC*, 774 F.2d 1205, 1212 (D.C. Cir. 1985) (citing *FTC v. Cement Inst.*, 333 U.S. 683, 700–03 (1948)). Nothing suggests that Chairman Pai or Commissioner O'Rielly approached this proceeding with anything other than background policy preferences and views of the law—as is expected of administrative decisionmakers. *See* 2 Koch & Murphy § 6:10.

Contrary to the petitioners' claim, moreover, it is not true that the Commission in 2017 "generally ignore[d] the extensive findings made in the [*2014* and *2015 Orders*]." Br. 57; *see* Amicus Br. 6. If the petitioners'

objection is that the Commission initiated a new proceeding, rather than reopening the same record from its earlier technology transitions orders, that was a routine exercise of the agency's broad discretion to order its proceedings. *See* 47 U.S.C. § 154(j). Commenting parties were free to (and did) present in the new docket whatever arguments and evidence they considered significant from the old one. To the extent the petitioners' complaint is that the Commission did not discuss what they characterize as "the disastrous implementation of [Verizon's] Voice[L]ink" on Fire Island (Br. 57), we have already explained that there was no reason for the Commission to do so. *See supra* pp. 42–44.

CONCLUSION

The Court should dismiss the petition for review for lack of jurisdiction. Should the Court assert jurisdiction to decide any of the petitioners' claims, the petition for review should be denied as to those claims.

Dated: November 30, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

The order under review has not previously been the subject of a petition for review in this Court or any other court. The United States Telecom Association petitioned for agency reconsideration of the Commission's predecessor reforms in *U.S. Telecom Ass'n v. FCC*, No. 15-1414 (D.C. Cir.). In view of later developments, including the litigation here, that case is in abeyance.

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I, Sarah E. Citrin, hereby certify that on November 30, 2018, I filed the foregoing Brief for the Respondents with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system.

I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

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STATUTORY ADDENDUM

STATUTORY ADDENDUM CONTENTS

Page

5 U.S.C. § 553 provides:

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 554 provides:

§ 554. Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except . . . administrative law judge appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

47 U.S.C. § 153(53) provides, in pertinent part:

> **§ 153. Definitions**
>
> For the purposes of this chapter, unless the context otherwise requires—
>
> *****
>
> (53) Telecommunications service
>
> The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.
>
> *****

47 U.S.C. § 154 provides, in pertinent part:

> **§ 154. Federal Communications Commission**
>
> *****
>
> (j) Conduct of proceedings; hearings
>
> The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense.
>
> *****

47 U.S.C. § 203 provides:

§ 203. Schedules of charges

(a) Filing; public display

Every cmmon carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the

Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 208 provides:

> **§ 208. Complaints to Commission; investigations; duration of investigation; appeal of order concluding investigation**
>
> (a) Any person, any body politic, or municipal organization, or State commission, complaining of anything done or omitted to be done by any common carrier subject to this chapter, in contravention of the provisions thereof, may apply to said Commission by petition which shall briefly state the facts, whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been caused, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper. No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.
>
> (b)(1) Except as provided in paragraph (2), the Commission shall, with respect to any investigation under this section of the lawfulness of a charge, classification, regulation, or practice, issue an order concluding such investigation within 5 months after the date on which the complaint was filed.
>
> (2) The Commission shall, with respect to any such investigation initiated prior to November 3, 1988, issue an order concluding the investigation not later than 12 months after November 3, 1988.
>
> (3) Any order concluding an investigation under paragraph (1) or (2) shall be a final order and may be appealed under section 402(a) of this title.

47 U.S.C. § 214 provides, in pertinent part:

> **§ 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity**
>
> (a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment
>
> No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. 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; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization

from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

(b) Notification of Secretary of Defense, Secretary of State, and State Governor

Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or 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. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the

Commission, the State commission, any State affected, or any party in interest.

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47 C.F.R. § 1.2 provides:

§ 1.2 Declaratory rulings.

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.

47 C.F.R. § 63.60 provides, in pertinent part:

§ 63.60 Definitions.

For purposes of this part, the following definitions shall apply:

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(i) The term "technology transition" means any change in service that would result in the replacement of a wireline TDM–based voice service with a service using a different technology or medium for transmission to the end user, whether Internet Protocol (IP), wireless, or another type; except that retirement of copper, as defined in § 51.332(a) of this chapter, that does not result in a discontinuance, reduction, or impairment of service requiring Commission authorization pursuant to this part shall not constitute a "technology transition" for purposes of this part.

47 C.F.R. § 63.71 provides, in pertinent part:

§ 63.71 Procedures for discontinuance, reduction or impairment of service by domestic carriers.

Any domestic carrier that seeks to discontinue, reduce or impair service shall be subject to the following procedures:

(a) The carrier shall notify all affected customers of the planned discontinuance, reduction, or impairment of service and shall notify and submit a copy of its application to the public utility commission and to the Governor of the State in which the discontinuance, reduction, or impairment of service is proposed; to any federally-recognized Tribal Nations with authority over the Tribal lands in which the discontinuance, reduction, or impairment of service is proposed; and also to the Secretary of Defense, Attn. Special Assistant for Telecommunications, Pentagon, Washington, DC 20301. Notice shall be in writing to each affected customer unless the Commission authorizes in advance, for good cause shown, another form of notice. For purposes of this section, notice by email constitutes notice in writing. Notice shall include the following:

(1) Name and address of carrier;

(2) Date of planned service discontinuance, reduction or impairment;

(3) Points of geographic areas of service affected;

(4) Brief description of type of service affected; and

(5) One of the following statements:

(i) If the carrier is non-dominant with respect to the service being discontinued, reduced or impaired, the notice shall state: The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments as soon as possible, but no later than 15 days after the Commission releases public notice of the proposed discontinuance. You may file your comments electronically through the FCC's Electronic Comment Filing System using the docket number established in the Commission's public notice for this proceeding, or you may address them to the Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, Washington, DC 20554, and include in your comments a reference to the § 63.71 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service.

(ii) If the carrier is dominant with respect to the service being discontinued, reduced or impaired, the notice shall state: The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments as soon as

possible, but no later than 30 days after the Commission releases public notice of the proposed discontinuance. You may file your comments electronically through the FCC's Electronic Comment Filing System using the docket number established in the Commission's public notice for this proceeding, or you may address them to the Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, Washington, DC 20554, and include in your comments a reference to the § 63.71 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service.

(6) For applications to discontinue, reduce, or impair an existing retail service as part of a technology transition, as defined in § 63.60(i), except for applications meeting the requirements of paragraph (f)(2)(ii) of this section, in order to be eligible for automatic grant under paragraph (f) of this section:

(i) A statement that any service offered in place of the service being discontinued, reduced, or impaired may not provide line power;

(ii) The information required by § 12.5(d)(1) of this chapter;

(iii) A description of any security responsibilities the customer will have regarding the replacement service; and

(iv) A list of the steps the customer may take to ensure safe use of the replacement service.

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(f)(1) The application to discontinue, reduce, or impair service, if filed by a domestic, non-dominant carrier, or any carrier meeting the requirements of paragraph (f)(2)(ii) of this section, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. The application to discontinue, reduce, or impair service, if filed by a domestic, dominant carrier, shall be automatically granted on the 60th day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. For purposes of this section, an application will be deemed filed on the date the Commission releases public notice of the filing.

(2) An application to discontinue, reduce, or impair an existing retail service as part of a technology transition, as defined in § 63.60(i), may be automatically granted only if:

(i) The applicant provides affected customers with the notice required under paragraph (a)(6) of this section, and the application contains the showing or certification described in § 63.602(b); or

(ii) The applicant:

(A) Offers a stand-alone interconnected VoIP service, as defined in § 9.3 of this chapter, throughout the affected service area, and

(B) At least one other alternative stand-alone facilities-based wireline or wireless voice service is available from another unaffiliated provider throughout the affected service area.

(iii) For purposes of this paragraph (f)(2), "stand-alone" means that a customer is not required to purchase a separate broadband service to access the voice service.

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47 C.F.R. § 63.505 provides:

> **§ 63.505 Contents of applications for any type of discontinuance, reduction, or impairment of telephone service not specifically provided for in this part.**
>
> The application shall contain:
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> (a) The name and address of each applicant;
>
> (b) The name, title, and post office address of the officer to whom correspondence concerning the application is to be addressed;
>
> (c) Nature of proposed discontinuance, reduction, or impairment;
>
> (d) Identification of community or part of community involved and date on which applicant desires to make proposed discontinuance, reduction or impairment effective, if for a temporary period only, indicate the approximate period for which authorization is desired;
>
> (e) Proposed new tariff listing, if any, and difference, if any, between present charges to the public and charges for the service to be substituted;
>
> (f) Description of the service area affected including population and general character of business of the community;
>
> (g) Name of any other carrier or carriers providing telephone service to the community;
>
> (h) Statement of the reasons for proposed discontinuance, reduction, or impairment;
>
> (i) Statement of the factors showing that neither present nor future public convenience and necessity would be adversely affected by the granting of the application;

(j) Description of any previous discontinuance, reduction, or impairment of service to the community affected by the application, which has been made by the applicant during the 12 months preceding filing of application, and statement of any present plans for future discontinuance, reduction, or impairment of service to such community;

(k) Description of the service involved, including:

(1) Existing telephone service by the applicant available to the community or part thereof involved;

(2) Telephone service (available from applicant or others) which would remain in the community or part thereof involved in the event the application is granted;

(l) A statement of the number of toll messages sent-paid and received-collect and the revenues from such traffic in connection with the service proposed to be discontinued, reduced, or impaired for each of the past 6 months; and, if the volume of such traffic handled in the area has decreased during recent years, the reasons therefor.