

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

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

**REPORT AND ORDER, ORDER ON RECONSIDERATION,
AND FURTHER NOTICE OF PROPOSED RULEMAKING**

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By the Commission: Chairman Wheeler and Commissioners Clyburn and Rosenworcel issuing separate statements; Commissioners Pai and O’Rielly dissenting and issuing separate statements.

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I. INTRODUCTION

1. Communications networks are rapidly transitioning away from the historic provision of time-division multiplexed (TDM) services running on copper to new, all-Internet Protocol (IP) multimedia networks using copper, co-axial cable, wireless, and fiber as physical infrastructure. Our actions today further the technology transitions underway in our Nation’s fixed communications networks that offer the prospect of innovative and improved services to consumers and businesses alike.¹ The core goals of the January 2014 *Technology Transitions Order* frame our approach here.² In the *Technology Transitions Order*, we emphasized the importance of speeding market-driven technological transitions and innovations while preserving the core statutory values as codified by Congress: competition, consumer protection, universal service, and public safety.³ Furthering these core values will accelerate customer adoption of technology transitions. Today, we take the next step in advancing longstanding competition and consumer protection policies on a technologically-neutral basis in order to ensure that the deployment of innovative and improved communications services can continue without delay.⁴

2. Industry is investing aggressively in modern telecommunications networks and services. Overall, according to data supplied by USTelecom and AT&T, capital expenditures by broadband providers topped \$75 billion in 2013 and continue to increase.⁵ AT&T recently announced that by the year 2020, 75 percent of its network will be controlled by software.⁶ To do this, AT&T is undergoing a

¹ *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 14969, para. 1 (2014) (*Notice*).

² See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd 1433, 1435, para. 1 (2014) (*Technology Transitions Order*).

³ See *id.*

⁴ See *Notice*, 29 FCC Rcd at 14969, paras. 1-2.

⁵ AT&T Comments at 25-26; see also USTelecom Reply at 4. Unless otherwise noted, all citations to comments in this item refer to comments filed in GN Docket No. 13-5, PS Docket No. 14-174, RM-11358, WC Docket No. 05-25, and RM-10593 (GN Docket No. 13-5 et al.). “Comments” or “Reply” are used to denote comments filed in response to the *Notice*, with reference to the date filed only when that date differs from February 5, 2015 for Comments and March 9, 2015 for Reply Comments, and then only in the first citation to such Comment or Reply, and commenters are referred to according to the list set forth *infra* in Appendix C.

⁶ Rachael King, AT&T’s Shift to DevOps and New Tech Requires a Massive Training Effort, Wall St. J. (June 5, 2015), <http://blogs.wsj.com/cio/2015/06/05/atts-shift-to-devops-and-new-tech-requires-a-massive-training-effort/>.

massive effort to train about 130,000 of its employees on software-defined networking architecture and protocols.⁷ AT&T has also expanded its wireline IP broadband network to 57 million customer locations, as well as extended fiber to 725,000 business locations.⁸ Moreover, Verizon passes more than 19.8 million premises with its all-fiber network — the largest such network in the country — and it projects that soon about 70 percent of the premises in its landline territory will have access to all-fiber facilities.⁹ Verizon too has announced an SDN-based strategy “to introduce new operational efficiencies and allow for the enablement of rapid and flexible service delivery to Verizon’s customers.”¹⁰ And CenturyLink has announced the launch of 1 Gbps broadband service to 16 cities.¹¹ According to recent reports, CenturyLink’s national fiber network upgrade has expanded availability of CenturyLink’s gigabit broadband services to nearly 490,000 business locations.¹² These are just a few of many examples in which industry is investing heavily to bring the benefits of new networks and services to customers of all sizes.

3. We recognize that the success of the technology transitions is dependent, among other things, on clear and certain direction from the Commission that preserves the historic values that Congress has incorporated in the Communications Act of 1934, as amended (the Act).¹³ In the November 2014 *Notice*, we sought comment on limited oversight that would encourage transitions that could otherwise be delayed if a portion of consumers were left behind or competition were allowed to diminish — recognizing that the transitions that are underway are organic processes without a single starting or stopping point. Building on that *Notice*, in this item we support the transitions by adopting limited and targeted regulation to preserve competition and to protect consumers, especially those in vulnerable populations who have not yet voluntarily migrated from plain old telephone service (POTS) and other legacy services. In taking these steps, we seek to avoid the need for future regulation and dispute resolution that could cause delays down the road.¹⁴ Carriers involved in the historic transitions have made

⁷ *Id.*

⁸ AT&T Comments at 26.

⁹ Verizon Comments at 9; *see also* Sean Buckley, Verizon Sees Value in Transforming Network to IP, Fiber, But Conversion Challenges Remain, FierceTelecom (May 19, 2015), <http://www.fiercetelecom.com/story/verizon-sees-value-transforming-network-ip-fiber-conversion-challenges-remains/2015-05-19> (“Internally, the copper-to-fiber migration will produce a number of savings for Verizon, including real estate, power, maintenance and network dispatching. Unlike copper, fiber is also less prone to damage from water or other environmental issues, meaning it can reduce truck rolls to solve customer issues.”).

¹⁰ Press Release, Verizon, Verizon Announces Software Defined Networking Strategy, SDN Initiative Means Rapid Time-to-Market Agile Network and Operational Efficiencies (Apr. 28, 2015), <http://www.prnewswire.com/news-releases/verizon-announces-software-defined-networking-strategy-300073315.html>.

¹¹ CenturyLink Comments at 29.

¹² Tim Gallen, Speeding Up: CenturyLink Expands Gigabit Internet Service Across Arizona, Phoenix Bus. J. (May 18, 2015), <http://www.bizjournals.com/phoenix/blog/techflash/2015/05/speeding-up-centurylink-expands-gigabit-internet.html>.

¹³ *See Notice*, 29 FCC Rcd at 14969, para. 1; *Technology Transitions Order*, 29 FCC Rcd at 1435-36, paras. 2-4; Letter from Michael R. Romano, Senior Vice President-Policy, NTCA-The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed Nov. 20, 2013) (stating that the Commission “has an essential, statutorily-defined role to play in defining regulatory frameworks to govern essential communications services regardless of underlying technology” and “regulatory certainty and sound public policy require the thoughtful evaluation of any potential changes to determine how core statutory objectives can be fulfilled and better served in the face of shifting consumer preferences, technological developments, and dynamic market forces”).

¹⁴ *See* USTelecom Comments at 10-11 (amended Feb. 25, 2015) (requesting clarity on proposed customer notice requirements and other requirements); Verizon Reply Comments at 2 (stating that the Commission’s “main focus should be to provide the industry with reasonable certainty that providers will be able to retire older facilities when

(continued...)

clear their intention to protect consumers and preserve a competitive marketplace going forward, and the pro-transition rules we adopt today are consistent with those mutually shared goals.¹⁵

4. Building on our proposals in the *Notice*, we adopt clear “rules of the road” to ensure that all consumers will enjoy the benefits of two distinct but related kinds of technology transitions: (1) changes in network *facilities*, and in particular, retirement of copper facilities; and (2) changes that involve the discontinuance, impairment, or reduction of legacy *services*, irrespective of the network facility used to deliver those services. We summarize each of the actions that we take today below.

5. *Informing and Protecting Consumers as Networks and Services Change.* We take the following actions to ensure that consumers are able to make informed choices and that new retail services meet consumers’ fundamental needs:

- *Copper Retirement:* We believe that the best balance is struck when consumers are informed, technological progress is fully incented, and current networks are maintained while they are in use. To that end, we reaffirm our decision not to create an approval requirement for retirement of legacy facilities so long as the change of technology does not discontinue, reduce, or impair the services provided — ensuring that incumbent local exchange carriers (LECs) can continue to transition to an all-fiber environment. However, because our current network change rules do not take account of the needs of consumers for accurate information about the consequences of retirements of copper facilities, we provide simply that incumbent carriers (i.e., incumbent LECs) must provide notice of planned copper retirements to retail customers when such retirements remove copper to the customers’ premises, along with particular consumer protection measures. We define “copper retirement” so that incumbent LECs know when these responsibilities are triggered. The definition that we adopt will prevent copper facilities from being “*de facto* retired” without adequate notice to affected persons.
- *Service Discontinuance:* Congress has mandated, per section 214 of the Act, that carriers must obtain our approval before they discontinue, reduce, or impair service to a community or part of a community.¹⁶ This discontinuance process allows the Commission to satisfy its obligation under the Act to protect the public interest and to minimize harm to consumers.¹⁷ In the Order on Reconsideration, we deny USTelecom’s Petition for Reconsideration of the declaratory ruling we adopted in November 2014, which concluded that the term “service” in section 214(a) is defined functionally and not solely with reference to a carrier’s tariffs.¹⁸ By

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they invest in newer, more advanced broadband networks”); TIA Comments at 7 (“Lack of clarity about whether a new investment might also be ruled a service discontinuance requiring Commission approval operates as a disincentive to investing in fiber or other new technologies.”); NTCA Reply at 11 (noting its consistent stance that “‘clear rules of the road’ are an important component of promoting the IP transition” and that “[c]lear rules provide carriers with certainty and therefore the incentive to invest, while ensuring that consumer needs are satisfied as networks continue to evolve”).

¹⁵ See, e.g., AT&T Comments at 6-7; Verizon Comments at 2-3; CenturyLink Comments at 3-6; see also Comments and Reply of NTCA-The Rural Broadband Association to Oppositions to Petition for Reconsideration of the United States Telecom Association, GN Docket No. 13-5 et al., at 4 (filed Jan. 30, 2015) (asserting that “core principles of consumer protection, competition, and universal service must be sustained in any technology transition” and “sensible, well-defined ‘rules of the road’ – rather than complete disregard of regulatory frameworks – are more essential than ever to achieve these objectives and at the same time encourage reasonable technology transitions”).

¹⁶ See 47 U.S.C. § 214(a).

¹⁷ For convenience, in certain circumstances this item uses “discontinue” (or “discontinuance,” etc.) as a shorthand that encompasses the statutory terms “discontinue, reduce, or impair,” unless the context indicates otherwise. See *id.*

¹⁸ Petition for Reconsideration of the United States Telecom Association, GN Docket No. 13-5 et al. (filed Dec. 23, 2014) (USTelecom Petition or Petition), <http://apps.fcc.gov/ecfs/document/view?id=60001010989>.

promptly acting on USTelecom's petition, we seek to avoid uncertainty concerning the Commission's position with respect to the scope of this important definitional question under section 214(a) of the Act.

6. *Safeguarding the Public Interest by Preserving the Benefits of Competition.* Incumbent carriers compete with competitive carriers (i.e., competitive LECs) to provide communications services to businesses,¹⁹ schools,²⁰ healthcare facilities,²¹ government entities,²² and other organizations of all shapes

¹⁹ See Letter from Laura VanTil, The Kessler Collection, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1-2 (filed June 17, 2015) (requesting the Commission to "protect vibrant competitive choice during technology transitions" for her portfolio of boutique hotels and residential properties); Letter from Deirdre Pook Magarelli, V. P., Pook & Pook, Inc. Auctioneers & Appraisers, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1-2 (filed June 16, 2015) (encouraging the Commission to "support policies that encourage investment and competition in broadband networks" for her auction firm); Letter from Debra Peterson, Owner, Bliss Yarns, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) (supporting broadband competition for her full service yarn shop); Letter from Oron Strauss, Chairman, Pantheon, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) (asking the Commission to promote competition and access for his technology company providing solutions for nonprofits, associations, and government organizations); Letter from Thomas Smith, Owner and CEO, Lakeland Finishing, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1-2 (filed June 17, 2015) (arguing that "[f]aster speeds and access to broadband competition will lower costs and increase innovation for manufacturing facilities" like Lakeland Finishing that provides painting and finishing solutions to the automotive industry); Letter from Jim Bodick, IT Dir., Minnesota Made, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) ("With IP based communications becoming more the norm, having choice becomes even more important."); Letter from Charles MacDonald, IT Director, Everglades Farm Equipment, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 23, 2015) (asking for the Commission to uphold competition during the transition period for broadband networks); Garrett Bush, Owner, Arrow Heating & Sheet Metal, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 2 (filed June 19, 2015) (noting that protecting competition "will help ensure that businesses like ours have the power to choose the broadband provider that is the best fit for our needs and growth"); Letter from Bryan Barger, Head of IT Operations, 1st Trust Bank, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) ("[W]e commend the FCC's efforts to provide customers with a variety of choices for broadband service and urge you to protect the wholesale access market.").

²⁰ See, e.g., Letter from Rich Belloni, Dir. of Support Servs., Lincoln County, Oregon School Dist., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) ("As technology transitions and more services move to IP based solutions, we encourage you to protect the wholesale access market."); Letter from Gene Martin, Nestucca Valley, Oregon, School Dist., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 20, 2015) (same); Letter from S. Todd Williver, 4-H Program Coordinator, Oregon Univ., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 22, 2015) (same); Letter from Mary Jane Johnson, Owner, Tomorrow's World Early Learning Ctr., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 2 (filed June 15, 2015) ("The availability of low cost, affordable broadband options make it easier for school administrators and day care owners to invest in teachers and caregivers."); Letter from David Spann, Chief Information Officer, McKinney Independent School District, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) ("It is critical that we provide a highly reliable service to our students and teachers. Since we rely on tax dollars to fund our services we need the most competitive pricing available.").

²¹ See, e.g., Letter from Gary Neat, Sys. Dir. of Info. Sys., Ephraim McDowell Med. Ctr., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) ("Our carrier of choice has been able to provide us with more desirable packages and a higher level of service [thereby] allow[ing] us to invest additional money back into vital programs . . ."); Letter from Linda Snyder, Supervisor of Admin. Servs., Greene County, Illinois, Health Dep't, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 16, 2015) (noting that protecting competition "will help ensure that lifesaving organizations . . . have the power to choose the broadband provider that is the best fit . . ."); Letter from Tony Downs, IT Dir., Cumberland Family Med. Ctr., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) (noting that he competitive carrier they use to provide the broadband and voice services on which they rely "provide[s] us with individualized services and high-quality customer support . . . [and] has also enabled us to cut overhead costs.").

and sizes. The competitive carriers often rely on a combination of their own facilities and the purchase of last-mile facilities and services from the incumbent carriers, such as unbundled network elements and special access services to provide business services.²³ The organizations these carriers serve benefit from this competition in their purchase of communications services, which helps them serve their customers better and more efficiently.²⁴ Through today's action, we are adopting policies to ensure competition thrives as our networks continue to transition. Specifically, we implement revisions to our copper retirement rules and our service discontinuance rules to ensure that: (i) competitive carriers are adequately informed about technology changes that impact them; (ii) the interests of end users impacted by upstream changes in service by providers of wholesale inputs are adequately recognized as important to our service discontinuance process; and (iii) competitive carriers do not lose the access that they need to continue to provide the benefits of competition.

- We update the process by which incumbent LECs notify interconnecting entities of planned copper retirements. Among other things, we require incumbent LECs to provide at least six months' advance notice of proposed copper retirements to interconnecting carriers in order to provide such carriers adequate time to prepare their networks for the changes.
- To fulfill our statutory obligation to ensure that changes to telecommunications services that negatively affect the public occur with proper oversight, we clarify that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input, but only when the carrier's actions will discontinue, reduce, or impair service to end users, including a carrier-customer's retail end users. We emphasize that carriers must consider the impact of their actions on end user customers, including the end users of carrier-customers.
- The Commission has long intended to conduct a comprehensive evaluation of dedicated high-capacity connections used daily and intensively by businesses and institutions to transmit their voice and data traffic, known traditionally as "special access." That evaluation will enable us to address critical long-term questions about the state of competition for business data connections and the role of regulation in facilitating competitive markets.²⁵ Today, we adopt an interim rule to preserve competitive access while the special access proceeding remains pending and to maintain incentives for all parties to rapidly transition to IP. We conclude that to receive authority to discontinue, reduce, or impair a legacy TDM-based service that is used as a wholesale input by competitive providers, an incumbent LEC must as a condition to obtaining discontinuance authority commit to providing competitive carriers

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²² See, e.g., Letter from Robert Kewan, Info. Tech. Dir., City of Pewaukee, Wisconsin, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) (noting the importance of choice); see also Letter from John Waffenschmidt, Information Technology Director, Lincoln County, Oregon, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) (noting that protecting competition "will help ensure that government entities like ours have the power to choose the broadband provider that is the best fit for our needs and growth."); Letter from Kevin J. Snyder, Borough Council Pres., Borough of Kutztown, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) ("Our community relies on access to affordable options that the wholesale marketplace provides in order to keep prices [of utility services] lower for taxpayers.").

²³ See Notice, 29 FCC Red at 14972, para. 6.

²⁴ See Windstream Comments at 6 (providing a chart based on data compiled by an independent market research firm estimating that competitive LECs accounted for 26% of non-residential customer expenditures on wireline communications during the second quarter of 2014, compared to only 16% for all non-LECs, such as cable companies and wireless providers). Within the subset of non-residential multi-location expenditures by companies with at least 250 employees, GeoResults estimated that in the third quarter of 2014 competitive LECs accounted for 32% of expenditures and non-LECs accounted for only 5% of expenditures. See *id.* at 10.

²⁵ See Notice, 29 FCC Red at 14973, para. 6.

wholesale access on reasonably comparable rates, terms, and conditions — but only until the Commission: (1) identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective.²⁶ We will evaluate compliance with this “reasonably comparable wholesale access” requirement based on the totality of the circumstances and articulate questions that will guide our inquiry. The interim reasonably comparable wholesale access condition applies to two categories of service: (1) special access services at DS1 speed and above; and (2) commercial wholesale platform services such as AT&T’s Local Service Complete and Verizon’s Wholesale Advantage.²⁷ This interim reasonably comparable wholesale access requirement preserves a clear path to transition to IP and the benefits of competition, and it provides the Commission with flexibility to adopt long-term rules best suited for the future as a result of its review of the special access data.

7. *Establishing Clear Standards to Streamline Transitions to an All-IP Environment.*

Having established that section 214’s discontinuance provisions apply to a service based on a totality-of-the-circumstances functional evaluation, we believe it is prudent to provide additional guidance so that consumers and providers are clear on the meaning of the section 214 standard. Building on the record developed in response to the *Notice*, in the Further Notice of Proposed Rulemaking we propose specific criteria for the Commission to use in evaluating applications to discontinue retail services pursuant to section 214 of the Act. We believe all stakeholders will benefit from an additional round of focused comment on our specific proposals. As we stated previously, adopting specific criteria will enable the Commission to ensure that we can carry out our statutorily-mandated responsibilities in a technology-neutral manner and provide clear up-front guidance that will minimize complications when carriers seek approval for large-scale discontinuances. With clear standards in place, carriers will not have to guess as to how they can obtain approval to discontinue TDM services once they are ready to do so.

II. REPORT AND ORDER

A. Background

8. The Commission initiated this rulemaking in November 2014 to help guide and accelerate the technological revolutions that are underway involving the transitions from networks based on TDM circuit-switched voice services running on copper loops to all-IP multi-media networks using copper, co-axial cable, wireless, and fiber as physical infrastructure. This rulemaking is only one of a series of Commission actions to protect core values and ensure the success of these technology transitions.²⁸ However, we recognize that for them to succeed, we need to ensure competition continues

²⁶ See *infra* para. 132 (describing the time period of the interim rule in greater detail).

²⁷ See *infra* Section II.B.2.b.

²⁸ See *Technology Transitions Order*, 29 FCC Rcd at 1435, para. 1 (kickstarting the process for experiments and data collections “to evaluate how customers are affected by the historic technology transitions that are transforming our nation’s voice communications services” (internal quotation marks omitted)). The Commission also is undertaking a comprehensive evaluation of the correct policies for the long-run concerning access to a key form of competitive inputs and technology change — special access. See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16319, para. 1 (2012) (*Data Collection Order*); see also *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order, 29 FCC Rcd 14346 (Wireline Comp. Bur. 2014) (establishing the filing deadline for responding to the mandatory collection of January 29, 2015 for large businesses and February 27, 2015 for other respondents); *Comment Deadlines Further Extended in Special Access Proceeding*, WC Docket No. 05-25, RM-10593, Public Notice, 30 FCC Rcd 2716 (Wireline Comp. Bur. 2015) (extending comment due date to July 1, 2015 (continued...))

to thrive and we protect consumers, especially those in vulnerable populations, who rely on POTS and other legacy services.²⁹

9. Recent data indicates that 30 percent of all residential customers choose IP-based voice services from cable, fiber, and other providers as alternatives to legacy voice services. Moreover, 44 percent of households were “wireless-only” during January-June of 2014.³⁰ The growth of “wireless-only” homes will necessitate more backhaul services than ever before, and these services are increasingly IP-based.³¹ Overall, almost 75 percent of U.S. residential customers (approximately 88 million households) no longer receive telephone service over traditional copper facilities.³² As consumer demand for faster service speeds continues, wireless providers and their customers have benefited from the transition to Ethernet, which is more easily scalable to increasing user demands compared to copper; and, by the end of 2014, certain incumbent LECs have dropped between 30 to 60 percent of their copper-based DS1 special access circuits, replacing these special access circuits with IP offerings.³³ Moreover, advancements in technology and interconnection have changed the relationship between broadband Internet access and Voice over Internet Protocol (VoIP) applications such that users indiscriminately communicate between North American Numbering Plan (NANP) and IP endpoints on the public switched network.³⁴

10. At the same time, competitive carriers today continue to rely on incumbent LEC TDM-based DS1 and DS3 special access services to serve a large number of utility, residential, and enterprise customer locations throughout the United States. Commenters assert that many areas across the country have few viable alternatives to currently-available incumbent LEC copper loop or TDM-based wholesale

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and reply comment due date to July 22, 2015); *Wireline Competition Bureau Further Extends Comment Deadlines in Special Access Proceeding*, WC Docket No. 05-25, RM-10593, Public Notice, DA 15-737 (Wireline Comp. Bur. rel. June 24, 2015) (establishing new comment due date of September 25, 2015, and reply due date of October 16, 2015). The Commission will use the data and public comment addressing the data to develop the long-term policies that will supersede the reasonably comparable wholesale access requirement adopted today.

²⁹ See, e.g., *Technology Transitions Order*, 29 FCC Rcd at 1439, para. 15 (“Technology transitions mark progress and are a good thing – sometimes even a triumph. But change on this scale can also be disruptive. Customer expectations may become unsettled, established business models may crumble as the assumptions on which they are built become outdated, and the rules of the road may be called into question through the uncertain application of existing rules to new technologies.”).

³⁰ *Protecting and Promoting the Open Internet*, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601, 5637, para. 90 (2015) (*Open Internet Order*) (citing Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January-June 2014* at 5, U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (2014), <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf>).

³¹ See Letter from Vonya B. McCann, Senior Vice President, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al., at 1 (filed May 20, 2015) (asserting “the critical need for access to reasonably priced special access circuits, including Ethernet, to increase capacity and expand coverage of mobile broadband services”).

³² Verizon Comments at 1-2, 4 (citing USTelecom, *Research Brief: Voice Competition Data Support Regulatory Modernization* at 1 (2014), http://www.ustelecom.org/sites/default/files/documents/National%20Voice%20Competition%202014_0.pdf); see also USTelecom Comments at 3-4 (stating that “USTelecom projects that the portion of customers relying either exclusively or mostly on traditional landlines will be only 11 percent by the end of 2015”).

³³ See CenturyLink Comments at 10. Similar change is occurring in the supply of mass-market services. See Verizon Comments at 8 (“Today, Verizon passes more than 19.8 million premises with its all-fiber network, and, soon, about 70 percent of the premises in our landline territory will have access to our all-fiber facilities.”).

³⁴ See *Open Internet Order*, 30 FCC Rcd at 5682 & 5787, paras. 187 & 401 n.1169.

inputs.³⁵ Competitive LECs have submitted evidence in this record and in other proceedings that, in such areas, the prices incumbent LECs charge for these replacement wholesale inputs (e.g., for 2 Mbps IP service) are significantly higher than a comparable service using a TDM-based service subject to a dominant carrier rate regulation.³⁶

11. The Commission received comments from over 65 parties in response to the *Notice*, including incumbent and competitive carriers, and industry organizations representing wireless, cable, rural and communications equipment companies as well as consumer advocates, state public service commissions, and local government entities.³⁷ And the National Telecommunications and Information Administration weighed in on behalf of the federal government, noting that “U.S. government departments and agencies . . . are among the largest customers of U.S. telecommunication service providers” and that the vagaries of the budgeting, appropriations, and procurement processes make it difficult for the government to accommodate transitions quickly.³⁸ It thus noted the need for “careful planning while supporting continued growth and innovation in our communications networks.”³⁹ These parties provided a wide range of arguments and legal analyses as well as relevant data and information on the important issues raised in the *Notice* to help the Commission make informed findings and final rules. Despite their varying positions, all the parties recognize the significance of the technology transitions and the need to protect the enduring values of our communications network.

³⁵ See Letter from Lawrence E. Strickling, Assistant Sec’y for Comm’n and Info. and Adm’r, National Telecommunications and Information Administration, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5, at 1 (filed July 29, 2015) (NTIA *Ex Parte* Letter) (“The ongoing evolution in our communications networks is producing a more capacious, reliable, resilient, and flexible transmission infrastructure for America’s consumers, businesses, and entrepreneurs. The transition presents an opportunity to support growth and innovation in over-the-top content, applications, and services to fuel the U.S. digital economy for decades to come. As the Commission is fully aware, a smooth and seamless technology transition requires careful, consistent planning and thoughtful policy decisions.”). See also Birch et al. Comments at 5-7; see also XO Comments at 26 (“XO is dependent in many locations upon ILEC DS1 and DS3 services to access end user customers, having no competitive alternatives.”); COMPTTEL Comments at 9, 11 & n.22 (stating that “competitive carriers that rely on wholesale access make up the greater part of competition in the business market”); Windstream Comments at 15 (“CLECs also must continue to use last-mile inputs from ILECs, because there often is no viable economic case for competitors to build their own last-mile facilities to address the relatively low level of demand for bandwidth from small, medium-sized, and multi-location customers.”); Letter from A.J. Peterson, HealthWise Chiropractic and Relief Neuropathy Centers of Milwaukee, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 23, 2015) (“If we are limited to a choice between only one or two providers, I am very concerned we will not be able to afford or use the services we need due to the ability of the remaining carriers to extract higher prices for limited products.”); Letter from Greg Butts, Property Manager, Oak Street No 2 LLC d/b/a Sunset Ridge Cemetery, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 19, 2015) (stating that “[i]f robust competition is restricted in the marketplace, my ability to serve my own customers could be harmed by the lack of individualized solutions and value based pricing”).

³⁶ See Windstream Comments at 20 (“The pricing disparity is even more significant for purchasers that do not operate under commercial agreements or commitment plan discounts: \$126.00 for a DS1 circuit under the 36-month tariffed rate, versus \$1,075.00 for a 2 Mbps Ethernet circuit under AT&T’s publicly available 36-month rate for Switched Ethernet, Interactive Class of Service.”).

³⁷ See *infra* Appendix C, List of Commenters.

³⁸ NTIA *Ex Parte* Letter at 1-2.

³⁹ *Id.* at 3.

B. Discussion**1. Revision of Copper Retirement Processes to Facilitate Technology Transitions by Promoting Competition and Protecting Consumers**

12. Today, we significantly update our copper retirement rules for the first time in over a decade to address the increasing pace of copper retirement⁴⁰ and its implications for consumers and competition. We do so to facilitate the smoothest possible transition of the Nation's legacy communications networks to newer technologies while ensuring this transition happens free from the obstacles that might arise were this transition not handled responsibly. We believe the updated rules that we adopt today will benefit the entire ecosystem of industry and consumers by ensuring that everyone has the information they need to adapt to an evolving communications environment. Interconnecting entities will be able to accommodate the planned network changes without disruption of service to their customers. Competitive opportunities will be ensured, resulting in greater consumer choice. Government departments and agencies will not be left unable to respond to changes in the networks over which their vital communications services are provided.⁴¹ Customer confusion regarding the impact of planned copper retirements, and possible complaints arising from such confusion, will be minimized. And incumbent LECs will be able to move forward with highly beneficial planned network changes with greater comfort and certainty.⁴²

13. The Commission issued the current rules governing copper retirement in 2003 in the *Triennial Review Order*.⁴³ At that time, fiber to the home deployment was in its infancy.⁴⁴ In the intervening twelve years, however, incumbent LECs have built extensive fiber networks, with fiber becoming the preferred choice for new greenfield deployments and in some instances deployed in parallel to existing copper networks. And in the last few years, the pace of copper retirement has accelerated.⁴⁵

⁴⁰ See USTelecom Reply at 6 (citing Telecommunications Industry Association, TIA'S 2014-2017 ICT Market Review & Forecast at 3-40 to 3-41 (2014), <http://www.tianow.org/videos/tias-ict-market-review-forecast-2014-2017/13883>) ("Total fiber deployment is projected to be approximately 16 million miles or more annually from 2015 through 2017 and the wireline telecom category is projected to account for approximately 70 percent over the next several years.").

⁴¹ See NTIA *Ex Parte* Letter at 2 (noting that "adhering to federal procurement regulations presents obstacles that can inhibit an agency's ability to upgrade networks, equipment, and services on pace with market developments").

⁴² Verizon, for instance, estimates that the cost of maintaining parallel copper facilities and the consumer welfare benefits from its existing fiber deployment each run in the hundreds of millions of dollars. See Verizon Comments at 7 ("Where Verizon's all-fiber network has been deployed, our cost of maintaining parallel copper facilities is more than \$200 million per year, even if no or few customers are using the legacy facilities."); *id.* at 5 ("[A]s a result of Verizon's programs in recent years to encourage customers experiencing repeated service issues with aging copper facilities to migrate to fiber, Verizon estimates it has made approximately 1.4 million fewer repair or trouble-shooting dispatches than would have been required had these customers remained on copper facilities. Although it is hard to quantify these saved dispatches in terms of savings to customers, . . . a conservative estimate of the consumer welfare gains from those avoided repairs would approach \$140 million.").

⁴³ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, CC Docket No. 01-338 et al., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020, *aff'd in part, remanded in part, vacated in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand, Unbundled Access to Network Elements et al.*, WC Docket No. 04-313 et al., Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004), *aff'd, Covad Commc'ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

⁴⁴ *Triennial Review Order*, 18 FCC Rcd at 17142, para. 274.

⁴⁵ See, e.g., *supra* paras. 2, 9 & notes 33 & 40; *infra* note 48; *Notice*, 29 FCC Rcd at 14978, para. 17 (noting that the Commission posted 20 public notices between January and November 2014 and describing Verizon's ongoing copper retirement and fiber deployment plans).

This rapid pace of formal copper retirements, along with the deterioration of copper networks that have not been formally retired, has led to requests from both competitive LECs and public advocates for changes to the Commission's copper retirement rules to protect competition and consumers.⁴⁶ We reaffirm that “the increasing frequency and scope of copper retirements call into question key assumptions that underpinned our existing copper retirement rules.”⁴⁷ Indeed, today we find that the pace and impact of copper retirement necessitates changes to ensure that our rules governing copper retirement serve the public interest.⁴⁸ We thus conclude, as we tentatively concluded in the *Notice*, that the foreseeable and increasing impact that copper retirement is having on competition and consumers warrants revisions to our network change disclosure rules to allow for greater transparency, opportunities for participation, and consumer protection.⁴⁹ By retaining a notice-based process that promotes certainty for consumers, interconnecting carriers, and incumbent LECs, our actions advance the transition to fiber while serving our key pro-competition and pro-consumer goals.

14. We clarify at the outset that the revisions we adopt today to the network change disclosure rules are not intended to change the nature of the process from one based on notice to one based on approval.⁵⁰ The current network change disclosure process applies to situations in which an incumbent LEC makes a change in its network facilities, such as when it replaces copper facilities with fiber.⁵¹ If this change in facilities does not result in a discontinuance, reduction, or impairment of service, then the carrier need not file an application under section 214(a) seeking Commission authorization for the planned network change. Rather, it must only provide notice in compliance with the Commission's network change disclosure rules. However, some changes in network facilities can result in a discontinuance, reduction, or impairment of service for which Commission authorization is needed. For instance, in one prominent example, Verizon filed an application under section 214(a) when it sought to replace the copper network serving Fire Island that was damaged by Superstorm Sandy with a wireless network over which it would provide its VoiceLink wireless service. We expect all carriers to consider carefully whether a proposed copper retirement will be accompanied by or be the cause of a

⁴⁶ See, e.g., TelePacific Reply at 7 (“The Commission's copper retirement rules adopted in 2003 are no longer workable in light of efforts by ILECs such as Verizon to abandon their copper networks without actually retiring them.”); see also Petition of BridgeCom Int'l, Inc. et al. for Rulemaking and Clarification of the Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358, at 1 (filed Jan 18, 2007) (BridgeCom Petition); Petition of XO Commc'ns LLC for a Rulemaking to Amend Certain Part 51 Rules Applicable to Incumbent LEC Retirement of Copper Loops and Copper Subloops, RM-11358, at 5 (filed Jan 18, 2007) (XO Petition); Letter from Joshua M. Bobeck, Counsel to TelePacific Commc'ns Corp. et al., Bingham McCutchen LLP, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-188 et al. (filed Jan. 25, 2013) (TelePacific et al. Request to Refresh Record); Letter from Public Knowledge et al., to Julie A. Veach, Chief, Wireline Comp. Bur., FCC, GN Docket No. 09-51 et al. (filed May 12, 2014) (Public Knowledge et al. May 12, 2014 Letter); Renewed and Revised Motion of the National Association of State Utility Consumer Advocates for Stay and to Suspend 47 C.F.R. § 51.333, GN Docket No. 09-51 et al., Report No. NCD-2351 et al. (filed Jul. 7, 2014) (NASUCA Motion).

⁴⁷ *Notice*, 29 FCC Rcd at 14993, para. 49.

⁴⁸ Sixteen copper retirement notices have been filed with the Commission since November 2014. See FCC, *Section 251 Wireline Network Changes*, <https://www.fcc.gov/encyclopedia/section-251-wireline-network-changes> (last visited Jul. 20, 2015); see also TIA Comments at 2 (“Each year TIA's Market Review & Forecast publication analyzes a wide range of data, weighing economic, technology and policy drivers, with specific data on industry segments, including wireless data, wireline data, conferencing services, wired internet access, network equipment, and more. This data confirms the speed with which the network transition is taking place and underscores the benefits associated with enabling the network transition as reflected by customer adoption.”).

⁴⁹ *Notice*, 29 FCC Rcd at 14995, para. 55.

⁵⁰ See 47 U.S.C. § 251(c)(5) (requiring “reasonable public notice of changes” (emphasis added)).

⁵¹ See *Notice*, 29 FCC Rcd at 14971, para. 5.

discontinuance, reduction, or impairment of service provided over that copper such that they must file a discontinuance application pursuant to section 63.71 of our rules. If the answer to that question is no, then the carrier need only comply with the Commission's network change disclosure process as revised herein.

a. Copper Retirement Notice Process

(i) Expansion of Notice Requirements to Promote Competition

15. *Background.* Certain commenters express fear that incumbent LECs will use technology transitions as an opportunity to thwart competition from competitive LECs and others by erecting market barriers.⁵² Thus, competitive LECs and state commissions, as well as other commenters, largely support the concept of revising the network change disclosure rules to provide for more robust notice to competitors of planned copper retirements.⁵³ They believe that the existing network change disclosure rules "are not sufficient to enable competitive LECs to prepare for an ILEC's broad-scale transition to an all-IP network."⁵⁴ Incumbent LECs, on the other hand, argue that the Commission's network change disclosure rules are sufficient and that there is no need for the revisions proposed in the *Notice*.⁵⁵ They assert that the proposed revised requirements would impose onerous and unnecessary burdens on incumbent LECs.⁵⁶ And many of the requirements proposed by competitive LEC commenters, they argue, go beyond the concept of adequate notice and would deter additional investment in fiber deployment.⁵⁷ We note, however, that Windstream, which is both an incumbent LEC and a competitive LEC, has stated that it "believes it could feasibly implement [the proposed] requirements, and they would not cause disruption to its copper retirement processes."⁵⁸

16. *Discussion.* After reviewing the record before us, we conclude that the Commission's network change disclosure rules should be updated in light of marketplace developments to address the

⁵² See, e.g., Ad Hoc Comments at 3; see also BridgeCom Petition at 1 ("Incumbent LECs must not be permitted to deprive consumers of the benefits that this legacy copper network will continue to provide, simply, as a means to raise competitive barriers in the information delivery market."); TelePacific et al. Request to Refresh Record at 12 ("Allowing an ILEC to remove copper infrastructure where it has deployed fiber would further entrench the ILEC's already dominant position in the marketplace with an effective monopoly for serving the area where fiber is deployed."); WorldNet Comments at 5-6; Letter from Angela Kronenberg, COMPTel, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 10 (filed Apr. 2, 2014) (COMPTel Managerial Framework *Ex Parte* Letter).

⁵³ See, e.g., Mich. PSC Comments at 4; Birch et al. Comments at 37-38; Pa. PUC Comments at 10; Cal. PUC Comments at 12-13; WorldNet Comments at 7; CCA Comments at 12; Ad Hoc Comments at 10. On February 26, 2015, the California PUC filed a motion for acceptance of its late-filed comments because it was first able to consider the *Notice* at its public meeting on February 5, 2015, and PUC staff was unable to provide a recommendation prior to that date. See Motion of the Cal. PUC for Acceptance of Late-Filed Comments, GN Docket No. 13-5 et al. (filed Feb. 26, 2015). No oppositions to this motion were filed. We grant the California PUC's motion and accept its comments, which we cite herein without reference to the date filed.

⁵⁴ CCA Comments at 11-12.

⁵⁵ See, e.g., Cincinnati Bell Comments at 12-13; AT&T Comments at 32; see also USTelecom Comments at 9; Frontier Reply at 2.

⁵⁶ See, e.g., Cincinnati Bell Comments at 12; USTelecom Comments at 9; AT&T Comments at 34-35; FTTH Council Comments at 22. Cincinnati Bell asserts that the Commission should not require direct notice to interconnecting carriers because of the "scores of interconnection agreements with CLECs, many of whom never became active or have only limited interconnection activity" and because "[m]any CLECs have been subject to various mergers and acquisitions but have failed to maintain current contact information." Cincinnati Bell Comments at 13.

⁵⁷ See, e.g., CenturyLink Reply at 34.

⁵⁸ Windstream Reply at 38; see also WorldNet Comments at 7.

needs of competitive carriers for more robust notice of planned copper retirements. To make our rules sufficient for this purpose, we revise them to require incumbent LECs planning copper retirements to include in their network change disclosures a description of any changes in prices, terms, or conditions that will accompany the planned changes. In addition, as explained in detail below, we establish a process in which incumbent LECs must provide direct notice to interconnecting entities at least 180 days prior to the planned implementation date, except when the facilities to be retired are no longer being used to serve customers in the affected service area.⁵⁹ The requirements that we adopt reflect the revisions proposed in the *Notice*, subject to certain modifications discussed further below.⁶⁰

17. We conclude that receipt of the additional information and the extended notice period we adopt today will allow interconnecting entities to work more closely with their customers to ensure minimal disruption to service as a result of any planned copper retirements. Contrary to some commenters' assertions,⁶¹ the record in this proceeding contains significant evidence that our existing rules are insufficient to ensure adequate notice to interconnecting carriers.⁶² Although some commenters claim that our rule changes will discourage copper retirements, we find that retaining a time-limited notice-based process ensures that our rules strike a sensible and fair balance between meeting the needs of interconnecting carriers and allowing incumbent LECs to manage their networks.⁶³

18. Also contrary to some commenters' assertions, we find that the revised notice requirements do not serve to conflate the section 251(c)(5) network change disclosure process and section 214(a) discontinuance process.⁶⁴ Consistent with the proposal in the *Notice*,⁶⁵ we retain a notice-based regime for copper retirement, in contrast to the approval-based process for a section 214(a) discontinuance of service.⁶⁶ The modifications we adopt today do not convert the network change

⁵⁹ See *infra* para. 29 (explaining the timing mechanism in detail, which will typically result in a notice period that marginally exceeds 180 days).

⁶⁰ See *Notice*, 29 FCC Rcd at 14995-96, paras. 57-59.

⁶¹ See, e.g., AT&T Comments at 33.

⁶² See, e.g., *Notice*, 29 FCC Rcd at 14978-81, paras. 17-20; COMPTTEL Comments at 34; TelePacific Reply at 1, 10; BridgeCom Petition at 4-7; XO Petition at 7-12; TelePacific et al. Request to Refresh Record at 13-15. We wish to avoid situations such as the one recounted by XO, where it received notice that one of its customers — a group of nursing homes — would be losing service the next day as a result of glitches in the copper retirement process (a result XO narrowly managed to avoid). See XO Comments at 15 n.28.

⁶³ Cf., e.g., USTelecom Comments at 9 (“[O]ne cannot help but think that [these additional requirements] are not about notice at all, but rather are designed to empower competing providers to delay or even prevent copper retirements from occurring.”); Letter from Mark Uncapher, Dir., Gov’t Affairs, TIA, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 2 (filed July 23, 2015) (TIA July 23, 2015 *Ex Parte* Letter) (“Requiring that copper that would otherwise be retired to remain in service introduces significant uncertainty to investment decision-making.”).

⁶⁴ See *supra* para. 14; see also, e.g., USTelecom Comments at 8-9; AT&T Comments at 31, 36; Verizon Comments at 13; Verizon Reply at 14-15. Other commenters, however, are concerned that incumbent LECs are themselves “blur[ring] the distinction between mere retirement of copper facilities (while the carrier continues to offer the same service(s) using other facilities), on the one hand, and the discontinuance, reduction, or impairment of service on the other.” See, e.g., AdHoc Comments at 7; see also Windstream Reply at 38 (“[T]o the extent that a copper retirement would effect the discontinuance of a service, when discontinuance is considered functionally, that retirement is subject to prior Commission review and authorization pursuant to Section 214. As enterprise consumers caution, the Commission should not permit carriers to cloak what is substantively a discontinuation of service in the form of a copper retirement to avoid Section 214 requirements.”).

⁶⁵ *Notice*, 29 FCC Rcd at 14995, para. 56.

⁶⁶ The Rural Broadband Policy Group asserts that we should not permit automatic enrollment in or switching of services unless explicitly approved by the customer. See Rural Broadband Policy Group Comments at 6. We believe this concern is obviated by the fact that we are retaining the notice-based nature of the network change

(continued...)

disclosure process to one in which incumbent LECs must obtain our approval of planned copper retirements. Rather, they acknowledge the shortcomings of the existing rules to give adequate notice of network changes given real-world experience in the intervening years since the Commission first adopted those rules to implement the statutory requirement. Moreover, as discussed below, we decline to adopt a number of the additional requirements proposed by various commenters.

19. *Scope and Form.* In the *Notice*, we proposed requiring that incumbent LECs provide public notice of copper retirement by the means currently permitted by section 51.329(a) of the Commission's rules,⁶⁷ as well as requiring them to directly provide notice of copper retirement to "each information service provider and telecommunications service provider that directly interconnects with the incumbent LEC's network."⁶⁸ Certain commenters support the proposal contained in the *Notice*,⁶⁹ while other commenters seek to expand the scope further to also require notice to additional entities.⁷⁰

20. Based on the record before us, we conclude that we should adopt these proposed requirements, modified to require notice to "each entity" within the affected service area that directly interconnects with the incumbent LEC's network. We find that doing so constitutes "reasonable public notice" under section 251(c)(5) of the Act because it will ensure that all entities potentially affected by a planned copper retirement, be they telephone exchange service providers, information service providers, or other types of providers that may or may not yet have been classified by the Commission, receive the information necessary to allow them to accommodate the copper retirement with minimal impact on their end user customers.⁷¹

21. We are not persuaded by the arguments of incumbent LEC commenters that this requirement "would impose onerous and unnecessary administrative burdens."⁷² AT&T argues that this requirement, in conjunction with expansion of the copper retirement notice requirement to encompass retirement of copper feeder plant, would necessitate providing direct notice to potentially hundreds of

(Continued from previous page) _____

disclosure process. Customers will have an opportunity to obtain service from other providers if they determine based upon a notice of a planned copper retirement that they no longer desire to receive service through their current provider. We realize certain commenters are concerned that a planned copper retirement might amount to a discontinuance of service. *See, e.g., id.* (asserting that "[u]nless a customer explicitly approved enrollment in a *new service*, that customer should not be automatically enrolled or switched" (emphasis added)). As discussed above, any loss of service as a result of a copper retirement may constitute a discontinuance, reduction, or impairment of service for which a section 214(a) application is necessary. *See supra* para. 14.

⁶⁷ *See* 47 C.F.R. § 51.329(a); *Notice*, 29 FCC Rcd at 15021, Appx. A, proposed new Section 51.332(b)(1).

⁶⁸ *Notice*, 29 FCC Rcd at 15022-23, Appx. A, proposed new section 51.332(b)(2) and (d)(4); *see also id.* at 14995, para. 57.

⁶⁹ *See, e.g.,* Pa. PUC Comments at 13.

⁷⁰ For example, one group of commenters urged the Commission to extend the notice requirements to competitive LECs that purchase UNEs and special access. *See, e.g.,* Birch et al. Comments at 37. We decline to adopt this proposal. First, by broadening copper retirement notice to encompass "each entity" that directly interconnects with the incumbent LEC's network, we ensure notice to a broad range of entities. Second, if after a change from copper to fiber facilities UNEs will no longer be available, that is an issue arising under section 251(c)(3) of the Act, pertaining to unbundled access, rather than section 251(c)(5), which applies to notice of change in facilities. With respect to special access, that is a service issue rather than a facilities issue. As such, any change in the availability may fall under the purview of our section 214(a) authority, as discussed *infra* in Section II.B.2.

⁷¹ *See* 47 U.S.C. § 251(c)(5) (requiring "reasonable public notice"). We do not, however, similarly expand the pool of entities to whom incumbent LECs must provide direct notice of network changes outside of the copper retirement context. The record does not contain any evidence sufficient to justify such an expansion.

⁷² AT&T Comments at 34; TCA Comments at 4.

competitive LECs that do not have any facilities implicated by the planned network change.⁷³ Because under existing requirements incumbent LECs must notify potentially large numbers of directly interconnected telephone exchange service providers as part of the copper retirement process, we do not find that argument supports the claim that the revisions we adopt today are unreasonable. Under the predecessor rules to those we adopt today, copper retirements were already subject to the “short term notice provisions” set forth in section 51.333(a).⁷⁴ Under section 51.333(a), which applies “if an incumbent LEC wishes to provide less than six months’ notice of planned network changes,” the incumbent LEC must file with the Commission a certificate of service that includes “(1) A statement that, at least five business days in advance of its filing with the Commission, the incumbent LEC served a copy of its public notice upon each telephone exchange service provider that directly interconnects with the incumbent LEC’s network; and (2) The name and address of each such telephone exchange service provider upon which the notice was served.”⁷⁵ Such certificates of service reflect that incumbent LECs have been obligated to provide notice to large numbers of interconnecting carriers.⁷⁶

22. Incumbent LECs have not provided sufficient detail to establish that providing the direct notice described in those certificates of service was burdensome or specifically how expanding the pool of recipients as proposed in the *Notice* would impose a new “onerous and unnecessary administrative burden”⁷⁷ on them. Rather, they rely solely on conclusory allegations.⁷⁸ As a result, we conclude that expanding this existing requirement to include all entities that directly interconnect with the incumbent LEC’s network within the affected service area would not impose an appreciably greater burden on incumbent LECs. We also find this revision to our rules reasonable because it will ensure that all competitive LECs and other interconnecting entities that could be affected by the planned copper retirement receive information that would assist them in preparing to accommodate the planned network change. We require the method of transmission of the notice to match existing requirements for notice to interconnecting telephone exchange service providers, as the record does not indicate that this existing requirement has been insufficient.⁷⁹

23. The rule that we adopt today requires notice to the Commission and omits the option to provide written public notice through industry fora, industry publications, or the carrier’s publicly accessible Internet site. This is merely a technical modification of our proposal, under which some form of notification to the Commission would have been required in all prior cases and publication-based

⁷³ AT&T Comments at 34 (“Under the new rule . . . AT&T would have to directly notify every provider that was interconnected with its network of [a] planned feeder replacement – potentially hundreds of direct notices in each instance – whether or not any of those providers actually had any facilities implicated by the proposed retirement.”).

⁷⁴ See 47 C.F.R. § 51.333(b)(2) (“Incumbent LEC notice of intent to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be subject to the short term notice provisions of this section . . .”). Unless otherwise specified or dictated by context, citations in this Order to specific sections of the Commission’s rules governing network change disclosures are to the version of those rules as they exist prior to the effective date of the rules adopted herein.

⁷⁵ 47 C.F.R. § 51.333(a).

⁷⁶ See, e.g., Verizon Certification of Network Changes, WC Docket No. 15-84 (filed Mar. 31, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001041967>; AT&T Certification of Short-Term Public Notice Under Rule 51.333(a), WC Docket No. 15-145 (filed Mar. 13, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001087600>.

⁷⁷ AT&T Comments at 34.

⁷⁸ See *id.*; TCA Comments at 4.

⁷⁹ This approach provides as much flexibility as possible to incumbent LECs while ensuring that the notice will serve its function. Letter from Micah M. Caldwell, Vice President, Regulatory Affairs, ITTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 23, 2015) (ITTA July 23, 2015 *Ex Parte* Letter) (asserting that incumbent LECs should have “maximum flexibility” when providing copper retirement notices).

notice would have been optional and thus not required.⁸⁰ Therefore, this change streamlines our rules and emphasizes that notice to the Commission initiates the copper retirement process. We find this change warranted to ensure that the Commission is notified promptly of all planned copper retirements and to streamline the rule. We nonetheless encourage incumbent LECs to provide notice through industry fora, industry publications, and the carrier's publicly accessible Internet site as a good practice.

24. *Content of Notice.* In the *Notice*, we proposed requiring incumbent LECs to include in their public notices of copper retirement, and thus their notices to interconnecting carriers, the information currently required by section 51.327(a) of our rules, as well as "a description of any changes in prices, terms, or conditions that will accompany the planned changes."⁸¹ Based on the record before us, we conclude that it is appropriate to adopt these proposed requirements. We find that doing so is consistent with section 251(c)(5)'s mandate that incumbent LECs provide "information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks" because it will ensure that interconnecting entities, including competitive LECs, are fully informed about the impact that copper retirements will have on their businesses.⁸²

25. We are unpersuaded by incumbent LEC commenters' assertions that the proposed expanded copper retirement notice requirements would impose an undue burden on them because it is impossible to determine how a planned change can be expected to impact various interconnecting entities.⁸³ Section 51.327(a) already requires that incumbent LEC network change public notices include "changes planned" and "the reasonably foreseeable impact of the planned changes."⁸⁴ We conclude that the proposed expanded content requirement, which is limited to a description of any changes in prices, terms, or conditions that will accompany the planned retirement,⁸⁵ is a narrow and targeted extension of the existing requirement to provide notice of the "reasonably foreseeable impact of the planned changes" already required by section 51.327(a)(6) of our rules. We do not believe providing this additional information will present an undue burden on incumbent LECs,⁸⁶ and any such additional burden will be outweighed by the needs for an interconnecting entity to have sufficient information to adjust its network

⁸⁰ *Notice*, 29 FCC Rcd at 15021, 15023, Appx. A, proposed new Section 51.332(b)(1), (d).

⁸¹ *Id.* at 15022, Appx. A, proposed new section 51.332(c)(1).

⁸² See 47 C.F.R. § 251(c)(5); see also *infra* Section II.B.1.a(vi).

⁸³ See, e.g., Cincinnati Bell Comments at 12; Verizon Comments at 13.

⁸⁴ 47 C.F.R. § 51.327(a); see also Windstream Reply at 40 (noting that carriers are already required to provide information regarding the "'foreseeable impacts' of planned network changes").

⁸⁵ We address commenter concerns regarding our legal authority to require this information in copper retirement notices *infra* in Section II.B.1.a(vi).

⁸⁶ See, e.g., Ad Hoc Comments at 10 ("[A]ny rational planning process will have already included an internal assessment of such impact and it is unlikely that summarizing those changes in a form suitable for notifying interconnecting carriers will be unduly burdensome."); Windstream Reply at 38; WorldNet Comments at 7 ("In most cases, an ILEC will have ample time to prepare such information, which ostensibly should [be] readily available to the ILEC as part of its retirement plans."). Indeed, the Commission rejected this very argument when it adopted the network change disclosure rules. See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98 et al., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19479-80, para. 190 (1996) (*Second Local Competition Order*) ("Providing notice of the reasonably foreseeable potential impact of changes does not require incumbent LECs to educate a competitor on how to re-engineer its network, or to be experts on the operations of other carriers, or impose a duty to know the competing service provider's service performance or abilities. Rather, we intend that incumbent LECs perform at least rudimentary analysis of the network changes sufficient to include in its notice (where appropriate) language reasonably intended to alert those likely to be affected by a change of anticipated effects. We find that such cautionary language will be a valuable, but not burdensome, element of reasonable public notice.").

to accommodate planned copper retirements, which could require costly and disruptive changes to the interconnecting carrier's network simply to allow it to continue serving its end user customers.⁸⁷

26. We decline, however, to require that the descriptions of the potential impact of the planned changes be specific to each interconnecting carrier to whom an incumbent LEC must give notice, as requested by the Competitive Carriers Association.⁸⁸ We conclude that such a requirement would impose an unreasonable burden on incumbent LECs. We also decline to require, as suggested by Windstream, that copper retirement notices include information regarding impacted circuits and wholesale alternatives.⁸⁹ Section 51.327(a) already requires that notices of planned network changes include "references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection."⁹⁰ And as discussed below, the rule we adopt today requires that incumbent LECs work in good faith with interconnecting entities to provide information necessary to assist them in accommodating planned copper retirements without disruption of service to their customers.⁹¹ We conclude that these requirements, included in proposed new section 51.332,⁹² already ensure that enough information will be provided to address Windstream's concerns and ensure sufficient protection to interconnecting carriers. We further conclude that such requirements will adequately address the concerns raised by Cincinnati Bell that incumbent LECs cannot "know what type of alternative arrangements might suit any impacted carriers."⁹³

27. We conclude that the content requirements we adopt today capture the needs of competitive providers for information that allows them to plan for and accommodate the planned network change while providing incumbent LECs the flexibility to provide that information in the form best suited to the particulars of their situation. We therefore require only that copper retirement notices include the information set forth in new section 51.332(c).⁹⁴ We decline to adopt a particular required format for copper retirement notices. We are not persuaded that the Commission's rules should mandate a particular format for copper retirement notices.⁹⁵ Rather, we believe that a specified format could prove

⁸⁷ See, e.g., COMPTTEL Comments at 34-35 ("ILEC replacement of any portion of the copper loop necessarily requires competitive LECs providing EoC to migrate to other forms of last-mile access. If it means shifting to another transmission medium, the competitive LEC needs time to accommodate the change and invest in alternative electronics."); CCA Comments at 12 (noting that competitive LECs need "sufficient lead time to make the upgrades or reconfigurations necessary to complete a seamless transition to IP-based service, or to make alternative arrangements"); Birch et al. Comments at 39 (asserting that changes to the Commission's copper retirement rules "are necessary to ensure that competitive carriers can adjust their business broadband service offerings to account for copper retirement"); WorldNet Comments at 7 (stating that a copper retirement "could require an unplanned, very costly, disruptive . . . network, operational, and customer changes just to maintain a status quo of competitive service"); Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 27, 2015) (COMPTTEL July 27, 2015 *Ex Parte* Letter).

⁸⁸ See CCA Comments at 12.

⁸⁹ See Windstream Reply at 41-43; see also WorldNet Comments at 8 ("WorldNet . . . invites the Commission to include a requirement for an ILEC to work with a CLEC in good faith by responding to reasonable requests for additional information about a proposed retirement and to work collaboratively with a CLEC in effectuating desired CLEC transitions to alternate facilities.").

⁹⁰ 47 C.F.R. § 51.327(a).

⁹¹ See *infra* para. 32.

⁹² See Notice, 29 FCC Rcd at 15022, 15024, Appx. A, proposed new section 51.332(c)(1) and (h).

⁹³ Cincinnati Bell Comments at 12.

⁹⁴ See *infra* Appendix A, Final Rules, new section 51.332(c).

⁹⁵ See, e.g., Birch et al. at 38.

problematic.⁹⁶ As noted by the California PUC, “a uniform format may not cover all aspects of each provider’s copper retirement plans. The FCC should require that all necessary components of the incumbent LEC’s planned retirement be contained in any notice, but also allow each provider to include additional information about options available to customers.”⁹⁷

28. *Notice Period.* In the *Notice*, we sought comment on whether the 90-day minimum notice period for copper retirements currently required by our rules is sufficient or whether it should be extended.⁹⁸ In response, commenters propose that if we replace the existing time period, we adopt either six months, one year, or an unspecified amount of time.⁹⁹ Based on the record in this proceeding, we conclude that 180 days’ advance notice of copper retirements is an appropriate time frame. We find that the ninety-days’ notice of planned copper retirements currently provided for by the Commission’s network change disclosure rules is insufficient.¹⁰⁰ The record reflects numerous instances in which competitors and their customers have suffered significantly due to the short notice period.¹⁰¹ Although current rules allow for the possibility for interconnecting carriers to object and attempt to extend the retirement to six months (i.e., approximately 180 days), this procedure is rarely used,¹⁰² likely because of the short time to file¹⁰³ and the fact that objections are deemed denied absent Commission action.¹⁰⁴

⁹⁶ See, e.g., Cal. PUC Comments at 13.

⁹⁷ *Id.*

⁹⁸ See *Notice*, 29 FCC Red at 14996, para. 59. Verizon asserts that if an incumbent LEC gives notice more than six months in advance of a planned implementation, there is no justification for requiring it to comply with the more burdensome short-term notice rules. See Verizon Comments at 14. However, the Commission’s short-term notice rules apply to planned copper retirements, and provide that “under no circumstances may an incumbent LEC provide less than 90 days’ notice of such a change.” See 47 C.F.R. § 51.331(b)(2).

⁹⁹ Commenters proposed a variety of time periods for notice, ranging from the existing ninety days, see, e.g., NY PSC Comments at 6, to 180 days, see, e.g., Cal. PUC Comments at 13; Ad Hoc Comments at 11; CCA Comments at 12, to no less than nine months, see, e.g., WorldNet Comments at 9, to one year, see, e.g., XO Comments at 17; Birch et al. Reply at 39-40; TelePacific Reply at 10-11, to an unspecified amount of time as is provided for in section 68.110(b) of the Commission’s rules, see CWA Comments at 9-12.

¹⁰⁰ Most competitive LECs provide service to business customers pursuant to multi-year contracts. See, e.g., Birch et al. Comments at 37; see also Letter from Eric Einhorn et al., Windstream, to Jonathan Sallet and Julie Veach, FCC, GN Docket Nos. 13-5 and 12-353, at 7 (filed Apr. 28, 2014) (Windstream April 28, 2014 *Ex Parte* Letter). And competitive LECs assert that a ninety-day notice period “may not provide competitive carriers with sufficient lead time to make the upgrades or reconfigurations necessary to complete a seamless transition to IP-based service, or to make alternative arrangements.” CCA Comments at 12; see also COMPTTEL Comments at 34-35; Windstream Apr. 28, 2014 *Ex Parte* Letter at 11 (“Given the importance of the competitive issues raised, wholesale customers need significant lead time so that they can both plan for the necessary changes to their products as well as prepare their customers for changes to offerings dependent upon ILEC last-mile facilities.”); Letter from Thomas Jones, Willkie Farr & Gallagher LLP, to Marlene H. Dortch, Secretary, FCC, Docket Nos. 13-5 and 12-353, Attach. at 3 (dated May 14, 2014) (“CLECs know that they must plan ahead and begin buying packet-based services now in an area in which regulated DS1 and DS3 inputs might well be eliminated. Customers are far more efficiently transitioned at the beginning of a contract, rather than in the middle . . .”).

¹⁰¹ See, e.g., Windstream Reply at 46.

¹⁰² See, e.g., AT&T Comments at 28-29; CenturyLink Reply at 30.

¹⁰³ See 47 C.F.R. § 51.333(c) (requiring objections within nine business days of notice); 47 C.F.R. § 51.333(f).

¹⁰⁴ See TelePacific et al. Request to Refresh Record at 13 (noting that an incumbent LEC may retire copper regardless of an interconnecting provider’s objections).

Indeed, at least one competitive LEC asserts that shortcomings in the incumbent LEC's public notice precluded any meaningful opportunity to object within the permitted time period.¹⁰⁵

29. We conclude that a notice period of at least 180 days (i.e., approximately six months) strikes an appropriate balance between the planning needs of interconnecting carriers and their customers and the needs of incumbent LECs to be able to move forward in a timely fashion with their business plans.¹⁰⁶ The period of time that we adopt is approximately the maximum time period that had been available in response to a successful objection previously.¹⁰⁷ We conclude a notice period of this length will not impose an undue burden on incumbent LECs, who must plan their deployments over extended periods of time.¹⁰⁸ Indeed, at least one incumbent LEC has acknowledged that it has provided notice to customers of a planned fiber-to-the-premises overbuild deployment six months prior to deployment.¹⁰⁹ And we find that any increased burden on incumbent LECs is outweighed by the need to ensure that interconnecting carriers receive sufficient notice to allow them to accommodate the transition without disruption of service to their customers, which can include enterprise and government customers whose communications needs and budgeting concerns require more than 90 days' notice.¹¹⁰ To ensure at least 180 days of notice, we require notice to interconnected entities to be provided no later than the same date on which the incumbent LEC provides notice of the retirement to the Commission. After the Commission receives notice of the retirement, it will issue a public notice of the retirement, starting the 180-day "countdown" such that the copper retirement may go forward under our rules. This use of Commission public notice to trigger the "countdown" matches the predecessor process, matches our proposal in the *Notice*, and helps to further ensure that the public is informed about copper retirements.¹¹¹

¹⁰⁵ See, e.g., Windstream Reply at 46 (asserting that because of the short time period allowed for filing objections and a two-week delay in receiving notice of a copper retirement affecting its circuits, Windstream was precluded from filing objections within the nine business days currently required by the Commission's rules).

¹⁰⁶ See 47 U.S.C. § 251(c)(5) (requiring reasonable public notice of changes to the incumbent LEC's network); see also Letter from Edward A. Yorkgitis, Jr., Counsel to XO Communications LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 22, 2015); Letter from Tamar E. Finn, Counsel for TelePacific, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 27, 2015) (TelePacific July 27, 2015 *Ex Parte* Letter) ("Increasing to a minimum of six months' notice of copper retirement would give TelePacific and its retail customers more time to find alternative broadband service.").

¹⁰⁷ See 47 C.F.R. § 51.333(c)(3).

¹⁰⁸ See, e.g., Ad Hoc Comments at 11 ("Ad Hoc also does not believe that such a lengthened requirement would be burdensome to carriers; their planning cycles are well in excess of 180 days.").

¹⁰⁹ See CenturyLink Comments at 32. Regardless, other incumbent LEC commenters contend that we should not extend the ninety-day notice period in the existing rules. See, e.g., Verizon Comments at 14.

¹¹⁰ See, e.g., TelePacific Reply at 10-11 ("Sophisticated business end users in particular must work closely with their competitive suppliers in transition planning. The 'planning and carrying out the migration of a large enterprise network from one service to another often takes a year or more.' For carriers, such migrations are exponentially more time intensive because of the multiple customers and locations involved and coordination that needs to occur between carrier, ILEC, customer and government entities and property owners in case of self-deployment of alternative facilities. The current notice periods are inadequate to facilitate a transition of customers from copper without disruption."); see also *supra* para. 28 & note 100.

¹¹¹ See 47 C.F.R. § 51.333(b)(2); *Notice*, 29 FCC Rcd at 15024, Appx. A, proposed new Section 51.332. The *Notice* sought comment on extending the notice period to 180 days, but it did not specifically propose this change and therefore the proposed rules retained the pre-existing 90-day "countdown" period. See *Notice*, 29 FCC Rcd at 14996, para. 59; *id.* at 15024, Appx. A, proposed new Section 51.332(f). The shift to a 180-day "countdown" period retains the timing mechanism in the proposed rules but reflects that a notice period to interconnecting entities of at least 180 days is necessary.

30. We are not persuaded by Verizon that our existing requirements provide more than sufficient notice.¹¹² It is the incumbent LEC itself that controls the timing of the decision to make or procure a product whose design necessitates the network change.¹¹³ This is a business decision on the part of the incumbent LEC, and, as such, there is no reason to assume that the timing it chooses will coincide with the needs of interconnecting carriers — indeed, as stated above, the record reflects that it does not. We agree with Verizon, however, that where facilities are no longer being used to serve any customers, whether wholesale or retail, a shorter notice period is appropriate.¹¹⁴ Accordingly, we do not apply the new notice period of at least 180 days to such situations and instead adopt a notice period of at least 90 days, which is similar to the baseline under the prior rules.¹¹⁵

31. Finally, we find that in light of the longer notice period we adopt today, we will discard the objection procedures as they apply to copper retirements.¹¹⁶ The extended notice period we adopt today will provide to interconnecting entities a notice period similar to the six months they previously would have been afforded if they successfully objected to the timing of a planned network change.¹¹⁷ This fixed period following the Commission’s release of public notice will provide parties sufficient opportunity to work together to allow for any accommodations needed to maintain uninterrupted service to end users. And by fixing a single time period following the Commission’s release of public notice, we provide all parties certainty and avoid the costs inherent in the objection process, which itself will be beneficial to all concerned.

32. We recognize the importance of information flow to competitors’ abilities to ensure that a retirement of copper facilities does not disrupt service to their end users.¹¹⁸ We therefore include a good faith communication requirement in the modified rule we adopt today.¹¹⁹ Under the prior rules, an interconnecting provider could request “specific technical information or other assistance” to enable it to accommodate the planned network change.¹²⁰ And in the *Notice*, we sought comment on what additional information interconnecting providers might need in order to make an informed decision.¹²¹ The good faith communication requirement we adopt today will ensure that interconnecting entities still may obtain

¹¹² Verizon Comments at 14.

¹¹³ See 47 C.F.R. § 51.331(b).

¹¹⁴ See Verizon Comments at 14.

¹¹⁵ See *supra* para. 16; 47 C.F.R. § 51.333(b)(2).

¹¹⁶ Specifically, we will modify the proposed rule as it pertains to objection procedures to delete the references to implementation dates in proposed paragraphs (g), (h), and (i) in their entirety. See *Notice*, 29 FCC Rcd at 15024, Appx. A, proposed new Section 51.332. We do not, however, remove the objection procedures pertaining to short-term notices of non-copper retirement network changes in section 51.333 because we are not creating a fixed six-month notice period for such planned network changes and because there is no evidence in the record that the concerns pertaining to copper retirements apply equally to other types of network changes.

¹¹⁷ Under the current rules, an interconnecting provider can object to the timing of a copper retirement and, if successful, delay the implementation of that retirement to six months from the date the incumbent LEC gave its original notice. See 47 C.F.R. § 51.333(c)(3).

¹¹⁸ See, e.g., WorldNet Comments at 7; Birch et al. Comments at 37 (“Given the potential harmful effects of copper retirement on competition and business customers, the Joint Commenters agree that incumbent LECs should be required to provide additional information about planned copper retirements.”); XO Comments at 14 (“Ensuring the foregoing information is contained within each retirement notice is vital for XO to plan the transition from the copper-based services or network elements it obtains from the ILEC in a manner that least affects its ability to continue providing service to existing customers.”).

¹¹⁹ See *infra* Appendix A, Final Rules, new section 51.332(g).

¹²⁰ See 47 C.F.R. § 51.333(c)(1).

¹²¹ See *Notice*, 29 FCC Rcd at 14996, para. 57.

the information they need in order to accommodate the planned copper retirement without disruption of service to their customers that they would have been entitled to seek through the objection procedures that we eliminate.¹²² Specifically, we provide that an entity that directly interconnects with the incumbent LEC's network may request that the incumbent LEC provide additional information where necessary to allow the interconnecting entity to accommodate the incumbent LEC's changes with no disruption of service to the interconnecting entity's end user customers, and we require incumbent LECs to work with such requesting interconnecting entities in good faith to provide such additional information. We conclude that incorporating a good faith requirement into the rule strikes an appropriate balance between the needs of interconnecting carriers for sufficient information to allow for a seamless transition and the need to not impose overly burdensome notice requirements on incumbent LECs.¹²³ In the Further Notice, we seek comment on possible specific indicia of such good faith.¹²⁴ We note that the Commission will not hesitate to take appropriate measures, including enforcement action, where incumbent LECs fail to act in good faith to provide appropriate information to interconnecting entities.

33. We conclude that the good faith communication requirement that we adopt today is consistent with the First Amendment because it compels disclosure of factually accurate information in a commercial context. Compelled commercial disclosures are not afforded the same protections as prohibitions on speech.¹²⁵ Indeed, the Supreme Court has held that “[b]ecause the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides,” the commercial speaker’s “constitutionally protected interest in *not* providing any particular factual information . . . is minimal.”¹²⁶ The Court held further in that case that an advertiser’s rights are reasonably protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers,¹²⁷ and that the right of a commercial speaker not to divulge accurate information regarding his services is not a fundamental right.¹²⁸ Thus, compelled disclosure is subject to a less stringent standard of review than prohibitions on speech.¹²⁹ The United States Court of Appeals for the D.C. Circuit has held that the holding in *Zauderer* can be read broadly and that government interests in addition to correcting deception can be invoked to sustain a mandate for the disclosure of purely factual information in the commercial context in the face of a First Amendment free speech challenge.¹³⁰ We find that, in this case, the government has an interest sufficient to compel incumbent LECs to provide necessary technical information to interconnecting entities to enable those entities to accommodate planned copper retirements without disruption of service to their customers. The disclosure that we require is designed ultimately to protect retail customers. This entails the provision only of factual information. We therefore find that the good faith requirement is reasonably related to the

¹²² See 47 U.S.C. § 251(c)(5).

¹²³ Certain commenters propose more extensive content requirements for copper retirement notices than we adopt today. See, e.g., WorldNet Comments at 7-8 (delineating the types of additional information WorldNet believes the Commission should require incumbent LECs to include in copper retirement notices). WorldNet also proposes adoption of “a requirement for an ILEC to work with a CLEC in good faith by responding to reasonable requests for additional information about a proposed retirement and to work collaboratively with a CLEC in effectuating desired CLEC transitions to alternate facilities.” *Id.* at 8.

¹²⁴ See *infra* Section IV.D.

¹²⁵ *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *American Meat Inst. v. U.S. Dep’t of Agriculture*, 760 F.3d 18, 22 (D.C. Cir. 2014).

¹²⁶ *Zauderer*, 471 U.S. at 651 (emphasis in original); see also *American Meat Inst.*, 760 F.3d at 22.

¹²⁷ *Zauderer*, 471 U.S. at 651.

¹²⁸ *Id.* at 651 n.14.

¹²⁹ See *American Meat Inst.*, 760 F.3d at 29-30 (Rogers, J., concurring).

¹³⁰ *Id.* at 22-23.

government's interest in advancing competition, and that this interest outweighs the incumbent LECs' "minimal" interest in not providing particular factual information to interconnecting entities.¹³¹

34. *Revisions to Other Rule Sections.* As proposed in the *Notice*, we revise section 51.331 by deleting paragraph (c), which provides that competing service providers may object to planned copper retirements by using the procedures set forth in section 51.333(c), and we revise section 51.333 to remove those provisions and phrases applicable to copper retirement.¹³² We find that consolidation of all notice requirements and rights of competing providers pertaining to copper retirements in one comprehensive rule provides clarity to industry and customers alike when seeking to inform themselves of their respective rights and obligations.

35. *Other Proposals.* We decline to adopt Ad Hoc's proposal that, for a network change to qualify as a "mere" copper retirement, in contrast to a service discontinuance, "a carrier must present the same standardized interface to the end user as it did when it used copper."¹³³ Ad Hoc argues that if a network change requires the use of "new or upgraded terminating equipment to convert traffic on the new facility into a format compatible with the installed base of network interface devices, customer premises equipment (CPE), or inside wire," the carrier should "install that terminating equipment on its own side of the network demarcation point . . . and absorb the costs of doing so as part of its network modernization costs."¹³⁴ We are not persuaded that the requirement Ad Hoc proposes is necessary. Section 68.110(b) of the Commission's rules, which speaks to the effect of "changes in facilities, equipment, operations, or procedures" on customers' terminal equipment, requires only that a carrier afford customers notice of such changes "[i]f such changes can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance," for the purpose of allowing the customer "an opportunity to maintain uninterrupted service."¹³⁵ While section 68.110(b) requires mere notice, Ad Hoc's proposal goes significantly further by requiring significant action on the part of the carrier, and the record is insufficient to support this significant and potentially burdensome departure from our current rules. And, as noted by AT&T in opposing this proposal, there is no reason to believe that all changes to customer CPE will be "costly" and that customers will not desire any freedom to select their own upgraded CPE.¹³⁶

¹³¹ *Id.* at 22. We note that, even if the higher standard of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* applied in this instance, the good faith communication requirement adopted as part of this Order satisfies this higher standard of judicial scrutiny. Under *Central Hudson*, a court in a commercial speech case must determine: (1) whether the expression is protected by the First Amendment; (2) whether the asserted government interest is substantial; and (3) whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). Even assuming the expression is subject to constitutional protection, we believe that the asserted government interest in this case of protecting retail customers is, indeed, substantial. Similarly, we conclude that ensuring competition in communications is a substantial interest. Moreover, we also find that the good faith requirement does not impose a more extensive burden than necessary because it applies only to information that is *necessary* to meet the government interest in allowing interconnecting carriers to accommodate the incumbent LEC copper retirements with no disruption of service. Thus, even were the more stringent standard of *Central Hudson* to apply in this instance, we believe that the good faith communication requirement detailed above satisfies such a standard.

¹³² See *Notice*, 29 FCC Rcd at 14995, para. 55.

¹³³ Ad Hoc Comments at 8.

¹³⁴ *Id.*

¹³⁵ 47 C.F.R. § 68.110(b).

¹³⁶ AT&T Reply at 25.

36. We also decline to adopt the proposal of certain commenters that incumbent LECs should provide competitive providers with an annual forecast of copper retirements.¹³⁷ We understand that competitive LECs would find this type of information useful in planning for the effects copper retirements might have on their respective networks and customer contracts.¹³⁸ However, incumbent LECs maintain that this type of information can constitute some of their most competitively sensitive information,¹³⁹ and that such an advance disclosure requirement may risk putting them at a competitive disadvantage.¹⁴⁰ We note that information contained in a forecast can change over time as circumstances change. Thus, the inclusion of a particular wire center in a copper retirement forecast does not guarantee that such a change in facilities will in fact occur or that it will occur within that timeframe. Thus, based on the record before us, we are skeptical of the value of such a requirement.

37. Finally, we decline to adopt a requirement that incumbent LECs establish and maintain a publicly available and searchable database of all their copper plant, whether it has been or will be retired, whether it will be removed, or a database of where copper retirements have occurred.¹⁴¹ Incumbent LECs oppose such a requirement because it “would divert vital resources away from the deployment of new fiber” and because “CLECs seeking to purchase UNEs . . . already have access to preorder systems that identify loop availability.”¹⁴² It simply is not clear based on the record available that creation of any such databases would be feasible or cost-effective. We are persuaded by commenters that such a requirement could impose an expensive and potentially duplicative, and therefore unnecessary, burden.¹⁴³

(ii) Notice to Retail Customers

38. *Background.* In the *Notice*, we proposed revisions to the Commission’s network change disclosure rules “to provide additional notice of planned copper retirements to affected retail customers, along with particular consumer protection measures, and to provide a formal process for public comment on such plans.”¹⁴⁴ Specifically, we proposed requiring incumbent LECs to provide notice of planned copper retirements to retail customers who are directly impacted by the planned change,¹⁴⁵ and we did not limit this proposal to consumers.¹⁴⁶ We further proposed allowing incumbent LECs to provide such notice to retail customers by either written or electronic means, and we sought comment on possible procedures to ensure that such notice is both received and accessible by customers.¹⁴⁷ We also proposed specific content requirements to ensure that retail customers receive sufficient information “to understand the practical consequences of copper retirement”¹⁴⁸ and sought comment on whether the proposed requirements are adequate to protect consumer interests.¹⁴⁹ With respect to the timing of the proposed

¹³⁷ See, e.g., WorldNet Comments at 8; CCA Comments at 12; AICC Comments at 8; Cal. PUC Comments at 12-13; XO Comments at 18.

¹³⁸ See WorldNet Comments at 8.

¹³⁹ See, e.g., CenturyLink Comments at 35; AT&T Reply at 23-24.

¹⁴⁰ See, e.g., CenturyLink Comments at 35; AT&T Reply at 24.

¹⁴¹ See XO Comments at 15-16; CALTEL Reply at 5.

¹⁴² AT&T Reply at 24.

¹⁴³ See, e.g., *id.*

¹⁴⁴ *Notice*, 29 FCC Rcd at 14971, para. 5.

¹⁴⁵ See *id.* at 14997, para. 61.

¹⁴⁶ See *id.* at 14997, para. 61 n.154.

¹⁴⁷ *Id.* at 14998-99, para. 63.

¹⁴⁸ *Id.* at 14999, paras. 65-66.

¹⁴⁹ *Id.* at 14999-15000, para. 67.

notice to retail customers, we proposed imposing the same requirement that currently applies to notice to interconnecting carriers¹⁵⁰ and giving such retail customers thirty days from the Commission's release of its Public Notice in which to comment on a proposed copper retirement.¹⁵¹ And we sought comment on our statutory authority to impose these proposed requirements.¹⁵² To address allegations of inappropriate actions taken by incumbent LECs with respect to consumers, we also sought comment on requiring incumbent LECs to "supply a neutral statement of the various choices that the LEC makes available to retail customers affected by the planned network change,"¹⁵³ as well as requiring incumbent LECs to undertake consumer education efforts in connection with planned copper retirements.¹⁵⁴

39. *Discussion.* After reviewing the record before us, we conclude that modification of our network change disclosure rules to require direct notice to retail customers of planned copper retirements is warranted and is consistent with the public interest, including our core value of consumer protection, and with section 251(c)(5)'s requirement of reasonable public notice of network changes. To be clear, as explained further below, this notice is required only where the retail customer is within the service area of the retired copper and only where the retirement will result in the involuntary retirement of copper loops to the customer's premises, i.e., in the circumstances in which retail customers are likely to be affected.¹⁵⁵ Copper retirements of this nature often affect consumers and other end users, whether for better or for worse, and these customers need to understand how they will be affected.¹⁵⁶ And consumers need to understand the ways in which copper retirement will *not* affect them; absent such notice, consumers may not understand that they may retain their existing service (if applicable in the particular circumstance). The record reflects numerous instances in which notice of copper retirement has been lacking, leading to consumer confusion.¹⁵⁷ Public interest commenters have brought to our attention proceedings in various states, including Maryland, California, New York, New Jersey, Illinois, and the District of Columbia, alleging customer complaints about being migrated from copper networks to other types of facilities,

¹⁵⁰ *Id.* at 15000, para. 68.

¹⁵¹ *Id.*

¹⁵² *Id.* at 15000, para. 69.

¹⁵³ *Id.* at 15001, para. 72.

¹⁵⁴ *Id.* at 15001-02, paras. 74-75.

¹⁵⁵ *See infra* paras. 44-45.

¹⁵⁶ A variety of commenters support our proposal to require direct notice to retail customers of planned copper retirements. *See, e.g.*, Pa. PUC Comments at 13; NY PSC Comments at 9; AARP Comments at 34; NASUCA Comments at 18; NATOA Comments at 4; Utilities Telecom Council Comments at 5.

¹⁵⁷ *See* Public Knowledge et al. Comments at 29-30; City of New York Comments at 6 ("As a major purchaser of communications technology, the City's experience is that notice of tech transitions from service providers has been, for practical purposes, sporadic, inadequate and in some cases provided not at all."); *see also* Letter from Public Knowledge et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed June 25, 2015) (Public Knowledge et al. June 25, 2015 *Ex Parte* Letter) (providing letter from 29 organizations, including CWA, asserting that "anti-consumer practices such as refusing to properly maintain their copper lines and requiring consumers to purchase expensive new services ('upselling')"); Public Knowledge June 25, 2015 *Ex Parte* Letter at 1-2 ("The town of Hopewell, New Jersey has repeatedly complained that Verizon does not service its copper lines, causing basic telephone service to degrade and become unreliable. At the same time, states have begun to actively prohibit their public service commissions from receiving consumer complaints, thus making it impossible to seek redress, or even adequately document the extent of the abandonment."); *Notice*, 29 FCC Rcd at 14979, para. 19 nn.48-52 (detailing allegations); Public Knowledge et al. May 12, 2014 Letter at 2-6 ("The Maryland Office of People's Counsel (Maryland OPC) has also previously testified that Verizon routinely migrates customers from the copper network to unregulated services with inadequate procedures for customer notice and Consent. The Maryland OPC's review of complaints filed with the Maryland Public Service Commission and the Maryland Office of Attorney General since 2011 has revealed a number of customer complaints about inadequate notice and consent to the migration, and complaints about service quality and lack of comparability to copper-based service.").

including allegations that such migrations have resulted in a move from regulated to unregulated services, without adequate customer notice and consent.¹⁵⁸ Based on this information, we are unconvinced by certain commenters' assertion that there is no record evidence to support the Commission's expressed concerns regarding customer confusion about their options.¹⁵⁹ And such consumer complaints and confusion persist.¹⁶⁰ Even commenters critical of aspects of our proposed customer notification requirements otherwise agree that consumers deserve to receive information regarding the effect of copper retirements on their service.¹⁶¹ And we believe that requiring incumbent LECs to provide this information to their customers will allow for a smoother transition by minimizing the potential for consumer complaints arising out of a lack of understanding regarding the planned network change.

40. We conclude the benefits of providing customers with the information needed to make informed decisions regarding the services they receive from incumbent LECs outweigh any additional burdens these new notice requirements may impose on the incumbent LECs. Indeed, incumbent LEC commenters note the importance of working with their customers in connection with copper-to-fiber transitions.¹⁶² And under the rules we adopt today, which we have modified from the rules proposed in

¹⁵⁸ See, e.g., Public Knowledge et al. Comments at 29-30; Public Knowledge et al. May 12, 2014 Letter at 2-6; Karl Bode, Utility: Verizon to Exit Wireline Business Within 10 Years (May 7, 2015), <http://www.dsreports.com/shownews/Utility-Verizon-To-Exit-Wireline-Business-Within-10-Years-133693> ("For several years, Verizon's been either raising rates or refusing to repair aging DSL infrastructure as part of an obvious attempt to drive away DSL customers it doesn't want to upgrade."). But see Letter from Maggie McCready, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 15, 2015) ("We do not force customers to switch to FiOS Digital Voice. . . . [W]e make clear they can keep their existing POTS voice service. . . .") (Verizon July 15, 2015 *Ex Parte* Letter); Letter from Thomas Cohen, Counsel for FTTH Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 3 (filed May 13, 2015) ("[C]oncerns about consumers being switched from copper to all-fiber without their knowledge or consent are vastly inflated if not unfounded."); TIA July 23, 2015 *Ex Parte* Letter at 3 (supporting the statements of the FTTH Council).

¹⁵⁹ See, e.g., AT&T Comments at 5-6; see also FTTH Council Reply at 18.

¹⁶⁰ See, e.g., Investigation into the Continued Use of Verizon Washington, DC, Inc.'s Copper Infrastructure to Provide Telecommunication Service, Reply Post-Hearing Brief of the Office of the People's Counsel for the District of Columbia, Formal Case No. 1102 (filed Apr. 27, 2015), http://www.dcpsc.org/edocket/docketsheets_pdf_FS.asp?caseno=FC1102&docketno=307&flag=D&show_result=Y; Karl Bode, Cincinnati Bell User: Being Upgraded From DSL to Fiber 'Un American' (June 26, 2015), <http://www.dsreports.com/shownews/Cinci-Bell-User-Being-Upgraded-From-DSL-to-Fiber-Un-American-134322>; April Witt, Suburbanology: Should I Keep My Landline Phone? (March-April 2015), <http://www.bethesdamagazine.com/core/pagetools.php?pageid=19567&url=%2FBethesda-Magazine%2FMarch-April-2015%2FSuburbanology%2Findex.php&mode=print>; Mitch Lipka, Phone Carriers Migrating from Copper to Fiber Optic Lines, (Aug. 31, 2014), <https://www.bostonglobe.com/business/2014/08/30/copper-fiber-phone-service-better-fight-than-switch/83SzuNwB4OmJbyMIRfmg1J/story.html>; Jon Brodtkin, How Verizon Let Its Copper Network Decay to Force Phone Customers Onto Fiber (Aug. 14, 2014), <http://arstechnica.com/information-technology/2014/08/why-verizon-is-trying-very-hard-to-force-fiber-on-its-customers/>.

¹⁶¹ See, e.g., NTCA Comments at 8 ("NTCA urges the Commission to adopt flexible and minimally burdensome requirements. To be sure, the NPRM is correct that consumers deserve to know how or whether their provider's copper retirement plans will affect the service they receive. At the same time, overly burdensome notice requirements only divert limited resources needed to improve the quality of services consumers receive.")

¹⁶² See, e.g., AT&T Comments at 37 ("There should be no question about AT&T's commitment to consumer education as part of the transition from legacy TDM networks to the all-IP ecosystem"); CenturyLink Comments at 31-33 (outlining their current retail notification process, which requires collaboration with customers); Cincinnati Bell Comments at 14 ("If a carrier is deploying FTTH, it must obtain access to the customer's premises to complete the upgrade and connect the customer's existing CPE to the optical network terminal. There is no way the carrier can do this without contacting the customer to schedule an installation appointment."); FTTH Council Comments at 22-23; TCA Comments at 4 ("Privately-owned rural LECs typically keep their customers informed of capital projects through newsletters, press releases, mailings and postings on their websites. Indeed, all rural LECs strongly

(continued...)

the *Notice* in order to minimize the burden they impose on incumbent LECs, incumbent LECs will be required to provide only one neutral statement to consumers and will not be subject to any other additional obligations.

41. We disagree with commenters who assert that rules mandating such notice are unnecessary.¹⁶³ Although some incumbent LECs assert that they already provide such notice, it is not clear that many or all provide such notice, and as noted above the record reflects numerous instances in which notice has been unreliable absent a regulatory mandate.¹⁶⁴ Some incumbent LECs assert that they already must contact customers who need to have new terminal equipment installed as a result of a network change so that they may obtain access to the customers' premises.¹⁶⁵ But this merely shows that incumbent LECs have incentives to communicate to a degree sufficient to obtain access to a consumer's premises; this does not demonstrate any incentive to educate consumers about issues such as whether existing services will remain available.

42. We also find unpersuasive the assertion that a notice requirement is unnecessary because the Commission's current rules already provide for notice to the public of planned network changes¹⁶⁶ via sections 51.325 and 68.110(b).¹⁶⁷ First, we note that section 68.110(b)'s notice requirements are not always triggered by a planned copper retirement.¹⁶⁸ More importantly, however, we find that the general public notice now provided by incumbent LECs under section 51.325, which typically takes the form of a general notice posted on the carrier's website, is not sufficient to give actual notice to those customers most likely to be affected by planned copper retirements. Until recently, consumers generally would not be directly affected in serious ways by most network changes because copper retirements in favor of fiber-only facilities were largely voluntary.¹⁶⁹ In that environment, reasonable public notice could be effectuated indirectly by posting on the carrier's website where those most affected (e.g., competitive LECs) would know to look. Given the accelerated pace of copper retirement, however, we find that consumers are directly affected in ways they had not been at the time the Commission adopted the copper retirement rules in the *Triennial Review Order*, and therefore consumers need direct notice for these important network changes that may directly affect them. We simply do not find it credible to believe

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desire that their customers understand the greater reliability and superior service fiber offers."); USTelecom Comments at 9-10; Verizon Comments at 14-15 ("[W]hen migrating customers from copper-to-fiber, Verizon has reached out to consumers repeatedly and on a one-on-one basis to describe the migration process and the effects on them."); ITTA Comments at 13-17 ("ITTA agrees with the Commission that consumers and other retail customers need to understand how copper retirements may affect them."). CenturyLink has even made sure in at least one instance to send postcards to its own customers, as well as to advise competitive LECs when their end user customers would be affected by a planned network change. See CenturyLink Comments at 37 n.89 & Exh. C.

¹⁶³ See, e.g., AT&T Comments at 36-37; Cincinnati Bell Comments at 3, 14; CenturyLink Comments at 39.

¹⁶⁴ See *supra* para. 39. We thus find unpersuasive Cincinnati Bell's argument that because a carrier that will discontinue a service after a copper retirement will have to file a section 214 application, to also requirement a copper retirement notice "would be redundant and confusing to consumers." Cincinnati Bell Comments at 15. The simple, clear notice that we require is necessary because the record reflects that consumers are not receiving sufficient notice in all cases.

¹⁶⁵ See Cincinnati Bell Comments at 14; see also USTelecom Comments at 10 ("Many providers already have to (and do) notify customers when making facilities changes because they need access to their customers premises to effectuate certain network changes. Even where such notice does not routinely happen or is not required, we believe customers are already receiving adequate notice when their service will be affected."); FTTH Council Reply at 18.

¹⁶⁶ See, e.g., GVNW Comments at 15.

¹⁶⁷ See *id.*

¹⁶⁸ See *infra* para. 74.

¹⁶⁹ See TIA Comments at 2-3; Cincinnati Bell Comments at 4-5.

that the public regularly checks the network change notification portion of our website or of their service provider's website.¹⁷⁰

43. We disagree with commenters who assert that our proposed notice requirement would impose an unnecessary burden because most customers are ultimately happy with an upgrade from copper to fiber facilities.¹⁷¹ This line of argument reflects a fundamental misunderstanding of the purpose of the notice requirement, which in no way reflects a view that fiber services are inferior to copper — indeed, the Commission has embraced the transition to fiber and other high-capacity transmission media.¹⁷² First, even the many customers who are ultimately happy with a copper-to-fiber transition are likely to benefit from understanding the change that will be occurring. Moreover, there remains a segment of the population, however comparatively small, that is resistant to changes in technology or for whom the new technology proves to be inferior to the old, and that will benefit from information that might ease the transition for them or that will allow them to seek out service from another provider. In the case of copper, such individuals may prefer a line-powered transmission medium, they may be comfortable with a long-standing technology that “just works,” or they may not understand the benefits of alternative technologies.¹⁷³ While we do not establish an approval process for copper retirement that would disrupt

¹⁷⁰ See, e.g., Letter from Edyael Casaperalta, Internet Rights Fellow, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 3 (filed May 6, 2015) (“The online public notice that some carriers provide cannot be considered full notification, particularly for consumers that only subscribe to voice service or have limited access to the Internet, such as low-income consumers and those living in rural and Tribal areas. Moreover, even consumer[s] with reliable Internet access cannot be expected to check their carrier’s website every day on the off chance they are about to undergo a network change.”).

¹⁷¹ See, e.g., FTTH Council Comments at 19-20, 26.

¹⁷² See, e.g., *City of Wilson, North Carolina, Petition for Preemption of North Carolina General Statute Sections 160A-340 et seq., The Electric Power Board of Chattanooga, Tennessee Petition for Preemption of a Portion of Tennessee Code Annotated Section 7-52-601*, WC Docket Nos. 14-115 and 14-116, Memorandum Opinion and Order, 30 FCC Rcd 2408, 2411, para. 5 (2015) (preempting Tennessee and North Carolina state restrictions on the provision of municipal broadband to promote “more overall broadband investment and competition”); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act*, GN Docket No. 14-126, 2015 Broadband Progress Report and Notice of Inquiry on Immediate Action to Accelerate Deployment, 30 FCC Rcd 1375, 1456, para. 144 (2015) (“Since the last Report, the Commission has taken several steps to remove more barriers to broadband deployment and adoption and promote competition. . . . [I]mplementation of the *2011 USF/ICC Transformation Order*, which transformed the high-cost universal service program to bring broadband to millions of Americans, is well underway. As of March 14, 2014, the Commission has dispersed more than \$438 million in Connect America Fund Phase I funding, which will bring new broadband service in the next several years. We are also moving forward on Phase II of the Connect America Fund that will provide nearly \$9 billion to expand broadband to five million Americans living in rural areas within the next five years.” (footnotes omitted)); *Technology Transitions Order*, 29 FCC Rcd at 1435, para. 1 (requesting proposals for technology transition experiments “to speed market-driven technological transitions and innovations”).

¹⁷³ As noted by the Pennsylvania PUC, “copper retirements under the existing rule apparently has the potential to reduce wholesale, incumbent, or competitor access, thereby reducing retail customer choice.” Pa. PUC Comments at 13. And as noted by the City of New York, “absent clear, direct notice to decision-makers for any discontinuance or network change, consumers will not be empowered to either plan or respond.” City of New York Comments at 6. And one commenter noted the possibility for confusion regarding whether certain advanced services offer the same functionality consumers have come to depend on from their legacy services. See NATOA Comments at 3 (“[C]onsumers do not receive the information necessary ‘to understand what is and is not happening during a copper retirement, and they need to understand their choices about service’ . . . [W]e are concerned that some of these advanced services lack the current functionality of the legacy services many consumers have come to know and depend on.”). And public interest commenters have expressed concern regarding the perceived state trend toward deregulation. See, e.g., AARP Comments at 32-33; Public Knowledge Reply at 2-3; Public Knowledge et al. May 12, 2014 Letter at 2.

technological advancement, neither can we ignore the benefits afforded to consumers from receiving information regarding planned network changes that may affect the service to which they subscribe. Moreover, we fear that without a clear, neutral message explaining what copper retirement does and does not mean, some consumers will easily fall prey to marketing that relies on confusion about the ability to keep existing services. As with the DTV transition, we must ensure that the most vulnerable populations of consumers do not fall through the cracks.¹⁷⁴ We believe that the minimally intrusive requirements we adopt today, which represent an education-based approach, strikes the correct balance between minimizing the impact on incumbent LECs' fiber deployment plans and ensuring that consumers are informed about how they will be impacted.

44. *Recipients.* In the *Notice*, we proposed requiring direct notice to “all retail customers affected by the planned network change,” and we defined “affected customers” as “anyone who will need new or modified CPE or who will be negatively impacted by the planned network change.”¹⁷⁵ Based on a review of the record in this proceeding, we conclude that we should adopt a modified version of this proposal. Thus, under the updated rules we adopt today, incumbent LECs will be required to provide direct notice of planned copper retirements to all of their retail customers within the affected service area(s), but only where the copper to the customer's premises is to be retired (e.g., where an incumbent LEC replaces copper-to-the-premises with fiber-to-the-premises regardless of the customer's preference).¹⁷⁶ We believe limiting the notice requirement to retirements involving involuntary replacement of copper to the customer's premises limits notice to circumstances in which customers are most likely to be affected, thereby avoiding confusion and minimizing the costs of compliance.¹⁷⁷

45. We also believe modifying the proposed class of recipients in this way will make it easier for incumbent LECs to comply with their notice obligations by (1) limiting the circumstances under which they must provide notice to retail customers, and (2) removing the need for the incumbent LEC to make an independent determination regarding whether particular customers will require new or modified CPE or whether particular customers will be negatively impacted by the planned network change.¹⁷⁸

¹⁷⁴ *DTV Consumer Education Initiative*, MB Docket No. 07-148, Report and Order, 23 FCC Rcd 4134, 4138 (2008) (stating that there is a compelling need to educate consumers about the DTV transition, especially the most vulnerable who still rely on over-the-air broadcasts).

¹⁷⁵ *Notice*, 29 FCC Rcd at 14997, para. 61.

¹⁷⁶ See, e.g., Public Knowledge et al. Comments at 32 (“The Commission should require that such notices be delivered to all customers in an affected area, because the ILECs by their own admission do not necessarily know what CPE or third-party services each customer uses.”); NASUCA Comments at 19 (“When an ILEC proposes to retire copper, there should be notice to all customers who receive service through the facilities subject to retirement. That bright-line resolution avoids many of the FCC's questions about recipients of notice.”); NATOA Comments at 4 (“Any attempt to narrow down or limit who or what constitutes an ‘affected’ customer runs the risk that someone will not receive proper notification.”); Cal. PUC Comments at 14 (“The notice requirement should apply to all customers whose premises are connected to a copper loop planned for retirement.”). *But see* AARP Comments at 34-35 (proposing that the Commission include more specific examples of possible negative impacts to consumers in the new rule).

¹⁷⁷ See, e.g., AT&T Comments at 5-6, 37 (stating that the new retail notice requirement “is more likely to introduce the kind of consumer confusion it is intended to avoid”); CenturyLink Reply at 37 (stating that “overbroad communication of an ILEC's planned copper retirement will only serve to cause customer confusion”); FTTH Council Reply at 20; ITTA July 23, 2015 *Ex Parte* Letter at 2. We recognize that in some cases copper is removed in connection with a voluntary election by the customer to receive fiber-to-the-premises or other non-copper-to-the-premises service; in such cases, of course, the regulatory notice requirement is not triggered. Our notice requirement is focused on circumstances in which an incumbent LEC chooses to stop offering service to the customer's premises via the copper network, irrespective of the customer's preference.

¹⁷⁸ This also obviates the need for the New York PSC's proposed requirement that incumbent LECs define “impacted customers” in their certifications. See NY PSC Comments at 11.

Notice to customers will not be required in those instances where operational copper remains in place. While under the rule that we adopt notice of a given copper retirement may be provided to more customers than would have received notice under the proposed rule, the notice requirement will be triggered less often because it will not be required if copper continues to reach the premises. Further, we conclude that this approach strikes the right balance in providing clarity,¹⁷⁹ ensuring no customers are inadvertently excluded from the pool of recipients, and ensuring that notice is provided where it is most needed. We emphasize that, consistent with our proposal set forth in the *Notice*,¹⁸⁰ the rule we adopt herein extends copper retirement notice requirements not just to consumers, but also to non-residential end users such as businesses and anchor institutions.¹⁸¹ This includes incumbent LEC enterprise customers, such as utilities and critical infrastructure industries within the affected service area.

46. *Content.* In the *Notice*, we proposed requiring that copper retirement notices to retail customers “provide sufficient information to enable the retail customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes,”¹⁸² including the information required by section 51.327(a), as well as statements notifying customers that they can still purchase existing services and that they have a right to comment, and advising them regarding timing and the Commission’s process for commenting on planned network changes.¹⁸³

47. After review of the record in this proceeding, we conclude that it is warranted and appropriate to adopt the content requirements proposed in the *Notice*, with several modifications described below. The record supports a finding that a significant number of consumers are confused regarding the effect of copper retirements on their service,¹⁸⁴ and would thus benefit from notices providing them the information needed in order to properly evaluate the continued ability of their current service to meet their needs.¹⁸⁵ Various commenters support our proposals regarding the content of copper

¹⁷⁹ Incumbent LEC commenters expressed concern regarding what they perceive as ambiguity about the proposed definition of “affected customers.” *See, e.g.*, AT&T Comments at 38-40; *see also* USTelecom Comments at 10 (“[I]n proposing that notice be provided to ‘anyone who will need new or modified CPE or who will be negatively impacted by the planned network change,’ the Commission offers no guidance on how providers are supposed to glean who has CPE that will no longer work, or to tell the difference between a negative’ impact vs. some other level of impact (inconvenience, for example).”); FTTH Council Reply at 20. Another incumbent LEC feels that “‘affected customers’ should be limited to those who must take some action in response to a network change, or whose service is affected due to a change in price, service feature or function, or equipment.” Cincinnati Bell Comments at 13.

¹⁸⁰ *See Notice*, 29 FCC Rcd at 14997, para. 61 n.154.

¹⁸¹ Certain commenters assert that our proposed notice requirements should be extended to include utilities and critical infrastructure industries. *See, e.g.*, Utilities Telecom Council Comments at 7.

¹⁸² *Notice*, 29 FCC Rcd at 15022, Appx. A, proposed new Section 51.332(c)(2).

¹⁸³ *See id.*

¹⁸⁴ *See supra* para. 39.

¹⁸⁵ We note that the requirements we adopt today provide as much flexibility as possible subject to necessary limits to help ensure that consumers will receive and understand the copper retirement notices they receive. *Cf.* Letter from Maggie McCready, Vice President, Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 23, 2015 (Verizon July 23, 2015 *Ex Parte* Letter); ITTA July 23, 2015 *Ex Parte* Letter at 2 (asserting that incumbent LECs “should have maximum flexibility with respect to providing notices to retail . . . customers” and “urg[ing] the Commission not to dictate the form, content, and means of customer notices . . . as those matters are best left to carriers’ reasonable discretion”); Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 29, 2015) (USTelecom July 29, 2015 *Ex Parte* Letter) (“The Commission also need not adopt additional requirements as to the type and format of customer notices, but should allow providers flexibility to determine how notifications should be made . . .”).

retirement notices to retail customers.¹⁸⁶ The notice requirement will have the added benefit of increasing consumer confidence in technology transitions. We further find that these content requirements should not be overly burdensome. Indeed, they are similar to existing Commission rules governing notice in the context of the discontinuance process and the use of customer proprietary network information (CPNI).¹⁸⁷ We find the CPNI notice process a useful comparison point because it also involves educating and informing consumers and because those rules prescribe detailed steps to ensure that consumers will receive and recognize e-mail based notice, which we also permit here.

48. The rule we adopt today is modified from the proposal in the *Notice* in four ways. First, we adopt the additional requirement that the mandatory statements in the notice must be made in a clear and conspicuous manner. As stated above, the record reflects that a number of consumers are confused when copper retirements occur, so clear and conspicuous provision of information will help to remedy that issue.¹⁸⁸ To provide additional guidance, we clarify that a statement is “clear and conspicuous” if it is disclosed in such size, color, contrast, and/or location that it is readily noticeable, readable, and understandable. In addition, the statement may not contradict or be inconsistent with any other information with which it is presented; if a statement materially modifies, explains or clarifies other information with which it is presented, then the statement must be presented in proximity to the information it modifies, explains or clarifies, in a manner that is readily noticeable, readable, and understandable, and not obscured in any manner; and hyperlinks included as part of the message must be clearly labeled or described. We adopt this detailed definition of “clear and conspicuous” to provide guidance to help ensure that customers will understand the required notice and to provide certainty to industry about our requirements.¹⁸⁹ To streamline the filing and reduce the burden on incumbent LECs, we decline to require that the notice include: (1) information required by section 51.327(a)(5), because that primarily requires provision of technical specifications that are unlikely to be of use to most retail customers; (2) a statement regarding the customer’s right to comment on the planned network change, because, as discussed below, we decline to include in the updated rule we adopt today a provision regarding the opportunity to comment on planned network changes;¹⁹⁰ and (3) a statement that “[t]his notice of planned network change will become effective” a certain number of days after the Federal Communications Commission (FCC) releases a public notice of the planned change on its website” because this statement is likely to be unnecessarily confusing and because 47 C.F.R. § 51.327(a)(3),

¹⁸⁶ See, e.g., NATOA Comments at 4; NASUCA Comments at 19; Public Knowledge et al. Comments at 32-33; AARP Comments at 36 (“[T]he proposal for the content of the notice is consistent with the objectives of fully informing customers of the impact of network changes.”).

¹⁸⁷ See 47 C.F.R. §§ 63.71, 64.2008; see also *Notice*, 29 FCC Rcd at 14999, para. 66.

¹⁸⁸ See, e.g., City of New York Comments at 2 (stating that “[s]ervice providers must also be required to clearly inform every affected customer of all of the changes to be expected as a result of a technology transition”); NATOA Comments at 4 (“Commenters support the proposition that the notice [to consumers] ‘provide sufficient information and that it contain a clear statement of the customer’s rights and the process by which the customer may comment on the planned copper retirement.’”); NASUCA Comments at 19; Public Knowledge et al. Comments at 33 (“The Commission should ensure this statement gives a plain-language description of the customer’s service options”). Our rules already require “clear and conspicuous” notice in a number of contexts. See 47 C.F.R. § 10.220; 47 C.F.R. § 10.240(a); 47 C.F.R. § 10.250(a); 47 C.F.R. § 15.117(k)(1)-(2); 47 C.F.R. § 54.418(b)(1); 47 C.F.R. § 64.11190(d)(2)(iii); 47 C.F.R. § 64.1200(a)(4)(iii)(A), *et seq.*; 47 C.F.R. § 64.2401; 47 C.F.R. § 64.3100(b)(3); 47 C.F.R. § 76.1630(b)(1).

¹⁸⁹ See generally Federal Trade Commission, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf> (explaining a “clear and conspicuous” standard and its importance).

¹⁹⁰ See *infra* discussion in Section II.B.1.a(iii), regarding ability to comment.

which we incorporate as to customer copper retirement notices, already requires disclosure of the implementation date of the planned changes.¹⁹¹

49. *Neutral Statement.* In the *Notice*, we proposed prohibiting incumbent LECs from including in copper retirement notices to retail customers “or any other communication to a customer related to copper retirement any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes.”¹⁹² In addition, we proposed requiring incumbent LECs to include “a neutral statement of the various choices that the LEC makes available to retail customers affected by the planned network change.”¹⁹³

50. After reviewing the record before us, we conclude that we should require incumbent LECs to include in copper retirement notices to retail customers a neutral statement of the various service options that they make available to retail customers affected by the planned copper retirement. We also conclude that the notice that we require must be free from any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes, but that this prohibition will apply *only* to copper retirement notices provided pursuant to the Commission’s network change disclosure rules and not to any other communication.¹⁹⁴ We intend that this notice serve not only this consumer protection goal, but also provide affected customers with the opportunity to learn about the facility change and give them an opportunity to seek more information. To that end, we require that providers maintain a toll-free number that customers may call to raise any questions about the planned retirement, and a URL for a related web page with relevant information (e.g., a “frequently asked questions” page). Both the toll-free number and the address for the web page should be included in the notice to the customer, along with contact information for the Commission (including a link to the Commission’s consumer complaint portal) and the relevant state PUC. This requirement will ensure that consumers have direct access to the provider to better understand what to expect regarding the process of copper retirement and any possible impact on their service. Moreover, while the requirement we adopt today is for a single notice to the affected customers, we emphasize that this single notice is a floor, not a ceiling. We strongly encourage carriers to follow up with affected consumers to ensure that they have received the notification and understand the implications to facilitate a smooth transition for these customers.

51. This neutral statement requirement and limited prohibition will better enable retail consumers to make informed choices about their services and will give them the necessary tools to determine what services to purchase without swaying them towards new or different offerings. We believe that this strikes the right balance between allowing incumbent LECs to advise their customers regarding the availability of advanced services¹⁹⁵ and preventing potentially aggressive marketing tactics that might lead to consumer confusion. To be clear, nothing in the requirements that we adopt prohibits marketing new or different services in communications other than the notice that we require.

¹⁹¹ See 47 C.F.R. § 51.327(a)(3); *Notice*, 29 FCC Rcd at 15023, Appx. A, proposed new section 51.332(c)(2)(iv).

¹⁹² *Notice*, 29 FCC Rcd at 15023, Appx. A, proposed new section 51.332(c)(4).

¹⁹³ *Id.* at 15001, para. 72.

¹⁹⁴ See *infra* Appendix A, Final Rules, new section 51.332(c)(2)(iii).

¹⁹⁵ See Letter from Frank S. Simone, Vice President Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed June 8, 2015) (“[R]ather than minimizing consumer confusion . . . prohibiting AT&T and other carriers from including information regarding their post-transition services in any materials explaining the impact of the transition on customers’ existing services could cause more, not less, confusion.”); Verizon July 23, 2015 *Ex Parte* Letter at 1; ITTA July 23, 2015 *Ex Parte* Letter at 2.

52. The record reflects extensive support for these requirements, and that they will carry clear value for consumers.¹⁹⁶ As ADT observes, “[t]he Commission should not permit ILECs to use the technology transition to create new marketing opportunities for themselves.”¹⁹⁷ Contrary to some assertions, we are not inserting ourselves in carriers’ marketing strategies—indeed, carriers remain free to engage in unlimited marketing with the exception of the single neutral notice that we require.¹⁹⁸

53. Certain commenters assert that there is no record evidence to support the Commission’s expressed concerns regarding the pressure certain carriers have allegedly brought to bear on customers to switch services.¹⁹⁹ However, the record belies this assertion. For example, NASUCA pointed to a news story in Montgomery County, Maryland describing a consumer’s experience with pressure to move from copper not just to fiber but to a package of digital services offered over the fiber network.²⁰⁰ According to the Director of Montgomery County’s Office of Consumer Protection, that office received complaints from consumers alleging that the carrier in question was engaged in “deceptive marketing practices” as it

¹⁹⁶ See, e.g., NASUCA Comments at 17 (“Upselling occurs and is reasonably foreseeable when retaining the customer (with the more profitable service) is better for the carrier than giving up the customer altogether. With these transitional copper retirements, most of the time upselling would make sense to the carrier. The harms to consumers include confusion about the best options available and being coerced into subscribing to a more expensive and possibly less reliable service.”); AARP Comments at 36-37; Cal. PUC Comments at 18-19; Mich. PSC Comments at 5; ADT Comments at 8 (“The Commission should not permit ILECs to use the technology transition to create new marketing opportunities for themselves, and it can prevent this from happening by prohibiting ILECs from using the transition to gain an advantage on other service providers who do not have equal access to consumers at this moment in time.”); MDTC Reply at 6 (“Outreach and education initiatives would complement the notice requirement, and may address concerns that the notice requirement is too rigid by ensuring that consumers receive notice through various media, and limiting the concerns of upselling through the involvement of governmental agencies and community organizations.”); NASUCA Comments at 17-18 (stating that the “harms to consumers” during transitional copper retirements include confusion about the best options available and being coerced into subscribing to a more expensive and possibly less reliable service, hence the need for the notice to customers to “identify alternative ‘services reasonably comparable to those to which the retail customer presently subscribes’”); OPC Reply at 8 (“[T]he marketplace cannot be relied upon to ensure ILECs will provide their customers with full and objective information about their service options and the impact of those options on them.”); Public Knowledge et al. Comments at 33 (stating that public interest commenters support the “neutral statement” proposal and that the FCC should ensure that this statement gives a plain-language description of the customer’s service options and that the statement also explains clearly to consumers their options to file comments on the proposed network change, or to contact the FCC and any relevant State commissions for more information about phone service issues”).

¹⁹⁷ ADT Comments at 8.

¹⁹⁸ See, e.g., Cincinnati Bell Comments at 3 (“[T]he Commission should not interfere with the ability of carriers to bring new services to the attention of the very customers to whom they are bringing that new capability.”).

¹⁹⁹ See, e.g., AT&T Comments at 5-6.

²⁰⁰ See NASUCA Reply at 17 n.69 (citing Liz Crenshaw and Patti Petite, Killing Copper? Customers Say They Felt Pressured Into FiOS (Dec. 9, 2013) (Killing Copper), <http://www.nbcwashington.com/news/local/Verizon-Fios-Phone-Copper-Customers-Say-They-Felt-Pressured-Into-Fios-235098041.html>). And public interest commenters cite to various incumbent LEC actions that raise the concern that incumbent LECs’ motivation to sell bundles may discourage the kind of neutral communication that we require. See, e.g., AARP Comments at 36-37 (addressing recent AT&T and Verizon settlements arising out of cramming allegations and quoting Verizon training materials that advise trainees that “it’s always best to sell bundles.”); NASUCA Comments at 17 (“[T]he ‘allegations that in some cases, incumbent LECs are misleading retail customers into believing that they may no longer continue to receive legacy services (e.g., POTS) or . . . that incumbent LECs are failing to advise retail customers that their legacy service remains available over fiber’ were made and supported in the Consumer Groups’ letter and the attachments, including evidence submitted in multiple state regulatory proceedings.”).

transitioned customers to the fiber network.²⁰¹ The assertions about lack of evidence in the record also ignore the sources of support cited in the *Notice*.²⁰²

54. We are not persuaded by the argument that prohibiting incumbent LECs from discussing the availability of advanced services prevents carriers from educating consumers regarding the benefits of fiber.²⁰³ The only thing our new rule prevents is the inclusion of such discussions in copper retirement notices issued pursuant to our rules, which could lead to confusion regarding the continued availability of the type of service to which the consumer currently subscribes. Incumbent LECs are free to provide information regarding advanced services offered over fiber in any of their marketing materials, as those materials are not the required copper retirement notice.²⁰⁴ While incumbent LECs and their representative organizations assert that the majority of consumers have embraced the benefits of fiber,²⁰⁵ these assertions ignore the existence of those consumers who have not yet chosen to purchase services beyond basic voice, many of whom are among the more vulnerable segments of the population.²⁰⁶ And it is those consumers who are most in need of the notice requirement that we adopt. Our “one neutral notice” requirement ensures that consumers will receive key information on the services available to them without significantly inhibiting incumbent LEC marketing efforts, therefore striking the best balance between informing consumers and facilitating the technology transitions.

55. Aside from the neutral statement requirement discussed above and the related requirement to make available a toll-free number and contact information,²⁰⁷ we decline to adopt any further content requirements. Certain commenters want the notices to retail customers to include detailed information regarding all possible changes that could result from a planned copper retirement,²⁰⁸ including “the impact on continuity of service in an electrical power outage” and the availability of substitute services.²⁰⁹ And one commenter proposes that notices to retail customers also “inform customers of their

²⁰¹ See *Killing Copper*. That article also points to nationwide complaints filed with the Federal Trade Commission. *See id.*

²⁰² See *Notice*, 29 FCC Rcd at 14979, para. 19, 14996-97, para. 60 n.152, 15000-01, para. 71 n.169; *see also generally* NASUCA Motion; Public Knowledge et al. May 12, 2014 Letter.

²⁰³ See, e.g., FTTH Council Reply at 23 (“This is particularly troublesome given the tremendous benefits that consumers will gain from an upgrade to fiber service, including better performance, increased resiliency, and access to a host of services that copper cannot support.”); *see also* Cincinnati Bell Comments at 15 (“A prohibition on upselling to consumers . . . would negatively impact both consumers and carriers. The majority of consumers are anxious to take advantage of the new services that FTTH deployments make possible. If carriers are not allowed to tell people about the new services that are available over the upgraded network, presumably until after the customers’ existing services have been converted to the new facilities, it will significantly increase costs and delay deployment of broadband Internet access.”).

²⁰⁴ See Letter from Geoffrey G. Why, Counsel to ADT, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed May 28, 2015) (asserting that under its proposed rule, carriers would “remain free to engage in marketing activities, even for services that compete with non-carrier’s services”).

²⁰⁵ See, e.g., Cincinnati Bell Comments at 15 (“The majority of consumers are anxious to take advantage of the new services that FTTH deployments make possible.”); FTTH Council Reply at 4.

²⁰⁶ See *infra* paras. 58-59.

²⁰⁷ See *supra* paras. 50-54.

²⁰⁸ See, e.g., City of New York Comments at 2-3; NY PSC Comments at 10.

²⁰⁹ City of New York Comments at 2; *see also* AARP Comments at 36 (“Given that the current transition has the potential to affect CPE and services for which customers make explicit payment, it is appropriate to provide additional information to consumers in the spirit of the DTV transitions. The notice should provide information to consumers regarding the installation and/or modification of CPE requirements, including backup power; statements regarding the impact on service availability and the potential impact on third-party CPE, such as alarm systems

(continued...)

avenues to appeal to their Public Utilities Commission, Office of Consumer's Counsel, or the Federal Communications Commission if the change would bring about negative consequences for consumers."²¹⁰ We decline to adopt these proposed expanded content requirements.²¹¹ The modified rule we adopt today will require incumbent LECs to identify "any changes to the service(s) and the functionality and features thereof," which would include continuity of power. And as discussed below, the updated rule will require that incumbent LECs certify their compliance with section 68.110(b)'s requirement that carriers notify customers when a planned change in facilities will affect the compatibility of CPE.²¹² With respect to the proposal that we require incumbent LECs to identify the availability of substitute services, we proposed in the *Notice* that incumbent LECs be required to include in their copper retirement notice to retail customers "a neutral statement of the various choices that the LEC makes available to retail customers affected by the planned network change."²¹³ As discussed above, we incorporate this requirement into the updated rule.²¹⁴ At this time, we do not believe it is necessary to require more than this in the context of the notice to customers, where the copper retirement does not rise to the level of a discontinuance, reduction, or impairment of service for which a carrier would need to seek Commission authorization.

56. *Constitutionality.* We are not persuaded by arguments that the prohibition on marketing new services and the requirement of a neutral statement of service offerings amount to violations of their constitutional right to free expression.²¹⁵ We conclude that the notice requirement that we adopt is consistent with the First Amendment because it merely contains a narrow, targeted time, place, and manner restriction and compels disclosure of factually accurate information in a commercial context.

57. The "one neutral notice" requirement that we adopt today largely addresses incumbents' arguments in opposition to the proposed prohibition on upselling contained in the *Notice*, which was far more restrictive. In fact, the upselling prohibition that we adopt today applies only to the notice that we require. Incumbent LECs are free to inform their customers of advanced services offered over fiber facilities through as many other communications as they wish. We believe deployment of fiber facilities is beneficial in many respects, and we do not seek to deter it. However, we must ensure that such deployments do not happen in a manner that negatively impacts vulnerable populations. The "one neutral notice" requirement that we adopt strikes this balance while imposing the most limited restriction possible.

58. It is well-established that government may impose time, place, and manner restrictions on protected speech "provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial government interest, and that they leave open ample alternative channels for communication of the information.'"²¹⁶ The Commission's upselling

(Continued from previous page) _____
and/or medical monitoring devices; and should also address whether any technician access to the customer's premise is required.").

²¹⁰ See Rural Broadband Policy Group Comments at 5; see also Public Knowledge et al. Comments at 32-33.

²¹¹ In an effort to minimize our regulation, we additionally decline to adopt the "separate postage" rule proposed by ADT, which would prohibit notices to retail customers from being included "in the same envelope" as any material marketing advanced services. ADT Comments at 9; see also Letter from Jay Hahn, Executive Director, Central Station Alarm Ass'n, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1-2 (filed July 22, 2015).

²¹² See *infra* Section II.B.1.a(v).

²¹³ *Notice*, 29 FCC Rcd at 15001, para. 72.

²¹⁴ See *infra* paras. 50-54.

²¹⁵ See, e.g., Cincinnati Bell Comments at 17-18; CenturyLink Comments at 44; AT&T Reply at 27; Hawaiian Telecom Reply at 7; USTelecom Comments at 7 n.13.

²¹⁶ *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

prohibition and neutral statement requirement are reasonable time, place, and manner restrictions given the low burden that these requirements place on providers and the substantial government interest they serve. Incumbent LECs will still be free to seek to inform customers about new or upgraded services in separate communications using whatever means they so choose, even during a network upgrade.²¹⁷ Instead, the requirement of a neutral statement of product offerings and the prohibition on attempts at upselling in a copper retirement notice are intended to promote the substantial government interest of protecting retail customers, especially vulnerable ones such as the elderly, from aggressive and confusing upselling by incumbent LECs at the same time the carriers are informing those customers of changes in facilities.²¹⁸ We are not seeking to control what incumbent LECs say to their customers or to impose our own view of appropriate upselling; rather, we seek to ensure that retail customers are fairly informed of the effect of a planned copper retirement without the possible added confusion of contemporaneous communications by their providers to attempt to sell them other, possibly more expensive services.²¹⁹ The objective is to better enable retail consumers to make informed choices about their services. We conclude that this significant government interest would be achieved less effectively absent implementation of the prohibition and the neutral statement requirement.²²⁰

59. The customer notice that we require is consistent with the First Amendment because it merely requires the provision of true factual information in a commercial context and therefore is consistent with *Zauderer*.²²¹ We find that, in this case, the government has an interest sufficient to compel incumbent LECs to include a neutral statement in their copper retirement notices that, among other things, includes the various choices available to retail customers affected by the planned network change and provide sources of additional information related to that planned network change, and to inform interconnecting entities about technical information concerning the changes. The notice that we require is designed to protect retail customers, in particular vulnerable populations such as elderly consumers, and to ensure that they are made aware of the full range of product offerings available to them following a planned copper retirement. The notice entails the provision only of factual information. We therefore find that the notice is reasonably related to the government's interest in safeguarding retail consumers, and that this interest outweighs the incumbent LECs' "minimal" interest in not providing particular factual information to their customers.²²²

²¹⁷ See Cincinnati Bell Comments at 18 ("A rule prohibiting only ILECs from upselling during a network upgrade is one-sided and prohibits only one group of companies from engaging in such marketing activities.").

²¹⁸ See *Notice*, 29 FCC Rcd at 15001, paras. 71-72.

²¹⁹ But see CenturyLink Comments at 44 (asserting that mandates that "ILECs tell customers that they can keep their existing service" would be considered unconstitutional compelled speech).

²²⁰ See *Ward*, 491 U.S. at 799-802 ("So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."); see also *Clark*, 468 U.S. at 295 (stating that the Government's purpose is the controlling consideration).

²²¹ *Zauderer*, 471 U.S. at 651.

²²² *American Meat Inst.*, 760 F.3d at 22. We note that, even if the higher standard of *Central Hudson* applied in this instance, the notice requirement adopted as part of this Order satisfies this higher standard of judicial scrutiny. See *supra* note 131. Even assuming the expression is subject to constitutional protection, we believe that the asserted government interest in this case of protecting retail customers — including but not limited to elderly consumers and other vulnerable populations — and ensuring that they are made aware of the full range of product offerings following a copper retirement is, indeed, substantial. Moreover, the requirement of a single neutral statement of service offerings has been tailored narrowly to directly advance these stated interests by providing retail customers with a list of the full range of product offerings made available by their providers. We also find that this notice requirement does not impose a more extensive burden on providers than is necessary to serve the asserted governmental interests. Thus, even were the more stringent standard of *Central Hudson* to apply in this instance, we believe that the notice requirement satisfies such a standard.

60. *Form.* In the *Notice*, we proposed allowing incumbent LECs to use written or electronic notice such as postal mail or e-mail to provide notice to retail customers of a planned copper retirement.²²³ Based on a review of the record in this proceeding, we conclude that we should adopt this proposed requirement, which a variety of commenters support.²²⁴ Although certain commenters urge the Commission to permit more flexibility, we conclude that the requirement we adopt today strikes the right balance between ensuring receipt of notice and avoiding unnecessary burdens. In particular, we find that notice in formats other than email or postal mail would be too easily ignored by consumers.²²⁵ The requirement we adopt today should be sufficient to ensure that retail customers receive notice, without imposing unnecessary additional burdens on incumbent LECs.

61. However, we are cognizant of concerns that permitting customers to directly reply to e-mails containing copper retirement notices could impose a heavy administrative burden on them.²²⁶ Because we retain the notice-based process for copper retirement network change disclosures, we find that there is little reason to require incumbent LECs to allow customers to reply directly to these e-mail notices. On the other hand, we find that the benefits to consumers of the other requirements we proposed in the *Notice*²²⁷ outweigh any additional administrative burdens on incumbent LECs. These requirements are consistent with the requirements contained in our CPNI rules,²²⁸ and only one commenter opposed to our proposed notice requirements touched on this specific issue.²²⁹ Dissemination of the notice shall be made available and accessible to persons with disabilities.²³⁰

62. *Notice Period for Retail Customers.* In the *Notice*, we proposed providing retail customers at least ninety-days' notice of planned copper retirements.²³¹ We conclude that this notice period is appropriate for residential retail customers, to whom earlier notice may be confusing and potentially forgotten over a long period of time. Based on our review of the record in this proceeding, however, we conclude that non-residential retail customers, which include businesses and anchor institutions, require more than ninety-days' notice. As discussed above, we have concluded that it is appropriate to extend the notice period for interconnecting carriers to at least 180 days.²³² We now conclude that non-residential retail customers should receive the same amount of notice as

²²³ See *Notice*, 29 FCC Rcd at 14998, para. 63, 15022, Appx. A, proposed new section 51.332(b)(3).

²²⁴ See, e.g., NASUCA Comments at 18; NATOA Comments at 4.

²²⁵ See *Notice*, 29 FCC Rcd at 14998, para. 63 (quoting *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information et al.*, CC Docket No. 96-115 et al., Third Report and Order and Third Further Notice of Proposed Rulemaking, 17 FCC Rcd 14860, 14901, para. 92 (2002)).

²²⁶ See, e.g., FTTH Council Comments at 25 (asserting that an e-mail notice requirement would "impose perhaps even greater costs [than postal mail], which would need to obtain consent, monitor outgoing emails, and potentially follow up with undeliverable messages via postal mail.").

²²⁷ See *Notice*, 29 FCC Rcd at 15022, Appx. A, proposed new Section 51.332(b)(3).

²²⁸ See 47 C.F.R. § 64.2008; see also *Notice*, 29 FCC Rcd at 14998, para. 63.

²²⁹ See FTTH Council Comments at 25.

²³⁰ We note that incumbent LECs are required to make their disseminated information and website accessible. See, e.g., 47 C.F.R. §§ 6.11 (accessible information requirements for telecommunications service providers and equipment manufacturers), 14.20(d) (accessible information requirements for advanced communications service providers and equipment manufacturers); see also Rural Broadband Policy Group Comments at 6 ("[A] carrier should be required to notify its customers of any changes to service via Internet telephone, television, radio, postal mail, and local newspapers in multiple languages and formats accessible to persons with disabilities before transitioning customers to a new service.").

²³¹ See *Notice*, 29 FCC Rcd at 15000, para. 68, and 15023, Appx. A.

²³² See *supra* para. 29.

interconnecting carriers.²³³ This should allow non-residential retail customers sufficient time to evaluate the impact of the planned network change on the service they would continue to receive and whether they need to seek out alternatives. Given that we are extending the notice period for interconnecting carriers, there is no significant added cost to matching that notice period for non-residential end users compared to adopting a shorter notice period solely for such end users. We note that where the facilities to be retired are no longer in use, we conclude that incumbent LECs need not provide notice of the planned copper retirement to their retail customers because there are no retail customers to whom to provide notice.²³⁴

63. *Other Consumer Education.* In the *Notice*, we sought comment on whether we should require incumbent LECs to undertake consumer education initiatives in connection with planned copper retirements.²³⁵ We conclude that the rules we adopt today requiring detailed notices to retail customers, together with the requirement to make available a toll-free number and contact information for additional resources, lessens the immediate need for further educational efforts directed toward consumers at this

²³³ Enterprise customer commenters and the competitive LECs that provide them service assert that they require more than ninety days' notice of planned copper retirements to allow for planning to accommodate the network changes. *See, e.g.,* City of New York Comments at 6-7 (“The City’s transition to alternative technologies requires long term planning, as the City’s telecommunications environment is extensive and complex. Governmental entities such as the City are often required to pursue substantial procurement cycles. Cycle length is greater for complex and often high-cost technology contracts. Ninety days’ notice is grossly insufficient for the City to plan for and implement replacement services in the communications technology space.”); Edison Electric Inst. Reply at 5 (“[S]ome utilities have either been notified after the fact or given less than ninety (90) days’ notice of discontinuance. This poses much uncertainty and numerous operational problems for utilities in their provision of critical electric service.”); Letter from Michael Oldak, Vice President Strategic Initiatives & General Counsel, Utilities Telecom Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) (Utilities Telecom Council July 29, 2015 Ex Parte Letter) (noting that “the required network and equipment re-engineering could be very time-consuming for utilities and . . . in a typical electric utility anywhere from several individual to several thousand substations and thousands of voice circuits could be involved”); *see also* Intergovernmental Advisory Committee to the Federal Communications Commission Advisory Recommendations No: 2015-5, GN Docket No. 13-5 et al., at 4 (dated May 12, 2015) (IAC May 12, 2015 Recommendations) (“The IAC also notes that state, local and tribal governments as telecommunications customers will, in many cases, need additional time to test and transition, and cost protections in the transition process to assure that public safety providers and other providers of critical government services are fully able to smoothly transition extensive, existing customer premises-side infrastructure and operations to reflect post-copper and post-TDM technology. Many entities will be unable to budget for new infrastructure, labor and equipment necessary to implement and to utilize IP communications services when traditional networks are no longer available.”). Certain commenters believe 180 days is an appropriate period for notice to retail customers. *See, e.g.,* Ad Hoc Comments at 11 (“[T]o help users with large complex networks analyze the proposed change and prepare for contingencies, at least 180 days’ notice of copper retirement would be appropriate.”); Cal. PUC Comments at 17-18. One commenter asserts, however, that utilities need notice of a planned copper retirement at least one year in advance. *See* Utilities Telecom Council Comments at 8-9 (mistakenly conflating the wholly separate issues of network change disclosures and service discontinuance, but understood to most clearly be addressing the appropriate notice period under our proposed copper retirement rules); *cf.* NTIA Ex Parte Letter at 2-3 (discussing the needs of federal agencies for advance planning to accommodate network conversions “[g]iven the current reliance on TDM-based facilities and services” and the “timeframe and uncertainties inherent in the budgeting, appropriations, and procurement process.”). On the other hand, CenturyLink currently gives its DSL consumer customers thirty days’ notice of “network upgrades.” *See* CenturyLink Comments at 32. At least one commenter supports providing retail customers the same amount of notice as provided to interconnecting carriers. *See* Cal. PUC Comments at 17. As stated above, we find this longer time period warranted as to non-residential customers but potentially confusing and unwarranted for residential customers.

²³⁴ *See infra* Appendix A, Final Rules, new section 51.332(b)(3).

²³⁵ *Notice*, 29 FCC Red at 15001, paras. 74-75.

time.²³⁶ That said, we remain concerned about whether consumers will have the information they need on copper retirement specifically and technology transitions more generally. For instance, the Michigan PSC states that “education during the copper transition is critical to alleviate misunderstandings and confusion for consumers and supports requiring initiatives similar to the digital television (DTV) transition to allow the copper transition to move along more smoothly.”²³⁷ While we set a foundation today by implementing a more targeted solution, we suspect that more will be necessary as the transition progresses. To be clear, we do not foreclose the possibility of adopting additional consumer education initiatives in response to the *Notice* and we otherwise may revisit the issue particularly if there is evidence of consumer confusion and concerns following copper retirements.

64. In addition, we emphasize and support the role of state commissions and Tribal governments to support consumer education around copper retirement. States traditionally have played a critical role in consumer protection, and we strongly encourage carriers engaging in copper retirement that affects consumers directly to partner with state public service commissions, Tribal entities, and other state and local entities to ensure consumers understand and are prepared for the transition. We note that the record reflects the benefit of cooperation between state commissions and carriers during the copper retirement process – including by ensuring minimal disruption to consumers.²³⁸ For instance, the Massachusetts Department of Telecommunications and Cable reports on its “recent experience with the transition of the Town of Lynnfield, Massachusetts to an all fiber network” and explains that “the MDTC worked collaboratively with Verizon Massachusetts on prior customer notification, and that as a result the Lynnfield transition was successfully completed with minimal disruption.”²³⁹ We applaud such efforts and encourage other providers to coordinate cooperatively with their state commissions.

65. *Other Proposals.* We decline to adopt the proposed rural exemption advocated by TCA, an organization representing a large number of rural LECs.²⁴⁰ TCA asserts that many of its members are small, member-owned or locally-owned businesses located in the very communities they serve.²⁴¹ As a result, TCA asserts that the requirements proposed in the *Notice* are “onerous and unnecessary.”²⁴² We conclude the modifications we have adopted in response to the record received sufficiently address these concerns. And while the rules necessarily impose some burden on incumbent LECs, we do not find that burden to be greater for rural LECs or that rural consumers are less in need of information regarding planned copper retirements.

66. We also decline to adopt the proposal of the Communications Workers of America that we should impose different notice requirements for network upgrades (i.e., replacing the copper facilities with fiber facilities), network downgrades (e.g., “a removal to replace the copper with [facilities for] an inferior voice-only service (such as Verizon’s Voice Link service)”), and “the complete abandonment of

²³⁶ See, e.g., Mich. PSC Comments at 5 (“[E]ducation during the copper transition is critical to alleviate misunderstandings and confusion for consumers and supports requiring initiatives similar to the digital television (DTV) transition to allow the copper transition to move along more smoothly. Education initiatives for the telephone transition are more critical than the DTV transition because telephone communication, including 911 services, plays such an essential role in our daily lives.”).

²³⁷ Mich. PSC Comments at 5; see also Cal. PUC Reply at 19; MDTC Reply at 4-6; Letter from Edyael Casaperalta, Coordinator, Rural Broadband Group et al., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, at 2 (filed Feb. 9, 2015).

²³⁸ Letter from Karen Peterson, Commissioner, Mass. Dep’t of Telecomm. and Cable, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, at 2 (filed July 30, 2015).

²³⁹ *Id.*

²⁴⁰ See TCA Comments at 6.

²⁴¹ See *id.* at 2.

²⁴² See *id.* at 4.

facilities.”²⁴³ We do not believe such differentiation is necessary. The “downgrade” CWA refers to is framed in terms of replacing one service with a different, inferior service. Such a situation is more appropriately addressed in the context of a section 214(a) discontinuance, reduction, or impairment of service,²⁴⁴ rather than a change in facilities. With respect to “the complete abandonment of facilities,” if this change in facilities results in a discontinuance, reduction, or impairment of service, then it also would fall within the purview of our rules governing such situations and the incumbent LEC would be obligated to comply with the copper retirement notice obligations and file a discontinuance application.

67. Finally, we decline to adopt the City of New York’s proposal that we require proof of notice acknowledged by individual customers before allowing changes.²⁴⁵ We are concerned that such a requirement would unfairly penalize incumbent LECs for the failure of their customers to act. End users typically would not have an incentive to provide such an acknowledgement.

(iii) Ability to Comment

68. After consideration of the record and other avenues for input, we find that avenues to communicate with the Commission are sufficient and that formalizing a right to comment is not needed. We therefore decline to adopt the proposal to revise the network change disclosure rules to provide “the public, including retail customers and industry participants, with the opportunity to comment on planned network changes.”²⁴⁶ We are persuaded that a formalized comment process could be confusing to consumers because there is no approval process associated with copper retirements.²⁴⁷ The public, including consumers and competitive carriers, have multiple means with which to communicate with us regarding copper retirements. Since we adopted the *Notice*, an amendment to section 51.329 of the Commission’s rules requiring that carriers file network change disclosures in the Commission’s Electronic Comment Filing System and permitting responsive filings to be filed via ECFS has become effective.²⁴⁸ Thus, network change disclosures are now docketed proceedings open to public comment. Consumers and others are able to submit complaints to the Consumer and Governmental Affairs Bureau.²⁴⁹ The public also may continue to comment on planned network change disclosures via the

²⁴³ See CWA Comments at 8.

²⁴⁴ See 47 U.S.C. § 214(a).

²⁴⁵ See City of New York Comments at 6.

²⁴⁶ *Notice*, 29 FCC Red at 15002, para. 78.

²⁴⁷ Certain commenters support the Commission’s proposal to provide retail customers with the formal right to comment on planned copper retirements, *see, e.g.*, Cal. PUC Comments at 20-21 (dated Feb. 26, 2015); NY PSC Comments at 9; Pa. PUC Comments at 14, although at least one commenter urged the Commission to at least make clear how it will use comments submitted by the public. See NY PSC Comments at 10. However, various commenters on both sides of this issue note that providing the public the right to submit comments formally (1) does not provide additional advantage beyond use of the existing email address, and (2) will confuse consumers and lead to dissatisfaction, because we did not propose to convert the network change disclosure process to one requiring Commission approval. See, *e.g.*, AT&T Comments at 40-41; USTelecom Comments at 10; CWA Comments at 8; NASUCA Comments at 20; NY PSC Comments at 9. As stated above, we reject requests that the Commission convert the current notice-based network change disclosure process to a process in which an incumbent LEC must obtain Commission approval before implementing a proposed copper retirement. See *supra* note 66; *cf.* NASUCA Comments at 5; CWA Comments at 11 (“[I]t should not be assumed that the retirement will go into effect automatically . . .”).

²⁴⁸ See 47 C.F.R. § 51.329(c), effective February 12, 2015; *see also Amendment of the Commission’s Rules of Practice and Procedure; Electronic Filing of Domestic Section 214 Applications and Notices of Network Changes*, GN Docket No. 10-44, Final Rule, 80 Fed. Reg. 1588 (Jan. 13, 2015).

²⁴⁹ See FCC Consumer Help Center, <https://consumercomplaints.fcc.gov/hc/en-us>.

email address established specifically for that purpose.²⁵⁰ We find that no further action is needed at this time.

(iv) Notice to States, Tribal Governments, and the Department of Defense

69. In the *Notice*, the Commission proposed requiring incumbent LECs to send notices of proposed copper retirements to the public utility commission (PUC) and to the governor of the state in which the network change is proposed and to the Secretary of Defense, similar to the current requirement for such notice in connection with section 214 discontinuance applications.²⁵¹ We sought comment on whether to also require notice of planned network changes that do not involve copper retirement and whether to require notice to other governmental entities, such as the Federal Aviation Administration, Tribal governments, or municipalities.²⁵² We noted that the Commission is “not the only governmental authority with important responsibilities with respect to technology transitions” and “[i]n particular, States serve a vital function in safeguarding the values of the Network Compact.”²⁵³

70. After reviewing the record before us, we conclude that “reasonable public notice” in the context of copper retirements includes providing notice of the planned copper retirements directly to state authorities (the governor and the state PUC), the Department of Defense, and federally recognized Tribal Nations²⁵⁴ where the copper retirement will occur within their Tribal lands.²⁵⁵ We further conclude that this notice should occur contemporaneously with notice to interconnecting entities. Specifically, this notice must be provided no later than the same time as the incumbent LEC notifies the Commission (i.e., no later than the same time that it submits the notice that will trigger the Commission to issue a public notice that establishes a period of at least 180 days before retirement) unless there are no customers, in which case the notice must be provided at least 90 days before retirement. We find this time period warranted to ensure adequate notice to these entities so that they can discharge their responsibilities, and we find the 90-day exception warranted because governance issues are likely to be fewer where there are no customers. In light of the accelerated pace of copper retirements and the allegations in the record of

²⁵⁰ See Section 251 Wireline Network Changes, <http://www.fcc.gov/encyclopedia/section-251-wireline-network-changes>.

²⁵¹ *Notice*, 29 FCC Rcd at 15003, para. 79.

²⁵² *Id.* Public interest advocates, including various state PUCs, support the Commission’s proposal to require notice to state authorities and the Department of Defense. See, e.g., NASUCA Comments at 20; Mich. PSC at 5; Pa. PUC Comments at 14-15; Cal. PUC Comments at 21; MDTC Reply at 3; Pa. PUC Reply at 11.

²⁵³ *Notice*, 29 FCC Rcd at 15002, para. 79.

²⁵⁴ Throughout this document, “Tribal Nations” and “Tribal governments” include any federally recognized Indian tribe’s reservation, pueblo or colony, including former reservations in Oklahoma; Alaska Native regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688); Indian allotments; and Hawaiian Home Lands – areas held in trust for Native Hawaiians by the State of Hawaii, pursuant to the Hawaiian Homes Commission Act, 1920, Act July 9, 1921, 42 Stat. 108, *et seq.*, as amended. See, e.g., 47 C.F.R. § 54.400(e) (defining Tribal lands for the Lifeline program); see also *Connect America Fund; A National Broadband Plan for Our Future et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC 17663, n.197 (2011) (*USF/ICC Transformation Order*), *aff’d sub nom In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

²⁵⁵ See *infra* Appendix A, Final Rules, section 51.332(b)(4). The copper retirement notices containing the information required by the rule we adopt today and existing state notification obligations under section 214 will provide state authorities with significant information concerning technology transitions. We therefore decline to impose any of the additional state and local notification requirements proposed by Public Knowledge at this time. See Letter from Meredith Rose, Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 27, 2015) (“As companies develop their transition plans, they should be required to share information about the timeline, nature of the transition and possible backup power concerns with affected localities and local authorities, state governments, and state public utility commissions.”).

this and other proceedings,²⁵⁶ we conclude that the states should be fully informed of copper retirements occurring within their respective borders so that they can plan for necessary consumer outreach and education.²⁵⁷ State authorities are an important source of consumer outreach and education, and they need the information that can allow them to field the calls that will come when consumers receive copper retirement notices.²⁵⁸ As noted by the Pennsylvania PUC, “copper retirements under the existing rule apparently ha[ve] the potential to reduce wholesale, incumbent, or competitor access, thereby reducing retail customer choice. This has real consequences on the ground in the states.”²⁵⁹ Because of the impact of copper retirements at the State level, we believe it is important to address “concerns about technological change, competitive access, and universal service . . . with the principle of cooperative federalism.”²⁶⁰ The concern is no less on Tribal lands,²⁶¹ where state commissions may not have jurisdiction to regulate carriers or address consumer complaints, and we find no basis in the record for distinguishing between States and Tribal governments. And given the increased cybersecurity risks posed by IP-based networks,²⁶² the Department of Defense should be kept informed of copper retirements. The requirement we adopt today is consistent with the requirements associated with section 214 of the Act and section 63.71 of the Commission’s rules.²⁶³ We decline to adopt this same notice requirement for other

²⁵⁶ See Cal. PUC Comments at 10-11, 16-17 (describing allegations that Verizon has failed to maintain its copper facilities as an intentional strategy to migrate customers to non-regulated services); Mich. PSC Comments at 6-7 (describing state response to concerns over incumbent LECs pulling out of a service area and discontinuing landline service); NY PSC Comments at 7-8 (describing difficulties faced by consumers related to Verizon’s retirement of copper-based TDM networks in the aftermath of Superstorm Sandy); Pa. PUC Comments at 13-14 (describing how an incumbent LEC’s discontinuance of a legacy copper network impacted consumer access to voice-grade (64 Kbps) services); see also Letter from Public Knowledge et al., to Julie A. Veach, Chief, Wireline Competition Bureau, FCC, GN Docket No. 09-51 et al., at 2-3 (filed May 12, 2014) (describing complaints of phone carriers pushing customers off traditional phone networks in California, Maryland, New York, New Jersey, Illinois, and the District of Columbia).

²⁵⁷ See, e.g., IAC May 12, 2015 Recommendations at 4.

²⁵⁸ See Intergovernmental Advisory Committee to the Federal Communications Commission Advisory Recommendations No: 2015-8, GN Docket No. 13-5 et al., at 1 (dated June 25, 2015) (IAC June 25, 2015 Recommendations) (“With this information, local governments can be prepared for calls and emails regarding the transitions and can assist in education efforts, as required. Governments may need to prepare staff for such events or at the very least prepare briefing information for those fielding calls and emails from the public. This is, in some cases, a public safety matter for citizens that rely on certain forms of infrastructure for security and healthcare systems. Direct information about transitions from incumbent LECs will assist state, local and tribal governments with holistic infrastructure planning for our communities. For example, it is critical that adequate power sources be available for fiber networks. If local governments don’t know where the planned changes will occur, or where they already are occurring, we cannot assist in planning for a robust, resilient system.”).

²⁵⁹ Pa. PUC Comments at 13.

²⁶⁰ *Id.* at 15; see also Letter from James Bradford Ramsay, General Counsel, National Ass’n of Regulatory Utility Commissioners, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 30, 2015) (urging the Commission “to support a continued FCC-State partnership to protect consumers *and* competition” (italics in original)).

²⁶¹ See Appalshop Comments at 1 (“Over 31% of Native communities do not have access to basic telephone service, and over 10 million subscribers depend on the Lifeline Program to be able to afford it. The reality is that the gap in availability of telecommunications services limits technology transitions in rural areas.”).

²⁶² See discussion of cybersecurity risks posed by IP-based networks *infra* in Section IV.A.

²⁶³ Indeed, when the Commission adopted the requirement that carriers seeking to discontinue services notify state PUCs and the Department of Defense, it noted: “State commissions with notice will be better able to bring to our attention the effects of discontinuances upon customers who may be unable themselves to inform us that they lack substitute service, upon interexchange access providers, and upon competing carriers who may not receive notice of anti-competitive discontinuances. Accordingly, 47 C.F.R. § 63.71 will include the requirement that the applicant must submit a copy of its application to the public utility commission as well as to the Governor of the State and the

(continued...)

network change notifications at this time given a lack of sufficient support in the record or clear need on the part of the governmental or Tribal Nations.

71. No commenters in this proceeding have brought to our attention any concrete difficulties that incumbent LECs would experience due to compliance with this proposed requirement. And various states already require carriers to file notices of network change with their public utility commissions.²⁶⁴ Moreover, various state commission commenters support this requirement,²⁶⁵ undercutting incumbent LEC arguments that states will be flooded with notices they do not necessarily want.²⁶⁶

(v) Certificate of Service

72. In the *Notice*, we proposed requiring that incumbent LECs file along with their public notice a certification containing specified information, much of which was previously required by sections 51.329(a)(2) and 51.333(a) of our rules.²⁶⁷

73. After reviewing the record before us, we conclude that we should adopt the proposal, as modified below. In particular, we adopt a rule that requires an incumbent LEC to file with the Commission at least ninety (90) days before retirement is permissible a certificate of service, signed by an

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Secretary of Defense” *Implementation of Section 402(B)(2)(A) of the Telecommunications Act of 1996 et al.*, CC Docket No. 97-11 et al., Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11381, para. 32 (1999). Carriers previously had been required to provide this same notice under sections 1.764 and 63.90(d) of the Commission’s rules. *See id.* at 11381, para. 31.

²⁶⁴ *See, e.g.*, Cal. PUC Comments at 21 (“ILECs in California already are required to file concurrently with the Cal. PUC’s Communications Division a copy of the notice of network change regarding copper loops that they file with the FCC.”).

²⁶⁵ *See, e.g.*, Mich. PSC at 5; Pa. PUC Comments at 14-15; Cal. PUC Comments at 21; MDTC Reply at 3; Pa. PUC Reply at 11).

²⁶⁶ Commenters opposed to the proposed rules argue that requiring additional notice to affected states and the Department of Defense could “introduce new and unwarranted complexity into the process” since such agencies will already receive notice to the extent they are customers who will receive notice in the regular course, pursuant to the *Notice*’s other proposed notice requirements. Verizon Comments at 16-17; *see also* Corning Comments at 3; ITTA Comments at 16. And, they argue, as the pace of copper retirement accelerates, these agencies likely will be deluged with notices for which the incumbent LECs argue there is no corresponding benefit. *See, e.g.*, AT&T Comments at 40 n.101. We are not persuaded by these arguments. Various states already require carriers to file notices of network change with their public utility commissions. *See supra* note 264. *But see* ITTA Comments at 16 (asserting that the Commission should not adopt a rule requiring notice to state authorities because “[s]tates public service commissions have the ability to require some form of notice relating to copper retirements if they believe it is necessary”). And we are not convinced that a government authority’s receipt of notice of a copper retirement should depend on whether the authority is a customer of the carrier because: (1) not every copper retirement in a state will affect the state as a customer; and (2) the notice of copper retirement to the state as a customer will likely go to a different administrative office than a notice to the State as a governmental entity. *See* IAC June 25, 2015 Recommendations at 4 (“[T]he notice to state, local and tribal governments should be direct. It is unreasonable for communities to be expected to monitor the Daily Digest or carrier websites for information about transitions. Dedicating valuable staffing resources to patrol websites in the hopes of gleaning more information about planned changes is outside the reach of local governments on limited budgets.”). Nor are we convinced that carrier participation in forums such as the National Security Telecommunications Advisory Committee obviates the Department of Defense’s need for copper retirement notifications. *See* Corning Comments at 10 (“[P]roviders participate in a number of bodies that apprise [the Department of Defense] of any national security impacts from changes in the telecommunications infrastructure. . . . There is simply no need to duplicate these functions by requiring additional notice to States and the [Department of Defense].”) Rather, as explained above, these notifications will ensure that government authorities have timely and consistent access to information they need to perform their consumer protection and public safety responsibilities throughout the technology transitions.

²⁶⁷ *See* 47 C.F.R. §§ 51.329(a)(2) and 51.333(a).

officer of the company and complying with section 1.16 of the Commission's rules,²⁶⁸ that includes the following information:

- (1) A statement that identifies the proposed changes;
- (2) A statement that notice has been given in compliance with paragraph (b)(1) of this section;
- (3) A statement that the incumbent LEC timely served a copy of its notice filed pursuant to paragraph (b)(1) of this section upon each entity within the affected service area that directly interconnects with the incumbent LEC's network;
- (4) The name and address of each entity referred to in paragraph (d)(3) of this section upon which written notice was served;
- (5) A statement that the incumbent LEC timely notified and submitted a copy of its public notice to the public utility commission and to the Governor of the State in which the network change is proposed, to any federally recognized Tribal Nations with authority over the Tribal lands in which the network change is proposed, and to the Secretary of Defense in compliance with paragraph (b)(4) of this section;
- (6) If customer notice is required by paragraph (b)(3) of this section, a statement that the incumbent LEC timely served the customer notice required by paragraph (b)(3) of this section upon all retail customers to whom notice is required;
- (7) If a customer notice is required by paragraph (b)(3) of this section, a copy of the written notice to be provided to retail customers;
- (8) A statement that the incumbent LEC has complied with the notification requirements of section 68.110(b) or that the notification requirements of section 68.110(b) do not apply;
- (9) A statement that the incumbent LEC has complied with the good faith communication requirements of paragraph (g) of this section and that it will continue to do so until implementation of the planned copper retirement is complete; and
- (10) The docket number and NCD number assigned by the Commission to the incumbent LEC's notice.²⁶⁹

Requiring this information is reasonable and necessary to ensure compliance with our rules, will assist with enforcement if any inaccuracies were subsequently found,²⁷⁰ and is consistent with the current requirement applicable to short-term notices in section 51.333(a).²⁷¹ Monitoring compliance with the

²⁶⁸ See 47 C.F.R. § 1.16 (setting forth the requirements for unsworn declarations).

²⁶⁹ See *infra* Appendix A, Final Rules, new section 51.332(d).

²⁷⁰ See 47 C.F.R. § 1.17 (requiring the submission of truthful and accurate information to the Commission).

²⁷¹ See 47 C.F.R. § 51.333(a). Numerous commenters support this requirement. See, e.g., NASUCA Comments at 21; Public Knowledge et al. Comments at 34; CCA Comments at 13. Incumbent LEC commenters, however, believe such a requirement is unwarranted. See, e.g., AT&T Comments at 35. As previously noted, under the existing rules, notices of copper retirements must comply with the short-term notice provisions. See 47 C.F.R. § 51.333(b)(2). We require identification of the docket number and NCD number to facilitate our processing of the certification.

rules we adopt today would be difficult without incumbent LECs confirming for us that they have complied. And the consumer complaints brought to our attention by public interest commenters²⁷² as well as the concerns raised by various competitive providers²⁷³ highlight the need for the Commission to be able to monitor compliance with the requirements we adopt today. The at least ninety-day time period we adopt is appropriate because it is as prompt as possible after all possible notification duties have been completed. We decline to require multiple staggered certifications to minimize the regulatory burden on incumbent LECs. The Enforcement Bureau will investigate potential carrier violations of the rules we adopt today governing the copper retirement process and will pursue enforcement action when necessary.

74. We conclude that section 68.110(b)'s notice requirements and the customer notice requirements we adopt today are complementary.²⁷⁴ We note, however, that section 68.110(b)'s notice requirements will not always be triggered when public notice of a planned copper retirement is required under revised section 51.325. We therefore also conclude that requiring incumbent LECs to certify their compliance with section 68.110(b)'s notice requirements, when applicable, will ensure that incumbent LECs have evaluated the effect of any planned copper retirements on customers' terminal equipment. We are not persuaded by Cincinnati Bell that requiring incumbent LECs to certify that they have directly notified all interconnecting carriers "may be an impossible burden to meet."²⁷⁵ As discussed above, under the predecessor rules to those we adopt today, copper retirements have been subject to the "short term notice provisions" set forth in section 51.333(a); and under section 51.333(a), which applies "if an incumbent LEC wishes to provide less than six months' notice of planned network changes," the incumbent LEC already must certify that they have provided the public notice required by section 51.325(a) directly to interconnecting telephone exchange service providers.²⁷⁶ The accelerated pace of broadband deployment and technology transitions warrant the Commission's reevaluation of the role of network change disclosures in protecting core values.²⁷⁷ Moreover, we conclude that the certification requirement embodied in section 51.333(a), which we carry over to new section 51.332(d), provides important protections. It ensures that all affected parties receive the appropriate notification.²⁷⁸

(vi) Legal Authority

75. *Notice Requirements.* We conclude that we have authority pursuant to sections 201(b) and 251(c)(5) of the Act to adopt the proposed revisions to the network change disclosure rules regarding the types of information that must be contained in copper retirement notices.²⁷⁹ As noted above, section 251(c)(5) of the Act requires "reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as

²⁷² See *supra* para. 39.

²⁷³ See *supra* para. 10.

²⁷⁴ Section 68.110(b) requires that telecommunications providers give customers "adequate notice" of changes in network facilities if such changes will render CPE incompatible. 47 C.F.R. § 68.110(b). Certain commenters argue that the protections afforded by section 68.110(b)'s notice requirements, in conjunction with section 51.325's public notice requirements for network changes, afford sufficient protections. See, e.g., GVNW Comments at 15. Others argue for cross-referencing section 68.110(b)'s notice requirements in any revised rules we adopt. See CWA Comments at 9, 12.

²⁷⁵ Cincinnati Bell Comments at 13.

²⁷⁶ See *supra* para. 21. As previously noted, incumbent LECs in fact include such certificates of service when filing their copper retirement notices with the Commission. See, e.g., *supra* note 76.

²⁷⁷ See *Notice*, 29 FCC Rcd at 14993, para. 49.

²⁷⁸ 2006 *Biennial Review Staff Report*, WC Docket No. 06-157, 22 FCC Rcd 2802, 2832 (Wireline Comp. Bur. 2007).

²⁷⁹ See, e.g., Birch et al. Comments at 38-39.

of any other changes that would affect the interoperability of those facilities and networks.²⁸⁰ We conclude that this language in the Act affords the Commission broad discretion in determining the information an incumbent LEC should be required to provide to interconnecting carriers.²⁸¹ However, in implementing section 251(c)(5) and adopting the network change disclosure rules, the Commission in the *Second Local Competition Order* defined the phrase “information necessary for transmission and routing” as “any information in the incumbent LEC's possession that affects interconnectors' performance or ability to provide services.”²⁸² Noting that network change disclosures promote “open and vigorous competition contemplated by the 1996 Act, the Commission declined to restrict the types of information that must be disclosed and noted that “[t]imely disclosure of changes reduces the possibility that incumbent LECs could make network changes in a manner that inhibits competition.”²⁸³ The Commission thus noted that the information “must include *but not be limited to* references to technical specifications.”²⁸⁴ We thus reject arguments that the enhanced content requirements proposed in the *Notice* go beyond the type of information authorized by section 251(c)(5).²⁸⁵ We conclude that providing interconnecting entities with information regarding the effect of a planned copper retirement on rates, terms, or conditions will allow those entities to better plan their business. We further conclude that, contrary to AT&T's assertions,²⁸⁶ this is consistent with the Commission's determination in the *Second Local Competition Order* that the information to be provided in network change disclosures is not limited to information that will affect existing interconnection arrangements but rather should include “information concerning network changes that potentially could affect anticipated interconnection.”²⁸⁷ We also conclude that the additional information proposed in the *Notice* is necessary to ensure that the incumbent LECs' practices are just and reasonable under section 201(b) of the Act.²⁸⁸ Competitive

²⁸⁰ 47 U.S.C. § 251(c)(5).

²⁸¹ See, e.g., Windstream Reply at 40 (“Section 251(c)(5) requires ‘notice of changes in the information necessary for transmission and routing of services . . . as well as of any other changes that would affect the interoperability of those facilities and networks,’ but does not limit the Commission's discretion to specify the contents of such notice.”).

²⁸² See *Second Local Competition Order*, 11 FCC Rcd at 19469, 19472, paras. 163, 170 (emphasis added); see also 47 C.F.R. § 51.325(a)(1) (requiring an incumbent LEC to provide public notice of any change that “will affect a competing service provider's performance or ability to provide service”); Birch et al. Reply at 38.

²⁸³ *Second Local Competition Order*, 11 FCC Rcd at 19471, para. 171.

²⁸⁴ See *id.* at 19479, para. 188.

²⁸⁵ See, e.g., AT&T Comments at 35 (asserting that section 251(c)(5) does not give the Commission the authority to require incumbent LECs to include in their copper retirement notices information regarding changes in prices, terms, or conditions).

²⁸⁶ See AT&T Comments at 34 (arguing that the proposed expanded notice requirement will require incumbent LECs to “directly notify every provider that was interconnected with its network of that planned feeder replacement . . . whether or not any of those providers actually had any facilities implicated by the proposed retirement”).

²⁸⁷ 47 U.S.C. § 201(b); see also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (“The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252, added by the Telecommunications Act of 1996.”); TelePacific et al. Request to Refresh Record at 15-16; Birch et al. Comments at 38-39 (“The proposed requirements are also necessary to ensure that an incumbent LEC's practices are just and reasonable under Section 201(b) of the Act and not unjustly or unreasonably discriminatory under Section 202(a).”); Windstream Reply at 39-40.

²⁸⁸ 47 U.S.C. § 201(b); see also *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999) (“Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority would seem to extend to implementation of the local-competition provisions. . . . The FCC has rulemaking authority to carry out the ‘provisions of this Act,’ which include §§ 251 and 252, added by the Telecommunications Act of 1996.” (quoting 47 U.S.C. § 201(b))); TelePacific et al. Request to Refresh Record at 15-16; Birch et al. Comments at 38-39 (“The

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providers need information regarding changes to the rates, terms, and conditions that will result from a planned copper retirement in order to engage in appropriate business planning.²⁸⁹

76. The updated network change disclosure rules we adopt today are crucial to protecting the core values of the Act, specifically the promotion of competition and protection of consumers.²⁹⁰ We disagree with commenters that argue that requiring incumbent LECs to provide notice to retail customers goes beyond the authority of section 251(c)(5) to require that incumbent LECs provide “reasonable public notice.” We conclude that the phrase “reasonable public notice” requires the Commission to determine what notice must be provided and to whom it should be provided in order to serve the public interest.²⁹¹ We agree with public interest commenters that our actions here ensure that consumers have accurate and timely notice of network changes that could impact the functionality and interoperability of their devices or third-party services, the Commission is giving clarity to what is considered “reasonable public notice” of changes that affect the transmission, routing, and interoperability of services on the network.²⁹² We further conclude that “reasonable” notice to non-expert members of the public cannot strictly be limited to a bare description of the changes; instead, it should encompass the kind of clarifying information that we require here.

77. Finally, we reject arguments that section 706 of the 1996 Act counsels against the actions we take today.²⁹³ Section 706(a) is a grant of authority to “utilize, in a manner consistent with the public interest, convenience, and necessity . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”²⁹⁴ Additionally, if the Commission determines that “advanced telecommunications capability” is not being deployed in a “reasonable and timely fashion,” section 706(b) requires that the Commission “take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”²⁹⁵ Our actions are consistent with these provisions.²⁹⁶ Contrary to Cincinnati Bell’s assertion, it simply is not true that we are “forc[ing] [incumbent LECs] to preserve their copper networks.”²⁹⁷ In fact, we retain a notice-based process that provides a clear path to copper retirement. By promoting an environment in which all parties are more able to accept transitions away from copper, creating a more predictable retirement notification process, and retaining a notice-based process that does not erect additional

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proposed requirements are also necessary to ensure that an incumbent LEC’s practices are just and reasonable under Section 201(b) of the Act and not unjustly or unreasonably discriminatory under Section 202(a.); Windstream Reply at 39-40.

²⁸⁹ See, e.g., Birch et al. Reply at 38 (“[G]iven that competitive carriers cannot conduct the requisite business planning without information on the changes in the rates, terms, and conditions governing wholesale inputs caused by copper retirement, the Commission could find that refusal to disclose such information is an unjust or unreasonable practice under Section 201(b).”).

²⁹⁰ See *supra* para. 13.

²⁹¹ See Public Knowledge et al. Comments at 34.

²⁹² See *id.*; see also AARP Comments at 39.

²⁹³ See, e.g., AT&T Reply at 15-16; Cincinnati Bell Comments at 17.

²⁹⁴ 47 U.S.C. § 1302(a); see also *Verizon v. FCC*, 740 F.3d 623, 639-40 (D.C. Cir. 2014).

²⁹⁵ 47 U.S.C. § 1302(b); see also *Verizon*, 740 F.3d at 641; TelePacific et al. Request to Refresh Record at 2 (“Because broadband deployment is not reasonable and timely, Section 706(b) commands the Commission to ‘take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.’” (quoting 47 U.S.C. § 1302(b))).

²⁹⁶ See, e.g., Birch et al. Reply at 39; Birch et al. Comments at 34.

²⁹⁷ Cincinnati Bell Comments at 17.

regulatory barriers, the Commission acts to facilitate the deployment of advanced telecommunications services and remove potential barriers to infrastructure investment in a manner consistent with the public interest. We also promote competition by ensuring that interconnecting entities have the information that they need to continue to serve customers, and thus retain income needed for further investment, when copper facilities with which they interconnect are retired.

78. *Provision to Governmental and Tribal Entities.* We also conclude that section 251(c)(5)'s requirement that incumbent LECs provide "reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks" supports our decision to require notice to state authorities, Tribal governments, and the Department of Defense. State authorities and the Department of Defense already receive notice of service discontinuances, and this information provision will facilitate a consolidated understanding of technology transitions. These key public agencies are important recipients of such notice as guardians of the public interest. And given their extensive duties and limited resources, it would be unreasonable to expect them to have to constantly monitor the websites of numerous incumbent LECs as well as the Commission. We conclude that cooperating and coordinating with these key governmental authorities to ensure that consumers are protected and competition is preserved is also supported by section 201(b)'s broad grant of authority to prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act.²⁹⁸ We are persuaded that the minimal additional notice requirements that we adopt here will not reduce incentives for incumbents to continue to deploy fiber, and the consumer protection and public safety benefits outweigh the additional burden on incumbent LECs. We realize that section 63.71(a) of the Commission's rules does not require notice to Tribes in connection with a discontinuance application,²⁹⁹ and that it could be incongruous to require greater notice for copper retirement than for discontinuances. However, as noted above, we believe it is important to act cooperatively with state and Tribal authorities to address "concerns about technological change, competitive access, and universal service," and the concern is no less on Tribal lands, where state commissions may not have jurisdiction.³⁰⁰ We therefore include in the Further Notice below a request for comment on revising section 63.71(a) to include such a requirement.³⁰¹

b. Definition of "Copper Retirement"

79. Due to the current frequency and scope of copper network retirement, it is critical that industry participants and stakeholders clearly understand when our copper retirement notice process is triggered so that the momentum of prompt, responsible transitions is not abated. Therefore, it is necessary to clarify when a "copper retirement" occurs. We endeavor to catalyze further fiber deployment and find that eliminating this uncertainty removes one potential source of industry resistance or hesitation to retiring copper. Further, we find that providing additional clarity is critical for properly informing the public of network changes in accordance with section 251(c)(5) of the Act and also for maintaining the Commission's core values. Our actions build on the *Notice*, which requested comment on proposed revisions to the "retirement" definition, with particular focus on: (1) the types of copper facilities to be included within the concept of "retirement", and (2) the actions (or lack of action) constituting "retirement."³⁰²

²⁹⁸ 47 U.S.C. § 201(b); *see also* 47 U.S.C. § 154(i) ("The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.").

²⁹⁹ *See* 47 C.F.R. § 63.71(a).

³⁰⁰ *See supra* para. 70.

³⁰¹ *See infra* Section IV.C.

³⁰² *Notice*, 29 FCC Red at 14993-94, paras. 51-54.

80. For the reasons set forth below, we adopt the expanded definition proposed in the *Notice* and therefore define copper retirement to mean “removal or disabling of copper loops, subloops, or the feeder portion of such loops or subloops, or the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops.”³⁰³ We also define copper retirement to include *de facto* retirement, i.e., failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling. By providing additional clarity in our rules, we will minimize ongoing disputes and carrier uncertainty as to what is required as technology transitions occur in the marketplace.

81. Section 251(c)(5) of the Act imposes on incumbent LECs “[t]he duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.”³⁰⁴ Although our rules require this statutorily mandated notice in the event of “retirement” of copper facilities,³⁰⁵ we have not specified what constitutes “retirement,” and we have not revisited the issue of when copper retirement triggers a network change notification requirement in over a decade.³⁰⁶ Given the increasing pace and scope of retirements of copper facilities, we find the definition that we adopt necessary to ensure fulfillment of the goals of section 251(c)(5).

(i) Copper Facilities to Be Included

82. The current network change disclosure rules do not include the feeder portion of loops within the relevant provisions, but they do include “retirement of copper loops or copper subloops, and the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops.”³⁰⁷ In the *Notice*, the Commission sought comment on expanding “retirement” to include the feeder portion of the loop and also on whether other copper facilities should also be included.³⁰⁸ After considering the record received, we find that modifying our rule is appropriate in light of experience with our initial implementing rules and the current marketplace.³⁰⁹

83. We agree with the Pennsylvania Public Utility Commission that if the feeder portion is unavailable to competitive LECs, the practical difficulty of accessing the remaining portion of the loop

³⁰³ *Id.* at 15022, Appx. A, proposed new section 51.332(a).

³⁰⁴ 47 U.S.C. § 251(c)(5).

³⁰⁵ *See* 47 C.F.R. § 51.325(a)(4).

³⁰⁶ *See Triennial Review Order*, 18 FCC Rcd at 17142, para. 274.

³⁰⁷ *See, e.g.*, 47 C.F.R. § 51.333(b)(2); *id.*, § 51.325(a)(4).

³⁰⁸ *Notice*, 29 FCC Rcd at 14993-94, para. 51. Prior to the *Notice*, various parties requested a rulemaking to adopt rules encompassing the feeder portion of the loop, noting that if the feeder portion is unavailable for unbundled access, “the practical difficulty of obtaining access to the remaining portion of the loop forecloses competitive access to the customer.” BridgeCom Petition at 12; *see also* Letter from Joshua M. Bobeck, Counsel to TelePacific et al., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-188 et al., at 22 (filed Jan. 25, 2013).

³⁰⁹ The Commission received many comments regarding the expansion of copper facilities included within the retirement definition. Several commenters support including the feeder portion, noting the importance of that portion to gaining access to retail customers. *See* Birch et al. Comments at 34-36; Birch et al. Reply at 31; Cal. PUC Comments at 9; TelePacific Reply at 8-10; WorldNet Comments at 5; COMPTel Comments at 33-34; Pa. PUC Comments at 11; XO Comments at 10; CALTEL Comments at 5-6. Other commenters take no position on the matter. *See* CWA Comments at 7-8. Incumbent LECs are generally opposed to the Commission’s proposed revisions to the scope of copper facilities encompassed within the rules. While incumbent LECs refrained from offering specific comments regarding the feeder loop addition, their overall position is that there is “little need for new rules in this area” and that the proposed modifications do not provide “any identifiable benefit to consumers or competition.” *See* Cincinnati Bell Comments at 10, 11; AT&T Comments at 27, 40; Verizon Comments at 12.

for retail purposes is insurmountable.³¹⁰ In many cases, replacement of copper feeder can have the same harmful effects as removal or replacement of the home run loops and sub loops, which are explicitly covered under the current rules.³¹¹ Therefore, we disagree with the incumbent LECs' argument regarding the supposed lack of benefits to consumers and competition.³¹² Incumbent LECs should not be permitted to avoid the network change notification requirements simply because they are replacing one portion of the loop instead of another equally critical portion. We also agree with XO Communications that specifying in our rules that retirement of copper feeder is a "retirement" will avoid confusion in the marketplace among both incumbent and competitive carriers.³¹³ We therefore adopt our proposal that the feeder portion of the loop should be one of the copper facilities captured within the concept of retirement.

(ii) Defining "Retirement", "Removal" and "Disabling"

84. The existing network change notification rules do not define what actions constitute "retirement" and thus what actions trigger the notification duty under section 251(c)(5). To address this lack of a definition, we proposed defining the term "copper retirement" as "the removal or disabling of" covered copper facilities, i.e., "copper loops, subloops, or the feeder portion of such loops or subloops." For reasons discussed below, we conclude that it is appropriate to adopt a definition that defines retirement as the "removal or disabling" of copper facilities. We further define "disabling" to mean rendering the copper facilities inoperable (through acts of commission or omission). We limit the definition of "removal" to physical removal.

85. We find that the phrase "removing or disabling" is appropriate because it captures the typical activities by which incumbent LECs have transitioned away from copper networks.³¹⁴ Notably, no commenters argued against the use of the phrase "removal or disabling." Moreover, it is straightforward enough to indicate that providers should understand the type of activity that implicates the notification process.³¹⁵

86. We conclude that "disabling" should be further defined to include rendering the copper facilities inoperable.³¹⁶ We also agree with the California PUC that "disabling" should only refer to long term or permanent periods of time and that instances where facilities are temporarily inoperable due to a catastrophe or for repair should not constitute "disabling" under the new rule.³¹⁷ We do not intend for the retirement definition to encompass the downtime associated with scheduled upgrades and repairs. However, we caution that a sufficiently long disabling of facilities (or the functional equivalent thereof) with no end in sight, even if ostensibly temporary, may constitute retirement for which a carrier must undergo our network change notification process. Because each circumstance will require careful analysis of the particular facts at issue — including but not limited to the length of time in which the facilities have been unavailable, the announced plans of the incumbent LEC with respect to the facilities,

³¹⁰ Pa. PUC Comments at 11.

³¹¹ *Id.*; cf. TelePacific July 27, 2015 *Ex Parte* Letter at 1-2 (noting the consequences to end user customers of an incumbent LEC's retirement of copper feeder); see also 47 C.F.R. § 51.325(a)(4).

³¹² See Cincinnati Bell Comments at 10-12; AT&T Comments at 27, 40; Verizon Comments at 12.

³¹³ XO Reply at 5.

³¹⁴ Cf. COMPTel July 27, 2015 *Ex Parte* Letter at 2 (supporting inclusion of "disabling or removal of the loop or feeder" in the definition of copper retirement).

³¹⁵ Notice, 29 FCC Rcd at 14993, para. 50.

³¹⁶ See Birch et al. Comments at 34-36 (stating that "disabled" should mean that the copper facility cannot be used to provide service, either due to the provider's deliberate action or to the provider's failure to maintain the facility); XO Reply at 5 (same).

³¹⁷ Cal. PUC Comments at 9.

and the extent of unavailability — we decline to adopt any bright line time limits and instead clarify that we will resolve each issue on a case-by-case basis.

87. We also clarify that the term “disabling” does not, however, mean only affirmative acts by incumbent LECs. As discussed below, acts of omission, such as the failure to repair or maintain copper facilities, can also render those facilities inoperable. A sufficient and long-term level of neglect can therefore constitute retirement.

88. As for “removal,” we conclude it should be defined as the physical removal of copper.³¹⁸ Cincinnati Bell suggests that the Commission consider creating two categories for retirement — one for physical removal and one for non-physical removal.³¹⁹ It argued there are several reasons that incumbent LECs should have an option to retire copper in place without physically removing it, such as: the provision of structural support for fiber optic cables and the provision of line power (from the copper) to other equipment in the field.³²⁰ We agree with Cincinnati Bell that copper that remains physically deployed but no longer performs its vestigial telecommunications function may nonetheless retain utility, but we find it necessary for such facilities to go through the copper retirement notification process so that the public is notified that the facilities no longer function.³²¹ We conclude, however, there is no need for a non-physical definition of removal because if copper remains physically present but is no longer capable of providing telecommunications services (i.e., it is inoperable), it has been “disabled” and is retired within the meaning of our rules. Therefore, contrary to Public Knowledge’s suggestion,³²² it is unnecessary to have multiple categories of “removal” in the new rule.

(iii) *De Facto Retirement*

89. The *Notice* outlines numerous allegations that in some cases incumbent LECs have allowed copper networks to deteriorate to the extent that the networks are no longer reliable.³²³ In these circumstances, under our current rules, incumbent LECs have not been required to comply with the Commission’s existing copper retirement procedures.³²⁴ The *Notice* proposed revising our rules to require an incumbent LEC to undergo the network change notification process for a *de facto* retirement, defined as the failure to maintain copper that is the functional equivalent of removal or disabling.³²⁵

90. We find that the practice of deliberately allowing copper networks to deteriorate is harmful to competition, negatively impacting end users, and that *de facto* retirements should be covered in the copper retirement requirements. We therefore add to our definition of retirement 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.”³²⁶ We adopt this change to ensure incumbent LECs are aware that intentional neglect of copper facilities triggers their notification responsibilities, and to make such practices less likely to occur.³²⁷ We find that while States, localities, and Tribal Nations play a critical

³¹⁸ See Birch et al. Comments at 34-36 (supporting this approach); XO Reply at 5 (same).

³¹⁹ Cincinnati Bell Comments at 10-12.

³²⁰ *Id.*

³²¹ *See id.*

³²² Public Knowledge Comments at 30 (stating that limiting “removal” to physical removal is too stringent a standard and would not capture instances when the carrier willfully neglects the copper network). As discussed below, we define retirement to include *de facto* retirement.

³²³ *See Notice*, 29 FCC Rcd at 14979, 14994, paras. 19, 53.

³²⁴ *Id.*

³²⁵ *See id.* at 14994, para. 53.

³²⁶ *See infra* Appendix A, Final Rules, new section 51.332(a).

³²⁷ *Notice*, 29 FCC Rcd at 14971, para. 5.

monitoring and enforcement role for *de facto* retirement, the Commission also has an important enforcement role to play, particularly in situations where local entities no longer have the authority to act. We encourage consumers and others to file a complaint on our website if their service is poor due to copper facilities that are not being maintained adequately. To be clear, the Commission will not hesitate to take appropriate measures where a provider *de facto* retires copper facilities without first complying with our the copper retirement requirements we adopt today, including enforcement action. We anticipate that the threat of enforcement action will serve as a deterrent to *de facto* copper retirement, but if not, the Commission reserves the right to consider more specific remedies in cases where carriers allow copper facilities to deteriorate to the point that is the functional equivalent of removal or disabling of the copper facilities (such as, depending on the particular facts and the legal authorities triggered, repairing the copper facilities or making available replacement facilities).

91. We agree with competitive LECs,³²⁸ state PUCs,³²⁹ and consumer advocates³³⁰ that the copper retirement definition should be expanded to include *de facto* retirements resulting from a provider's intentional neglect.³³¹ Contrary to AT&T's suggestion that "there is no such thing as a *de facto* retirement,"³³² the record suggests that this is a significant issue. Several filings in the record detail a number of specific examples of negligence in Maryland, the District of Columbia, California, Illinois, and New York.³³³ And the Utilities Telecom Council points out the consequences of *de facto*

³²⁸ TelePacific Reply at 5; Full Service Network et al. Comments at 4.

³²⁹ Pa. PUC Comments at 11; *see also* Utilities Telecom Council Comments at 13.

³³⁰ NASUCA Comments at 6, 12, 13-15; Public Knowledge et al. Comments at 30-31; Ad Hoc Comments at 9-10; *see also* Letter from Access Humboldt et al., to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 25, 2015).

³³¹ In response to the *Notice*, CWA suggests eleven factors for the Commission to consider when identifying a *de facto* retirement during a complaint process. Letter from Debbie Goldman, Telecommunications Policy Director, CWA, to Marlene Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 5-6 (filed June 24, 2015) (CWA *Ex Parte* Letter) (suggesting that we consider factors such as "[r]etail [s]ervice [q]uality metrics," "[w]holesale [s]ervice [q]uality metrics," "[e]mployment information by function," and "[c]ustomer surveys"). We recognize that a wide range of information may be relevant to our evaluation, but while we gain experience with this issue we prefer to adopt a case-by-case approach rather than constrain the sources of information that we will consider.

³³² AT&T Reply at 17 (quoting GVNW Comments at 17); *see also* Verizon July 15, 2015 *Ex Parte* Letter at 3-4.

³³³ *See* CWA *Ex Parte* Letter at 4-5, Attachs. 3-4 (Attachment 3 lists 21 pages of public complaints from Verizon's home phone forum for the period May 2014 to June 2015); Letter from Public Knowledge et al., to Julie A. Veach, Chief, Wireline Competition Bureau, FCC, GN Docket No. 09-51 et al., at 2-3 (filed May 12, 2014) (Public Knowledge et al. May 12, 2014 Letter); CWA Comments at 22-33; Utilities Telecom Council Comments at 13; *cf.* AT&T Comments at 27; Verizon Comments at 12-13. *But see* Verizon July 15, 2015 *Ex Parte* Letter at 3-4 (disputing assertions that *de facto* copper retirement is a problem, stating that it is a "myth"); TCA Comments at 4 (asserting that there is no evidence that rural LECs have engaged in such behavior). Xchange Telecom expressly disputes Verizon's assertion that *de facto* retirement is a myth. *See* Letter from Eric J. Branfman, Counsel to Xchange Telecom LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1-2 (filed July 21, 2015) ("In Xchange's recent experience attempting to order copper loops from Verizon, *de facto* copper retirement is reality, not a myth. * * * Since July 2014, Verizon has canceled, changed or otherwise modified over 180 orders placed by Xchange because of lack of copper facilities in the New York City metro area. The five attached examples are but a few of many examples. Based on Xchange's experience, as part of its unilateral tech transition, Verizon is, without seeking FCC approval pursuant to Section 214 or otherwise, allowing its copper network in New York City to deteriorate to the point of unavailability in many instances, and in other instances Verizon has simply removed its copper network altogether."); *see also* Letter from Debbie Goldman, Telecommunications Policy Director, Communications Workers of America, to Marlene Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2-3 (filed July 27, 2015).

retirements.³³⁴ We do not, however, adopt WorldNet’s proposed broader definition of *de facto* retirement that would encompass inside wiring owned or controlled by the incumbent LEC.³³⁵ The record does not support adoption of such a broad approach, which would go beyond the scope of our copper retirement rules. Instead, we find that the scope of facilities to which the *de facto* retirement concept applies should be no broader than the underlying scope of facilities covered by our copper retirement rules.

92. We remind carriers that where they neglect copper facilities in a manner that constitutes *de facto* retirement, any resulting loss of service may constitute a discontinuance, reduction, or impairment of service for which a section 214(a) application is necessary. The copper retirement network change notification process and the discontinuance approval process remain fundamentally distinct because the former concerns changes in facilities and merely requires notice, while the latter concerns changes in services and requires Commission approval.³³⁶ However, in those instances where a *de facto* copper retirement also results in discontinuance, we expect carriers in such a situation to file both a notice and an application.³³⁷

(iv) Scope of New Rules

93. *Flexibility to address individual customer service concerns.* In recognizing the concept of “*de facto*” copper retirement and requiring notice of certain retirements to individual customers, it is not our intent to limit a carrier’s flexibility to respond to an individual customer’s service quality concerns by migrating a customer from its copper facilities in areas where a carrier has already deployed fiber-to-the-premises. Accordingly, the advance notice requirements will not apply in situations in which a carrier migrates an individual customer from its copper to its fiber network to resolve service issues raised to the carrier by the customer (e.g., complaints by the customer of a frequent “crackling” sound on the copper voice line or frequent outages in wet conditions), provided that the retirement does not result in a change in the nature of the services being provided to the affected customers.³³⁸ We contrast this customer-specific network migration (which will not trigger advance notice requirements or serve as *prima facie* evidence of *de facto* copper retirement) with migrations in which (i) the carrier requires customers in a given area to move from its copper to its fiber network as part of a planned network migration, in which case the notice process described above should be followed, or (ii) the carrier allows its copper network serving a broader geographical area (e.g., an entire neighborhood) to deteriorate in a manner that is the “functional equivalent of removal or disabling it” without first following the notice-based copper retirement process. In addition, we caution that this clarification is not a loophole and if we see evidence of abuse, we will reevaluate the issue and take action if appropriate.

94. The clarification we provide above provides carriers with sufficient flexibility to manage service calls by moving customers from a copper to a fiber network. We therefore do not believe it is necessary or appropriate to adopt the “safe harbors” from the copper retirement notice requirements we adopt today requested by Verizon — one “in which an incumbent LEC will not be considered to have

³³⁴ See Utilities Telecom Council July 29, 2015 *Ex Parte* Letter at 2 (“If carriers fail to maintain their copper circuits, utilities may experience poor performance, which could affect the reliability and security of utility infrastructure.”); *id.* at Attach. (article discussing impact on utilities of carriers’ failure to adequately maintain lines).

³³⁵ WorldNet Comments at 5.

³³⁶ We therefore disagree with assertions that the revised definition for copper retirement “begins to look like the service discontinuance process.” USTelecom Comments at 8-9.

³³⁷ By emphasizing section 214(a), we do not mean to suggest that it is our only source of authority to act with respect to carriers that fail to maintain copper facilities adequately. See *generally* Letter from Meredith Rose, Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1-2 (filed June 22, 2015) (Public Knowledge June 22 *Ex Parte* Letter) (asking for clarification that consumers can use the Commission’s complaint process to report *de facto* degradation problems).

³³⁸ See *infra* Appendix A, Final Rules, section 51.332(a).

engaged in *de facto* copper retirement in areas where it has deployed a fiber network and service is available to customers over fiber facilities,” and the other “in which an incumbent LEC that meets a statewide Network Trouble Reports Per Hundred Lines standard will not be found to have engaged in *de facto* retirement of its copper facilities.”³³⁹ Read literally, these safe harbors could permit immediate retirement regardless of the circumstances, e.g., there would be no need to notify customers even in the event of a planned retirement (as opposed to in response to an individual service complaint), and a carrier could allow its network serving many customers over a given area to deteriorate to the point of *de facto* retirement without first following the notice-based copper retirement process.³⁴⁰

95. The modest clarification addresses the underlying concern that carriers will be unable to transition customers to fiber when service issues arise, while still achieving the Commission’s pro-consumer goals. We understand TelePacific’s concerns regarding involuntary transitions from copper to fiber,³⁴¹ and the rules that we adopt strongly promote transparency regarding such transitions. However, we also recognize the need for carriers, when faced with exigent circumstances, to manage their networks and ensure that their customers do not have their service disrupted while their provider goes through the copper retirement network change disclosure process. Nor do we intend to subject carriers to liability for *de facto* retirement in situations where the issue is not widespread but instead the movement of a customer from a copper to a fiber network is the most effective and efficient means of addressing the customer’s service concerns. Limiting the exception in the manner that we adopt strikes an appropriate balance between the needs of the incumbent LECs and the needs of competitive LECs and retail customers.

96. *States, Localities, and Tribes.* We recognized in the *Notice* that States, localities, and Tribal Nations play a vital role in overseeing carriers’ service quality and network maintenance. Nevertheless, in light of the trend in which many states’ legislatures have elected to limit the scope of their PUCs’ traditional authority over telecommunications services³⁴² we requested comments on whether these local institutions remain able to perform key oversight functions.³⁴³ Many commenters indicate a

³³⁹ Letter from Maggie McCready, Vice President Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 28, 2015). Fiber to the Home Council seeks an even broader exception, asserting that there should not be a finding of *de facto* retirement “once a carrier announces its intention to deploy fiber to residential customer premises in a specific area . . . since the carrier has an incentive to install fiber promptly and any dispute about *de facto* retirements would only impose costs without any material benefit.” Letter from Thomas Cohen, Counsel for FTTH Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 24, 2015). We are not persuaded by this argument in light of recent news stories of incumbent LEC failures to follow through with announced intentions to deploy fiber. *See, e.g.*, Karl Bode, New York City Report Slams Verizon for Missing FiOS Goals (June 18, 2015), <http://www.dsireports.com/shownews/New-York-City-Report-Slams-Verizon-for-Missing-FiOS-Goals-134216>. In such instances, if the incumbent LEC follows the procedures set forth in the rules we adopt today, it would not subject itself to claims of *de facto* retirement.

³⁴⁰ In particular, we decline to adopt the first suggested safe harbor as written because it is so broad that it would eliminate any duty to educate consumers and inform carriers about transitions to fiber, undercutting a key goal of the copper retirement rules that we adopt. We also decline to adopt Verizon’s second suggested safe harbor because we find it to paint with too broad a brush. While we do not suggest that this is the intent of Verizon’s proposed safe harbor, meeting a statewide average troubles per line metric set by a state would allow a carrier to mask large concentrations of bad copper lines by averaging its relatively few troubles per line numbers for its fiber lines with its relatively higher troubles per line numbers for its copper lines, again undercutting the purposes of our actions today. Letter from Tamar E. Finn, Counsel for TelePacific, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 30, 2015) (TelePacific July 30, 2015 *Ex Parte* Letter) (“Grossly excessive trouble reports in one ‘community’ or location could be easily offset by a reasonable level of trouble reports elsewhere in the state.”).

³⁴¹ *Id.* at 1.

³⁴² *See* Public Knowledge et al. May 12, 2014 Letter at 2-3.

³⁴³ *Notice*, 29 FCC Red at 14994, para. 54.

strong belief that local institutions are fully capable of administering the requisite oversight—including that of copper network maintenance.³⁴⁴ Several states emphasize that they still have unique insights into their jurisdictions and require a free hand to operate.³⁴⁵ We agree that local authorities have an important and unique role to play. And contrary to Verizon’s claims, our actions do not encroach on traditional state jurisdiction regarding ongoing maintenance obligations.³⁴⁶ As stated in the *Notice*, we emphasize that we do not seek to revisit or alter the Commission’s decision in the *Triennial Review Order* to preserve state authority with respect to requirements for copper retirement.³⁴⁷ Furthermore, we agree that in addition to complaints directed to the Commission, complaints from retail and wholesale customers submitted to state regulatory agencies provide critical insight as to whether an incumbent LEC has failed to adequately maintain its copper networks.³⁴⁸

97. *Other Issues.* We decline to adopt CWA’s suggestion that we distinguish disabling copper for service upgrades versus service downgrades.³⁴⁹ Our copper retirement rules do not contain such a distinction and we decline to adopt one because the Commission and the public have an equal need to be informed about all copper retirements, regardless of the purpose. We also decline at this time to adopt Public Knowledge’s proposal that we establish a process for situations where a network is damaged after a natural disaster and a carrier decides to permanently replace that network with a new technology because such a clarification is unnecessary given existing requirements.³⁵⁰ The Act and our rules establish clear requirements for emergency and temporary discontinuances,³⁵¹ and the November 2014 declaratory ruling that we reaffirm today provides significant guidance regarding when an application is required when functionality is lost.³⁵² As the Commission noted when it granted Verizon’s request for a waiver of section 63.63’s requirements following Superstorm Sandy: “[T]he information required by the rule is critical to the Commission’s ability to ensure that customers of communications providers are minimally affected by discontinuance, reduction, or impairment of service due to conditions beyond a provider’s control.”³⁵³ Further, the discontinuance and network change notification requirements that we propose in the Further Notice and adopt today are responsive to this concern because they help to ensure that carriers will notify us and seek our approval in appropriate circumstances and meet the needs of end users, so we do not find it necessary to establish a separate process at this time.

³⁴⁴ See Pa. PUC Reply at 9; Cal. PUC Comments at 15; NY PSC Comments at 12; TCA Comments at 4; OPC Reply at 10; Pa. PUC Comments at 11, 14-15; Verizon Comments at 12; Verizon Reply at 5-6.

³⁴⁵ See Pa. PUC Reply at 9; Cal. PUC Comments at 15; NY PSC Comments at 12.

³⁴⁶ Cf. Verizon Comments at 12; Verizon Reply at 5-6.

³⁴⁷ See *Notice*, 29 FCC Rcd at 14994, para. 54; *Triennial Review Order*, 18 FCC Rcd at 17148, para. 284 (“[W]e stress that we are not preempting the ability of any state commission to evaluate an incumbent LEC’s retirement of its copper loops to ensure such retirement complies with any applicable state legal or regulatory requirements.”).

³⁴⁸ See NASUCA Comments at 14-15.

³⁴⁹ Cf. CWA Comments at 7.

³⁵⁰ See Public Knowledge et al. Comments at 31; see also Public Knowledge June 22 *Ex Parte* Letter at 1-2; Public Knowledge July 27, 2015 *Ex Parte* Letter at 1.

³⁵¹ See 47 U.S.C. § 214(a); 47 C.F.R. § 63.63; see also *Section 63.71 Application of Verizon New Jersey Inc. and Verizon New York Inc. for Authority to Discontinue Domestic Telecommunications Services*, WC Docket No. 13-149 & Comp. Pol. File No. 1112, Order, 28 FCC Rcd 13826, 13832, para. 15 (Wireline Comp. Bur. 2013) (*Verizon Sandy Waiver Order*).

³⁵² See *Notice*, 29 FCC Rcd at 15016-18, paras. 116-19.

³⁵³ *Verizon Sandy Waiver Order*, 28 FCC Rcd at 13832, para. 15.

c. Sale of Copper Facilities That Would Otherwise Be Retired

98. We continue to “believe that sale of copper facilities could be a win-win proposition that permits incumbent LECs to manage their networks as they see fit while ensuring that copper remains available as a vehicle for competition.”³⁵⁴ We are pleased that incumbent LECs such as AT&T and Cincinnati Bell have expressed willingness to consider selling copper facilities that they intend to retire.³⁵⁵ Although we recognize that there may be difficulties involved,³⁵⁶ we encourage other incumbent LECs to consider selling copper facilities that they intend to retire.

99. While the potential benefits of sales of to-be-retired copper facilities are clear, we are not persuaded based on the record before us that we should mandate the sale of copper that an incumbent LEC intends to retire and/or establish for ourselves a supervisory role in the sale process.³⁵⁷ First, we agree with a number of commenters that Commission oversight of sales could be intrusive, costly, potentially a barrier to technology transitions, and would tax limited Commission resources.³⁵⁸ Second, the record has not revealed sufficient demand by competitive LECs or others for retired copper to warrant addressing the challenging legal and policy issues that likely would be raised.³⁵⁹ Third, as noted above, there is reason to expect that there will be willing incumbent LEC sellers in at least some markets without the need for regulatory action. Finally, we note that some state regulators are already active in this area, which mitigates at least somewhat the need for further Commission action.³⁶⁰

100. We reject the argument that Commission intervention is necessary because incumbent LECs will refuse to sell facilities that they intend to retire to thwart competition or exercise market power

³⁵⁴ *Notice*, 29 FCC Rcd at 15005, para. 87.

³⁵⁵ See AT&T Comments at 41 (“AT&T, as part of its efforts to support the transition to an all-IP ecosystem, has put forward a proposal under which copper loops that are retired pursuant to the existing network modification rules would be made available for sale to interested competitive providers that wish to use those facilities to provide service to their end-user customers.”); Cincinnati Bell Comments at 19 (“[Cincinnati Bell] has no objection to offering retired assets, whether they be equipment or cable plant, for sale to any legitimate purchaser, should it be a salvage vendor, reseller or a CLEC. . . . Any reasonable company would not and should not ignore a reasonable bid for retired network assets . . .”).

³⁵⁶ See Verizon Comments at 17 (“Selling these facilities would be easier said than done, due to the intertwined way that copper and fiber facilities often are deployed and the required ongoing engagement from ILECs that might be necessary to make such a sale work.”).

³⁵⁷ See, e.g., Ad Hoc Comments at 12-13; NASUCA Comments at 21-22; WorldNet Comments at 10-15; see also Sprint Comments at 9 (“Sprint does not support a Commission mandate that the ILECs and other owners of copper networks be forced to operate them indefinitely; rather, the Commission should oversee an orderly process whereby competing carriers have an opportunity to purchase ILEC copper facilities rather than allowing the ILECs to allow them to decay until they are otherwise worthless.”); Mich. PSC Comments at 5-6 (“The MPSC also supports—with proper oversight—permitting the sale of [an] ILEC’s copper facilities as a vehicle for competition.”); ADTRAN Comments at 12 (“[T]he Commission should not attempt to dictate the prices or other terms and conditions of these sales.”).

³⁵⁸ See AT&T Comments at 41-42; CALTEL Comments at 8-9; Cincinnati Bell Comments at 19; TIA Comments at 6; Verizon Comments at 17.

³⁵⁹ But see WorldNet Comments at 10-15. See generally TIA Comments at 6 (“Given the existing difficulty for carriers in maintaining legacy networks that depend on obsolete equipment that is no longer being manufactured or supported, TIA is skeptical of the ability of new entrants to take over the operation of these copper networks that would otherwise be retired.”).

³⁶⁰ See Cal. PUC Comments at 21-22 (“[T]he CPUC adopted a process for CLECs to purchase or lease the copper lines upon ILEC retirement.”); NY PSC Comments at 11-12 (stating that “should the FCC decide [to regulate the sale of copper facilities], it should not supersede the NYPSC’s jurisdiction to review any such sale and approve or deny such transactions”).

in determining the price and terms of sale.³⁶¹ There is no evidence on the record before us that incumbent LECs have refused to sell facilities that they intend to retire.³⁶² Further, our action today to ensure reasonably comparable wholesale access to next-generation services pending completion of the special access proceeding mitigates the concern that incumbent LEC refusal to sell would foreclose competition on next generation technology in the near term.³⁶³ Given the lack of existing evidence that incumbent LECs have refused to sell to-be-retired copper facilities, the potential disruption that could be caused by Commission oversight, and the lack of clear proof of demand in the record, we do not think it necessary to impose any such oversight measures at this time. However, we note that if parties bring to our attention evidence of actual anticompetitive behavior or market failures in connection with the sale of copper, we may revisit this issue in the future.³⁶⁴ Finally, we are not convinced that we must act because “carriers were fully reimbursed for their investments” in copper facilities — even if true, this does not show that purchasers will be able to extract additional value.³⁶⁵

2. Updating and Clarifying Commission Section 214 Discontinuance Policy for the Technology Transitions

101. We further facilitate technology transitions by addressing the service discontinuance requirements set forth in section 214(a) of the Act. Section 214(a) mandates that the Commission must ensure that the public is not adversely affected when carriers discontinue, reduce, or impair services on which communities rely.³⁶⁶ Today, we act to ensure that transitions in the technologies used to provide service do not undercut the availability of competitively-provided services that benefit communities and enterprise customers of all sizes that serve those communities. Our actions encourage technology transitions that could otherwise be delayed if enterprise customers lose the option to make comparable purchases at comparable rates to those which are presently available, including through supply from competitive carriers. First, we clarify that consistent with our longstanding precedent, a carrier must seek our approval if its elimination of a wholesale service results in the discontinuance, reduction, or impairment of service to a community. This clarification will minimize further disputes and carrier uncertainty as to what section 214(a) requires as technology transitions continue in the marketplace, thereby facilitating the ability of carriers and consumers to successfully navigate this transition. Second, we require *on an interim basis* incumbent LECs that discontinue a TDM-based service to provide competitive carriers reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions during the pendency of the special access proceeding. Competition provided by competitive

³⁶¹ See, e.g., Ad Hoc Comments at 12-13 (“[I]f competitors can use the copper to provide competitive services, then the copper is de facto a valuable resource for the public, and in most cases, ratepayers will already have paid the full cost of these facilities. To allow ILECs to refuse to sell them to competitors would merely allow ILECs to waste these resources in order to thwart competition.”); NASUCA Comments at 13-14, 21-22.

³⁶² AT&T claims in its reply comments that there “is no evidence that market-based solutions will harm competition or consumers, and thus no basis for Commission regulation.” AT&T Reply at 26; see also Cincinnati Bell Comments at 19 (claiming that the sale of copper facilities is “already a fully functioning market driven process”); ITTA Comments at 13 (arguing that “there is no evidence that ILECs have refused to sell their retired copper or that they would not sell their copper infrastructure on reasonable terms and conditions in the future should marketplace demand exist.”). Several commenters assert that there is nothing prohibiting any prospective purchaser from inquiring about the sale of copper facilities that have been or are scheduled to be retired, and that such sales will occur to the extent that these facilities offer value to prospective purchasers. See Cincinnati Bell Comments at 19; AT&T Reply at 26.

³⁶³ See *infra* Section II.B.2.b.

³⁶⁴ See Sprint Comments at 9 (stating that “it is appropriate for the Commission to ensure that these facilities that were largely constructed under a monopoly rate of return structure, are put to appropriate use”).

³⁶⁵ NASUCA Comments at 22.

³⁶⁶ 47 U.S.C. § 214.

carriers that often rely on wholesale inputs offers the benefits of additional choice to an enormous number of small- and medium-sized businesses, schools, government entities, healthcare facilities, libraries, and other enterprise customers.³⁶⁷ We therefore take these actions to protect consumers, preserve the extent of existing competition, and facilitate technology transitions. These actions will benefit the public by ensuring that as technology transitions proceed, end users do not lose service and continue to have choices for communications services. We are not today protecting competitive carriers; rather, we act to preserve their contributions to the market, which can include lower prices, higher output, and increased innovation and quality.³⁶⁸

a. Scope of Section 214(a) Discontinuance Authority and Wholesale Services

102. *Overview and Background.* In this section, we provide guidance and clarification concerning the circumstances in which the statutory obligations of section 214(a) of the Act apply to a carrier's discontinuance of a service used as a wholesale input by one or more other carriers. Consistent with section 214(a) of the Act and our precedent, we clarify that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier's actions will discontinue, reduce, or impair service to end users, including a carrier-customer's retail end users.³⁶⁹ We also clarify that a carrier may discontinue a service used as a wholesale input so

³⁶⁷ See, e.g., Letter from Thomas Jones, Counsel, TDS Telecommunications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 et al., Declaration of James Butman at 8 (filed Mar. 26, 2015) (stating that "small businesses with 10 or fewer employees account for greater than 75 percent of the market for TDS CLEC"); see also *supra* note 24 (citing a chart based on data compiled by an independent market research firm estimating that competitive LECs accounted for 26% of non-residential customer expenditures on wireline communications during the second quarter of 2014); Letter from Thomas Jones, Counsel, Granite Telecommunications, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at Attach. (filed June 3, 2015) (stating that Granite serves 4,800 companies with 1.4 million business lines at 400,000 customer locations across all 50 states); Letter from Thomas Jones, Counsel, Granite Telecommunications, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at Attach. (filed May 29, 2015) (asserting that "[i]n 51% - 85% of our customer locations, the ILECs will be the only provider available to the small business market, if wholesale use of RBOC/ILEC network is not continued"); Letter from Jamie Belcore Saloom, Assistant Chief Counsel, SBA Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2-3 (filed June 23, 2015) (SBA Office of Advocacy *Ex Parte* Letter) (stating that "[c]ompetitive carriers offer services and products to small businesses that incumbent providers do not offer" and "[c]urrent data shows that competitive carriers provide nearly one-third of the wireline services consumed by small businesses," (citing Windstream Comments at 7 Fig. 2)); Windstream Comments at 4, 15 (stating that Windstream serves approximately 600,000 business customers in 48 States and that, "in the post-IP transition world, competitors still will need equivalent access to last-mile facilities and services to continue offering business services to millions of customers"); XO Comments at 5 stating that XO provides Ethernet over Copper (EoC) service in over 565 local serving offices and to approximately 953,000 buildings); Letter from Suzin Bartley, Executive Director, Children's Trust, to Thomas Wheeler, Chairman, FCC, GN Docket Nos. 13-5 and 12-353 (filed Oct. 31, 2014) ("We are a customer that uses a competitive carrier for our voice and data services. As a competitor in the Massachusetts market, our carrier is able to provide us with the individualized services and support, and the best overall value. It is critical to our nonprofit firm, and, presumably, to other nonprofits similar to us . . . that competitive carriers continue to provide us with a choice we otherwise might not have or might not be suitable to our needs.").

³⁶⁸ See *supra* notes 19-22 (providing comments from small- and medium-sized businesses, schools, healthcare facilities and government entities on the benefits of competition).

³⁶⁹ See, e.g., *BellSouth Telephone Companies Revisions to Tariff FCC No. 4*, Transmittal No. 435, Memorandum Opinion and Order, 7 FCC Rcd 6322, 6322-23, paras. 5-6 (1992) (*BellSouth Telephone*); *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Super Group Facilities*, Memorandum Opinion and Order, 74 FCC 2d 293, 296, para. 7 (1979) (*Western Union*); see also 47 C.F.R. § 63.62(b) (defining the types of discontinuance, reduction, or impairment of service requiring section 214 authorization to include the "severance of physical connection or the termination or suspension of the interchange of traffic with another carrier"). The Commission has previously equated "community, or part of a community" with the using public. See, e.g., *Western Union*, 74 FCC 2d at 296, para. 7.

long as it either (a) obtains Commission approval via the section 214 process, or (b) determines that there will be no discontinuance, reduction, or impairment of service to end users, including carrier-customers' end users. As we explain in detail below, under the statute and our precedent it is not enough for a carrier that intends to discontinue a service to look only at its own end user customers. Instead, the carrier must follow the process established by statute and precedent for obtaining approval if its action will discontinue, reduce, or impair service to a community, or part of a community — including service provided to the community by the discontinuing carrier's carrier-customer.³⁷⁰ Thus, we explain that in order to comply with its obligations, a carrier discontinuing service — whether that carrier is an incumbent or a competitive carrier — must carefully determine whether its actions will, in fact, discontinue, reduce, or impair service to end users.³⁷¹

103. We provide clarity and certainty for carriers seeking to transition technologies while continuing to protect the public in the manner mandated by Congress. We find that this clarification is necessary to fortify the Commission's ability to fulfill its critical statutory role in overseeing service discontinuances under section 214 of the Act, which requires carriers to obtain a certificate from the Commission "that neither the present nor future public convenience and necessity will be adversely affected" by the carrier's plan to discontinue service to a community or part of a community.³⁷² Section 214(a) and our implementing rules were designed to protect retail customers from the adverse impacts associated with discontinuances of service, and they ensure that service to communities will not be discontinued without advance notice to affected customers, opportunity to comment, and Commission authorization.³⁷³ Section 214(a) and our implementing rules ensure that the Commission has the information needed to determine whether the present or future public convenience and necessity will be adversely affected by the carrier's action.³⁷⁴ As the Commission has stated in a prior enforcement action related to the section 214 discontinuance process, "[u]nless the Commission has the ability to determine whether a discontinuance of service is in the public interest, it cannot protect customers from having essential services cut off without adequate warning, or ensure that these customers have other viable alternatives."³⁷⁵

104. Our actions will help to ensure that before service that benefits a community is discontinued, reduced, or impaired, the Commission is able to conduct a careful evaluation of whether that action is consistent with the public interest. Competitive LECs are concerned that they will lose the ability to access the last-mile facilities necessary to serve their customers if incumbent LECs discontinue TDM-based services when transitioning from TDM to IP-based services.³⁷⁶ Several commenters state that discontinuance of wholesale services used by competitive LECs will necessarily, or is likely to, result in a discontinuance of service to retail end users.³⁷⁷ We address these concerns in the context of section

³⁷⁰ 47 U.S.C. § 214(a); *see also* 47 C.F.R. § 63.62(b); *BellSouth Telephone*, 7 FCC Rcd at 6323, paras. 5-6; *Western Union*, 74 FCC 2d at 296, para. 7.

³⁷¹ *See id.*; 47 C.F.R. § 63.60 *et seq.*

³⁷² 47 U.S.C. § 214(a).

³⁷³ *See id.*; 47 C.F.R. § 63.60 *et seq.*; *see also Western Union*, 74 FCC 2d at 295-296, paras. 6-7.

³⁷⁴ *See* 47 U.S.C. § 214(a). Our rules are designed to ensure that customers are fully informed of any proposed change that will reduce or end service, ensure appropriate oversight by the Commission of such changes, and provide an orderly transition of service, as appropriate. *See* 47 C.F.R. § 63.60 *et seq.*

³⁷⁵ *Business Options, Inc.*, EB Docket No. 03-58, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6881, 6892, para. 29 (2003) (*Business Options*).

³⁷⁶ *See, e.g.*, Windstream Comments at 33; Birch et al. Comments at 2-4; Windstream April 28, 2014 *Ex Parte* Letter at 2-8.

³⁷⁷ *See, e.g.*, NASUCA Comments at 26-27 (stating that, "[i]f a CLEC service is disrupted, their customers suffer"); CCA Comments at 10-11 ("The discontinuance of wholesale service inevitably impacts end users, because a competitive LEC purchases wholesale service from an ILEC either to serve end users on its own, or to sell

(continued...)

214(a) and precedent by emphasizing that carriers must consider the impact of their actions on end user customers, including the end users of carrier-customers.

105. We reiterate that our intent is to fulfill our statutory duty to safeguard the public interest while also facilitating technology transitions and that “[t]o say that section 214 applies does not mean that section 214 approval will be withheld.”³⁷⁸ We also recognize that a carrier’s discontinuance, reduction, or impairment of a wholesale service may not always discontinue, reduce, or impair service to retail end users. Rather, we emphasize that a carrier must undertake a meaningful evaluation of the situation, as discussed in greater detail below.³⁷⁹

106. Our decision will ensure that the Commission is informed and able to fulfill its statutory duty with respect to discontinuances, reductions, or impairments of service used as a wholesale input, but it also ensures that carriers need not file an application where no such discontinuance, reduction, or impairment occurs.³⁸⁰ Thus, our action is not in tension with commenter assertions that retail services are not necessarily discontinued, reduced, or impaired by changes in wholesale service, and that there is little evidence to support a conclusion that retail services are discontinued, reduced, or impaired by such changes.³⁸¹ We do not prejudge whether and when a discontinuance occurs, and instead we simply reinforce that section 214 mandates that our approval process be followed when it does.

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connectivity to downstream service provider(s) that is then used to offer service to end users.”); COMPTTEL Comments at 6, 9 (asserting that “competitive carriers are generally dependent on the wholesale input services they obtain from the incumbent LEC to provide their retail services, so discontinuance of a wholesale input service necessarily impacts the retail end-user’s ability to get service . . . from the carrier-customer”); Windstream Comments at 33 (stating that “[w]ith respect to services used by a competitor to provision last-mile services to its retail end user, these will always affect the retail end user in the community”); *see also* Verizon Reply at 13 (stating that “[b]y definition, ILECs sell their wholesale services so that they can be resold to end user customers”). *But cf.* Verizon Reply at 13 (stating that “[t]here is no need to add new requirements or rebuttable presumptions regarding wholesale services to ensure Section 214 will apply”).

³⁷⁸ Notice, 29 FCC Rcd at 15018, para. 118.

³⁷⁹ *See infra* paras. 114-119.

³⁸⁰ In addition, section 214(a) states that no authorization is required “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.” 47 U.S.C. § 214(a).

³⁸¹ *See* CenturyLink Comments at 6-7 (asserting the need to “account for the ultra-competitive state of the market and the unprecedented number of alternatives available to customers, as well as for the ways in which customers treat different offerings as substitutes for one another”); Cincinnati Bell Comments at 20 (asserting that “[r]etail services are not necessarily affected by changes in wholesale service”); AT&T Comments at 2, 51-52 (stating that “given the prevalence of alternative local providers – including the incumbent local provider – it will rarely be true that discontinuance of a wholesale service will deprive a community of end users or any part thereof of adequate replacement or alternative services”). *But cf.* Letter from Tamar E. Finn, Counsel to TelePacific, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed Feb. 27, 2015) (stating that “its surveys of alternative fiber providers show there is no alternative to the ILEC for more than 80% of TelePacific’s business customer locations” and that “[w]hile TelePacific in most cases would prefer to use fiber and IP-based technologies to provide service, fiber is available to less than 20% of its customer locations”); Birch et al. Comments at 5 (asserting that “[b]etween 2003 and 2010, the Commission repeatedly found *de minimis* self-deployment by non-incumbents, and in 2005 and 2006, respectively, the Department of Justice and Government Accountability Office found that competitors had deployed their own facilities to only a small percentage of commercial buildings across the United States”). We note that we find AT&T’s assertion that discontinuance of service to competitive LECs’ customers would “rarely be true” to be in tension with its separate statement that it cannot be expected to know how its wholesale customers’ end users would be affected by a service discontinuance. *Compare* AT&T Comments at 51-52, *with* AT&T Reply at 43. We further address commenters’ arguments that replacement services may be available to carrier-customers such that service to retail end users may not be affected *infra* at para. 116.

107. Because our careful review of section 214(a) and precedent leads us to adopt the clarification articulated above, we find it unnecessary to adopt the rebuttable presumption proposed in the *Notice*.³⁸² We see no need to create a new legal mechanism with the potential to unnecessarily delay technology transitions when the clarification that we adopt is sufficient to ensure that we are able to fulfill our obligation under section 214(a) to protect the public, while continuing to facilitate these transitions.

108. *Precedent.* We take this action pursuant to section 214, the Commission's implementing rules, and precedent. As explained in detail below, our clarification of precedent to ensure that the public interest is protected and carriers have the clarity needed to facilitate technology transitions, particularly as discontinuances increase during these transitions, is consistent with and builds on our precedent. Section 214(a) states that "[n]o 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."³⁸³ By the plain terms of the statute, carriers must obtain Commission approval when their actions will discontinue, reduce, or impair service to a community or part of a community, not just when their actions will discontinue, reduce, or impair their own service to their own end users. The Commission has consistently held that carrier-to-carrier relationships *are* subject to section 214(a), and that prior Commission approval is required when a carrier seeks to discontinue service that another carrier uses to provide service to the community or part of the community if discontinuing, reducing, or impairing that service will discontinue, reduce, or impair service to the carrier-customer's retail customers.³⁸⁴

109. In *Western Union*, the Commission addressed the purpose of the section 214(a) notice and discontinuance requirements, finding that they "are directed at preventing a loss or impairment of a service offering to a community or part of a community without adequate public interest safeguards."³⁸⁵ Similarly, in that decision the Commission stated that "[i]n determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public."³⁸⁶ Our clarification is consistent with these statements precisely because they focus on impact on the using public and are directed to preventing a loss to the end-user community without adequate safeguards. Notably, *Western Union* also states that the Commission "consider[s] carrier-to-carrier interconnection relationships to come within the context of Section 214(a),"³⁸⁷ demonstrating that carrier relationships can be cognizable within the scope of section 214(a). The Commission found that "for Section 214(a) purposes, we must distinguish those situations in which a change in a carrier's service offerings to another carrier will result in an actual discontinuance, reduction or impairment to the latter carrier's customers as

³⁸² We proposed establishing a rebuttable presumption that "where a carrier seeks to discontinue, reduce, or impair a wholesale service, that action will discontinue, reduce, or impair service to a community or part of a community such that approval is necessary pursuant to section 214(a)." *Notice*, 29 FCC Rcd at 15010, para. 103. In the *Notice*, we proposed that this presumption would be rebutted where it could be shown that either: (i) discontinuance, reduction, or impairment of the wholesale service would not discontinue, reduce, or impair service to a community or part of a community; or (ii) discontinuance, reduction, or impairment of the wholesale service would not impair the adequacy or quality of service provided to end users by either the incumbent LEC or competitive LECs in the market. *See Notice*, 29 FCC Rcd at 15010, para. 103.

³⁸³ 47 U.S.C. § 214(a).

³⁸⁴ *See BellSouth Telephone*, 7 FCC Rcd at 6323 at paras. 5-6; *Western Union*, 74 FCC 2d at 296, para. 7; *see also* 47 C.F.R. § 63.62(b) (defining the types of discontinuance, reduction, or impairment of service requiring section 214 authorization to include the "severance of physical connection or the termination or suspension of the interchange of traffic with another carrier").

³⁸⁵ *Western Union*, 74 FCC 2d at 295, para. 6.

³⁸⁶ *Id.* at 296, para. 7.

³⁸⁷ *Id.*

opposed to a discontinuance, reduction or impairment of service to only the carrier itself.”³⁸⁸ Under the particular set of facts at issue in *Western Union*, the Commission found that the carrier-customer failed to show how its claims of increased costs and loss of operational flexibility as a result of the upstream carrier’s actions would result in a loss or impairment of service to the carrier-customer’s retail end users.³⁸⁹ This conclusion does not foreclose the possibility that the impact of a carrier’s actions on a carrier-customer’s ability to serve its end users *could* constitute discontinuance. To the contrary, it simply was a finding that the end user community simply had not undergone a discontinuance *under the facts of that case*. Consistent with *Western Union*, we recognize that a carrier’s actions can result in a discontinuance, reduction, or impairment of service to the end-user community via impact on a carrier-customer’s ability to serve that community, depending on the particular facts and circumstances at issue.

110. In *Lincoln County*, the Commission again considered the question of when a discontinuance under section 214(a) occurs.³⁹⁰ The Commission noted that “[h]ere we have one carrier attempting to invoke Section 214(a) against another carrier” and that “[t]he concern should be for the ultimate impact on the community served.”³⁹¹ The Commission further stated that “for Section 214(a) purposes, we must distinguish those situations in which changes . . . will result in an actual discontinuance, reduction or impairment to the latter carriers’ [i.e., carrier-customers’] customers as opposed to a discontinuance, reduction or impairment of interconnection to only the carrier itself,” and found that an alternate routing reconfiguration did not impair service to the community served by the carrier-customer.³⁹² Again, this holding shows that there was not a discontinuance under the particular facts of the case.³⁹³ The Commission’s decision in *Lincoln County* shows that “an actual discontinuance, reduction or impairment to the [carrier-customers’] customers” as a result of the upstream carrier’s actions *would* require a discontinuance application.³⁹⁴

111. In *Graphnet*, the Commission again addressed the issue of whether a carrier violated section 214(a) and stated that “in situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.”³⁹⁵ The Commission found that service to a community or part of a community “was not discontinued, reduced, or impaired *in this instance*” where domestic traffic was routed through Canada but no service disruption was noted.³⁹⁶ Thus, the Commission merely found that there was not a discontinuance based on the particular facts in that case, i.e., there was not a reduction or impairment of service to the using public.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 296-97, paras. 8-9.

³⁹⁰ See *Lincoln County Tel. Sys., Inc. v. Mountain States Tel. and Tel. Co.*, File No. TS 3-79, Memorandum Opinion and Order, 81 FCC 2d 328, 331-33, 334-35, paras. 11-14, 22 (1980) (*Lincoln County*).

³⁹¹ *Id.* at 332, para. 13.

³⁹² *Id.* at 332-33, 335, paras. 13-14, 22.

³⁹³ *Id.* at 335, para. 22 (“This alternate routing does not impair the service available to the public through interconnection with Lincoln County Telephone System [i.e., the carrier customer] under the meaning of Section 214.”).

³⁹⁴ *Id.* at 332, para. 13. As noted in para. 115 below, we maintain the distinction, highlighted in both *Western Union* and *Lincoln County*, between situations in which a discontinuance, reduction, or impairment of service will result in an actual discontinuance, reduction, or impairment to the carrier-customer’s retail end users and situations where the actions will discontinue, reduce, or impair service to only the carrier-customer itself. See *Western Union*, 74 FCC 2d at 296, para. 7; *Lincoln County*, 81 FCC 2d at 332, para. 13.

³⁹⁵ *Graphnet, Inc. v. AT&T Corp.*, File No. E-94-41, Memorandum Opinion and Order, 17 FCC Rcd 1131, 1140, para. 29 (2002) (*Graphnet*).

³⁹⁶ *Id.* (emphasis added).

112. Our clarification finds especially strong support in *BellSouth Telephone*.³⁹⁷ In that proceeding, the Commission specifically rejected BellSouth's argument that section 214 authorization is not required to discontinue certain service because it was only discontinuing service to its carrier-customers.³⁹⁸ The Commission again emphasized that "[i]f, for example, a discontinuance, reduction, or impairment of service to the carrier-customer ultimately discontinues service to an end user, the Commission has found that § 214(a) requires the Commission to authorize such a discontinuance."³⁹⁹ It also found that, under the facts at issue, a section 214(a) application and evaluation *was* necessary prior to service discontinuance to determine if the impairment of service to the carrier-customer's end users will adversely affect the present or future public convenience or necessity.⁴⁰⁰ The Commission further noted that it would evaluate BellSouth's arguments for approval and the impact of such discontinuance on end users in the proceeding on that application.⁴⁰¹

113. Therefore, we reject arguments that a carrier need not ever seek Commission approval for discontinuance of service to a carrier-customer.⁴⁰² As explained above, these arguments ignore the fact-specific nature of the conclusions in those proceedings, and they overlook *BellSouth Telephone*. We also find that our clarification is fully consistent with and strengthens the Commission's finding in these cases that it must distinguish between discontinuances, reductions, or impairments of service that will result in the discontinuance, reduction, or impairment of service to a community or part of a community and those that will not have such an impact on the using public.⁴⁰³ Discontinuance, reduction, or impairment of wholesale service is subject to section 214(a), and prior authorization is required when the actions will discontinue, reduce, or impair service to retail customers, including carrier-customers' retail end users.⁴⁰⁴ In such cases, a 214 application is necessary to determine if the impairment of service to the carrier-customer's end users will adversely affect the present or future public convenience or necessity.

114. *Required Evaluation.* We clarify that carriers must assess the impact of their actions on end user customers to prevent the discontinuance of service to a community without adequate public interest safeguards, including notice to affected customers and Commission consideration of the effect on the public convenience and necessity.⁴⁰⁵ Specifically, carriers must undertake a meaningful evaluation of the impact of actions that will discontinue, reduce, or impair services used as wholesale inputs and assess the impact of these actions on end user customers. This meaningful evaluation must include consultation directly with affected carrier-customers to evaluate the impact on those carrier-customers' end users. If their actions will discontinue service to any such end users, Commission approval is required. Commission approval is not required, however, for a planned discontinuance, reduction, or impairment of service: (i) when the action will not discontinue, reduce, or impair service to a community or part of a community; or (ii) for any installation, replacement, or other changes in plant, operation, or equipment,

³⁹⁷ See *BellSouth Telephone*, 7 FCC Rcd at 6322-23, paras. 5-6.

³⁹⁸ See *id.*

³⁹⁹ *Id.* at 6322-23, para. 5.

⁴⁰⁰ *Id.* at 6323, para. 6.

⁴⁰¹ *Id.* at 6322-23, paras. 5-6.

⁴⁰² See, e.g., CenturyLink Comments at 15 (stating that "decades of precedent hold[s] that discontinuance requirements do not apply to wholesale services").

⁴⁰³ See, e.g., AT&T Comments at 51.

⁴⁰⁴ See, e.g., *Western Union*, 74 FCC 2d at 296, para. 7; see also, e.g., 47 C.F.R. § 63.62(b) (requiring an application for the "severance of physical connection or the termination or suspension of the interchange of traffic with another carrier").

⁴⁰⁵ *Western Union*, 74 FCC 2d at 295, para. 6 (stating that "the notice and discontinuance requirements of Section 214(a) are directed at preventing a loss or impairment of a service offering to a community or part of a community without adequate public interest safeguards"); see also 47 U.S.C. 214(a).

other than new construction, which will not impair the adequacy or quality of service provided.⁴⁰⁶ Consistent with the text of section 214(a) and precedent, a carrier should not discontinue a service used as wholesale inputs until it is able to determine that there will be no discontinuance, reduction, or impairment of service to a community or part of a community of end users, including carrier-customers' end users, or until it has obtained Commission approval pursuant to section 214(a).

115. The framework articulated above maintains the distinction between discontinuances, reductions, and impairments that affect a community or part of a community (i.e., end users) and those that only affect carrier-customers.⁴⁰⁷ Thus, in undertaking this evaluation, the carrier's focus must be on impact to the using public. Our clarification therefore ensures that, consistent with the statute and precedent, a carrier *fully* evaluates whether there will be a discontinuance, reduction, or impairment of service to a community or part of a community, including a carrier-customer's retail end users.⁴⁰⁸ When the carrier can determine with reasonable certainty that there will be no such impact on the community or part of the community, Commission approval is not required and the carrier may proceed.

116. When assessing whether a carrier's actions will result in discontinuance, reduction, or impairment of service to a carrier-customer's retail end users, consideration of whether replacement wholesale services are available to the carrier-customer from other sources is warranted. If such replacement services are reasonably available to the carrier-customer, retail end users may not necessarily experience a discontinuance, reduction, or impairment of service. However, we caution that bare speculation will not be sufficient to establish the necessary evaluation has occurred, and the carrier must have some basis for concluding that such alternatives will not result in discontinuance, reduction, or impairment of service to the carrier-customer's end users.⁴⁰⁹ Moreover, the fact that there are other carriers in the market and other services are, or may be, available to a carrier-customers' end users does not eliminate a carrier's obligation to seek Commission approval and provide notice when its actions will discontinue, reduce, or impair service to retail customers.⁴¹⁰

⁴⁰⁶ 47 U.S.C. § 214(a).

⁴⁰⁷ See, e.g., *Western Union*, 74 FCC 2d at 296, para. 7 (stating that we must distinguish situations where a discontinuance will result in discontinuance to the carrier-customers' retail end users as opposed to discontinuance of service only to the carrier-customer itself); see also *Lincoln County*, 81 FCC 2d at 332, para. 13 (stating that "for Section 214(a) purposes, we must distinguish those situations in which changes in a carrier's reconfiguration of plant will result in an actual discontinuance, reduction or impairment to the latter carriers' customers as opposed to a discontinuance, reduction or impairment of interconnection to only the carrier itself"). The Commission will also continue to distinguish discontinuance of service that will affect service to retail customers from discontinuances that affect only the carrier-customer itself when considering applications for discontinuance of wholesale service and determining whether the discontinuance will adversely affect the public convenience and necessity.

⁴⁰⁸ See *Western Union*, 74 FCC 2d at 296, para. 7 (finding that "[i]n determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, i.e., the using public"); *Lincoln County*, 81 FCC 2d at 332, para. 13 (noting that where one carrier is attempting to invoke Section 214(a) against another carrier, "[i]he concern should be for the ultimate impact on the community served" (citing *Western Union*, 74 FCC 2d at 296)); *Graphnet*, 17 FCC Rcd at 1140, para. 29.

⁴⁰⁹ Some commenters assert that retail customers will not be affected because adequate replacement or alternative services will typically be available independent of the wholesale service being discontinued, reduced or impaired. See AT&T Comments at 52; Cincinnati Bell Comments at 20. AT&T also argues that competitive LECs can "purchase or provide for itself a substitute," for example by obtaining bare copper loops and utilizing their own electronics to provide service. AT&T Comments at 52. We caution that such unsupported, blanket assertions will not be sufficient to establish the necessary evaluation has occurred.

⁴¹⁰ Consistent with precedent, any discontinuance, reduction, or impairment of service to the using public must be approved by the Commission pursuant to section 214, and the Commission will consider whether there are adequate substitutes in the market; in such cases, the existence of alternative services "does not obviate the need for a section 214 finding." *Southwestern Bell*, 8 FCC Rcd at 2596, para. 30; see also *Implementation of Section 402(b)(2)(A) of* (continued...)

117. For example, many enterprise customers receive nationwide voice and other low-speed services from competitive LECs that depend upon wholesale voice inputs that combine local loops, switching, and transport.⁴¹¹ If such commercial wholesale platform services are discontinued, then this would constitute a discontinuance, reduction, or impairment to the enterprise end users if the competitive LEC carrier-customer cannot readily obtain a replacement input that would allow it to maintain its existing service without reduction or impairment. If, on the other hand, the competitive LEC could maintain its existing service through use of alternative inputs without material difficulty or costs that would necessitate discontinuance, reduction, or impairment as to its end users, then the incumbent LEC's action would not constitute a discontinuance for which an application is necessary to that set of end users. We recognize that rate increases alone do not trigger a section 214 application and that the issue of whether rates for a service are just and reasonable is distinct from the issue of whether a discontinuance requires Commission approval.⁴¹² However, we disagree with commenter assertions that this principle is in conflict with our decision here, which addresses a carrier's section 214 obligations only when: (1) the carrier ceases to provide service used by a carrier-customer as a wholesale input; (2) that discontinuance potentially adversely impacts a community; and (3) the carrier is not merely implementing a rate change for services that will remain available.⁴¹³ In these circumstances, prior Commission approval may be

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the Telecommunications Act of 1996 and Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, CC Docket No. 97-11 and AAD File No. 98-43, Report and Order and Second Memorandum Opinion and Order, 14 FCC Rcd 11364, 11380, para. 30 (1999) (stating that “[e]ven customers with competitive alternatives need fair notice and information to choose a substitute service”); *see also Business Options*, 18 FCC Rcd at 6892, para. 29 (stating that the Commission must be able to determine whether a discontinuance of service is in the public interest so that it can protect customers from having services terminated without adequate warning or ensure that customers have other viable alternatives); *BellSouth Telephone*, 7 FCC Rcd 6322, 6323 at paras. 5-6 (finding that Commission approval was required pursuant to section 214(a) and stating that the Commission would consider the impact of the discontinuance on end users and arguments in favor of discontinuance in the proceeding on that application); *Verizon Telephone Companies Section 63.71 Application to Discontinue Expanded Interconnection Service Through Physical Collocation*, WC Docket No. 02-237, Order, 18 FCC Rcd 22737, 22742, para. 8 (2003) (*Verizon Expanded Interconnection Order*) (stating that in evaluating discontinuance applications the Commission considers, among other factors, the need for the service in general and the existence, availability, and adequacy of alternatives).

⁴¹¹ *See* Granite Comments at 3-4 (“Granite provides these national customers with the ability to obtain service from a single supplier at their disparate retail locations nationwide. Granite’s customers find this to be a major benefit. These customers need the efficiency of a single source of supply at multiple locations. Because no single supplier has, or reasonably could have, facilities serving all of this type of customer’s locations, to meet the demand for such services, Granite obtains, through agreements with ILECs, a DS0 wholesale service, such as AT&T’s LWC, that is a combined package of an unbundled DS0 loop, local switching and shared transport.”); *see also* SBA Office of Advocacy *Ex Parte* Letter at 2 (stating that “[c]ompetitive carriers offer services and products to small businesses that incumbent providers do not offer”).

⁴¹² *See American Tel. and Tel. Co., Long Lines Department, Revisions to Tariff FCC Nos. 258 and 260 (Series 5000) – Termination of TelPak Service, Transmittal No. 12714*, Memorandum Opinion and Order, 64 FCC 2d 959, 965, para. 18 (1977) (holding that because AT&T was still offering “like” services, the elimination of a discount did not constitute a discontinuance) (*American Tel. and Tel. Co., Long Lines Department*), *aff’d sub nom. Aeronautical Radio*, 642 F.2d at 1233 (agreeing with the Commission’s decision that section 214 did not apply in that case because the carrier’s actions “constituted a tariff change rather than the discontinuance of a service” and only “eliminate[d] a rate discount, thereby effectuating a rate increase”).

⁴¹³ *See, e.g.,* AT&T Comments at 53 (arguing that “it may usually be the case that an incumbent’s decision to discontinue a given service to a wholesale carrier will raise that wholesale carrier’s costs of providing retail service, but both the Commission and the D.C. Circuit have held that such a ‘rate increase’ does ‘not in fact, discontinue, reduce, or impair any service at all’ and citing *Aeronautical Radio* and *American Tel. and Tel. Co., Long Lines Department* in support of these assertions); AT&T Reply at 46; Letter from Frank S. Simone, Vice President Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., Attach. at 4 (filed Jun. 16, 2015) (AT&T June 16, 2015 *Ex Parte* Letter). Other commenters also assert that rate increases that simply increase

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required if the increased cost to the carrier-customer due to the loss of a service input is such that it causes the carrier-customer to exit the market or materially and negatively change the services offered in the market such that there is a discontinuance, reduction, or impairment of service to end users. As the Commission has previously stated, “where the technical or financial impact on the carrier customer is such that it would lead to discontinuance or impairment of service to its customers, such considerations may establish that Section 214 authorization is required.”⁴¹⁴ Accordingly, we find that financial and technical factors affecting the carrier-customer may be relevant to determining the impact of a planned discontinuance on the retail end-user for purposes of deciding whether section 214(a) authorization is required. Of course, the ultimate test always will be the impact on the community or part of community affected, not merely on the carrier-customer.

118. We disagree with commenters who assert that incumbent LECs are not in a position to determine whether discontinuing wholesale service will discontinue service to competitive LEC retail customers or are otherwise unsure of the impact on the community when they seek to discontinue wholesale service.⁴¹⁵ Obtaining approval for a discontinuance is a clear statutory obligation. If a carrier is not able to determine whether discontinuing wholesale service will discontinue service to its carrier-customers’ retail end users, that carrier cannot be sure that it is not discontinuing service to a community

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_____ a customer-carrier’s costs do not discontinue, reduce, or impair service to a community or part of a community and are not a basis for requiring section 214 applications. *See, e.g.*, CenturyLink Reply at 19 (also arguing that *Western Union* supports the conclusion that “rate increases need not be addressed in the context of Section 214 – they can, like other common carrier rates and practices, be considered under other provisions of the Act”); CenturyLink Comments at 26 (stating that the “[s]ection 214(a) discontinuance requirements were never intended primarily to protect against higher rates resulting from a discontinuance”); Verizon Comments at 23 & n.50, 30-31 (noting that the Commission has consistently held that a change in rates “does not implicate a Section 214 discontinuance, and it should not change its approach now”).

⁴¹⁴ *See Southwestern Bell Telephone Company, US West Communications, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670 and W-P-D-364, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2599, para. 48 (1993) (*Southwestern Bell*), remanded on other grounds, *Southwestern Bell v. FCC*, 19 F.3d 1475 (D.C. Cir. 1994), vacated on other grounds, 23 FCC Rcd 569 (2008). The Commission further found that the decision in *Western Union* does not preclude “the use of technical or financial factors in determining the applicability of Section 214 to service withdrawals to carrier customers” and “taken in context with the entire discussion of this issue, it is clear that the intent in *Western Union* was merely to exclude technical or financial considerations when their impact was limited solely to the carrier customer, and did not affect the carrier customer’s ability to continue to provide service to its customers.” *Southwestern Bell*, 8 FCC Rcd at 2599, para. 48; *see also Western Union*, 74 FCC 2d at 296-97, paras. 8-9 (ultimately finding that the carrier-customer failed to show how its claims of increased costs and loss of operational flexibility as a result of the upstream carrier’s actions would result in a loss or impairment of service to the carrier-customer’s retail end users).

⁴¹⁵ *See, e.g.*, AT&T Reply at 43 (stating that “incumbent LECs cannot be expected to know how their wholesale customers’ end-users would be affected by any such discontinuance” and only competitive LECs hold this info); Cincinnati Bell Comments at 20 (asserting that “ILECs should not be placed in the position of having to prove that they are not affecting the availability of a service in a community in order to have to avoid making section 214 filings because ILECs do not necessarily know how their wholesale customers are using the services they purchase from the ILEC”). These commenters further argue that, if we were to adopt the rebuttable presumption proposed in the *Notice*, carriers will be required to seek Commission approval and file section 214 applications for the majority of wholesale discontinuances. AT&T Reply at 43 (arguing that “[b]ecause incumbent LECs cannot be expected to know how their wholesale customers’ end-users would be affected by any such discontinuance, and because the process for rebutting the presumption would be nearly as burdensome as a § 214 application, the likely result is that carriers would be effectively required to file § 214 applications for the majority of wholesale discontinuances”); Cincinnati Bell Comments at 20 (asserting that “[s]uch a requirement would in effect extend the section 214 process to all wholesale services, when it is only intended to apply to retail impacts”). As noted above, we do not adopt the rebuttable presumption or a “process for rebutting the presumption.” Rather, we are providing greater clarity regarding the scope of the existing duty under section 214.

or part of a community and it should not discontinue the wholesale service until it is able to make such a determination or until it has obtained Commission approval pursuant to section 214(a). Further, this argument overlooks avenues of information available to carriers about their carrier-customers' service. For example, Windstream states that "[w]hen Windstream orders channel terminations for last mile special access services, it must specify the end points of those services" and "[t]he ILEC has those end point locations."⁴¹⁶ Windstream further asserts that, "[w]ithin a wire center, the ILEC should be able to determine with a high degree of accuracy whether that location is its own switching office, the switching office or point of presence of a third party carrier, a carrier hotel, or an end user premises."⁴¹⁷ In an analogous context, CenturyLink states that it is able to notify affected telephone exchange service providers of proposed copper retirement by email, "with detailed information, including the Circuit ID, cable and pair numbers, and impacted addresses."⁴¹⁸

119. We emphasize that carriers must evaluate whether an application is required using all information available, including information obtained from carrier-customers. To be a thorough evaluation that would support a conclusion that no application is required, this must include at a minimum examining all information reasonably available to the carrier and reasonable efforts to ascertain the impact on retail end users. Nevertheless, we recognize that there may be times when a carrier, even after a thorough examination, is unable to determine the impact of its actions on a carrier-customer's end users. As a result, we clarify that when such information cannot be obtained from any sources, including carrier-customers, after an exercise of reasonable effort, the carrier may permissibly conclude that its actions do not constitute a discontinuance, reduction, or impairment of service to a community or part of a community with respect to end users of its carrier-customers and need not file an application for Commission approval on that basis. We anticipate that in an enforcement proceeding concerning whether a carrier discontinued, reduced, or impaired service without approval required by section 214(a) (whether in response to a complaint from a third party or on our own motion), such efforts would be at issue. Some commenters argue that the proposed rebuttable presumption would require applications in many cases,⁴¹⁹ but the statutory command of section 214(a) does not depend on the frequency with which it applies (and, in any event, more frequent submission of applications would tend to show the importance of the statute's application in order to ensure that communities are protected in the event of a discontinuance, reduction, or impairment of service). The Commission will continue to address such applications expeditiously.⁴²⁰

120. Our clarification is necessary to ensure that all carriers — including both incumbent LECs *and* competitive LECs — meet their section 214(a) obligations when a carrier discontinues a

⁴¹⁶ Letter from Malena F. Barzilai, Senior Government Affairs Counsel, Windstream Corporation, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 4 (filed June 12, 2015).

⁴¹⁷ *Id.*

⁴¹⁸ CenturyLink Comments at 31 and Exh. A.

⁴¹⁹ AT&T Reply at 43 (arguing that "[b]ecause incumbent LECs cannot be expected to know how their wholesale customers' end-users would be affected by any such discontinuance, and because the process for rebutting the presumption would be nearly as burdensome as a § 214 application, the likely result is that carriers would be effectively required to file § 214 applications for the majority of wholesale discontinuances"); Cincinnati Bell Comments at 20 (asserting that "[s]uch a requirement would in effect extend the section 214 process to all wholesale services, when it is only intended to apply to retail impacts"). As noted above, we do not adopt the rebuttable presumption or a "process for rebutting the presumption." Rather, we are providing greater clarity regarding the scope of the existing duty under section 214.

⁴²⁰ *See infra* para. 145 (discussing the streamlining of section 214 applications and noting that we grant the vast majority of applications within 31 or 60 days of release of the Commission's public notice of the application filing). We note that some commenters argue that this process should be modified, and we seek comment on proposed changes to this process in the attached Further Notice. *See infra* Section IV.B.

service,⁴²¹ the Commission is able to fulfill its obligations under section 214(a), and carriers have the clarity and certainty needed when carrying out technology transitions. Otherwise, the Commission may not be informed prior to carrier actions that discontinue, reduce, or impair service to retail end users due to the discontinuance, reduction, or impairment of a service taken by carrier-customers, actions that potentially adversely affect the present or future public convenience and necessity.⁴²² Further, carrier-customers and retail end users might not receive adequate notice or opportunity to object when such actions will discontinue service to carrier-customers' retail end users.⁴²³ Section 214 does not permit carriers to simply avoid filing applications for approval of discontinuances because they did not look into the impact of such discontinuances.⁴²⁴ Commenters' arguments that incumbent LECs do not necessarily know how the discontinuance of wholesale services will affect the retail customers of competitive LECs that rely on those services further fuel our concerns that, in the absence of clarifying and establishing a clearly articulated obligation on the part of carriers to assess the impact of their planned actions on carrier-customers' retail customers, carriers may mistakenly assume that their discontinuance, reduction, or impairment of wholesale services will not discontinue, reduce, or impair service to carrier-customers' retail customers, and carriers will discontinue those services without complying with section 214 and the Commission's rules and precedent.

121. We find AT&T's assertion that carrier-customers should bear the burden of persuasion that discontinuance of wholesale service will discontinue service to a community to be inconsistent with the language of section 214(a) and precedent, which put the burden on the carrier discontinuing service.⁴²⁵ Carriers must fully evaluate the impact of their actions and determine whether section 214 requires that they file applications prior to implementation. The clarification we provide acknowledges that carrier-customers have information that will likely be useful to carriers when determining the impact of their actions on carrier-customers' retail end users.⁴²⁶ Nevertheless, the statute clearly places the compliance obligation on the carrier to seek approval if necessary before it proceeds. Evaluating whether approval is required is a necessary predicate to fulfilling this obligation. And we have consistently held that carrier-to-carrier relationships are subject to section 214(a) and that carriers must obtain Commission approval to discontinue service used as a wholesale input by another carrier if its actions will discontinue, reduce, or

⁴²¹ Nothing stated herein excuses carrier-customers from the requirements of section 214(a). For instance, carrier-customers that discontinue, reduce, or impair service to retail end users as a result of the elimination of a wholesale input must also comply with section 214(a) of the Act and the Commission's implementing rules, even if the carrier that eliminates the wholesale input also is subject to the same requirements. This helps ensure that all affected retail end users are properly notified and that the Commission is able to fulfill the duties assigned by Congress.

⁴²² The Commission normally will authorize proposed discontinuances of service unless it is shown that customers or other end users would be unable to receive service or a reasonable substitute from another carrier, or that the public convenience and necessity would be otherwise adversely affected. *See* 47 C.F.R. § 63.71(a).

⁴²³ The clarification that we adopt today does not excuse carriers from any existing applicable legal duties, including obligations under the Act, and their tariffs and terms of service unless and until modified. We therefore recognize that carrier-customers may learn of changes to tariffed carrier services through updated tariff filings. However, we note that not all carrier services are tariffed services, and the notice period before the tariff change goes into effect is very short. AT&T also argues that the Commission need not address any rules regarding notice in this area because the network change notice rules, 47 C.F.R. §§ 51.325, 51.331, sufficiently cover notice matters and contracts and negotiation are sufficient to address early termination fees. AT&T Comments at 64-65. However, AT&T fails to recognize the distinction between parts 51 and 63 of our rules. For instance, there are circumstances when a carrier will file a section 214 application under Part 63, but not a copper retirement notification under Part 51.

⁴²⁴ 47 U.S.C. § 214(a). This requirement ensures that retail customers do not suffer lapses in service. Waiting until after a carrier discontinues service to determine if retail end users had adequate service substitutes could adversely affect those retail customers.

⁴²⁵ *See* AT&T Comments at 56; AT&T Reply at 44.

⁴²⁶ *See supra* paras. 114, 119.

impair service to a carrier-customers' retail end users.⁴²⁷ As a result, the obligation properly falls on the carrier seeking to discontinue service. That said, as noted above, we recognize a burden of production on carrier-customers when the discontinuing carrier seeks information relevant to making the determination of a discontinuance's impact on end-user customers (i.e., customers should respond to carriers if and when they are contacted).

122. Moreover, we disagree with AT&T's assertion that the Commission's decision in *Graphnet* supports a finding that the burden of persuasion should be placed on the competitive LECs.⁴²⁸ In *Graphnet*, the Commission considered a complaint that a carrier violated section 214(a) and failed to seek Commission approval prior to reducing or impairing service. Although the Commission determined that the carrier did not violate section 214(a) and that the carrier-customer failed to show that there would be a discontinuance, reduction, or impairment of service to the using public, the Commission did not conclude that carriers need not make such a determination regarding the effects of their actions when deciding whether Commission approval is necessary prior to implementing changes.⁴²⁹

123. That said, we do not agree with commenters that argue we should adopt more prescriptive requirements to ensure that carriers have met their obligations under section 214(a). For example, some commenters have proposed requirements that: the carrier submit documentation or a certification to the Commission identifying and providing the basis for its conclusion that the carrier has adequately rebutted the presumption, the carrier submit *prima facie* evidence that it has rebutted the presumption, and the carrier provide notice of such submissions and opportunity to comment.⁴³⁰ We are not adopting a rebuttable presumption, but rather clarifying the scope of an existing duty under section 214 that functionally leads to the same result: a considered decision as to the impact of an action on the community. Regardless, we find that it is not necessary for carriers to submit information to the Commission when it determines that a section 214 application is not needed because its actions do not discontinue, reduce, or impair service to the community or part of the community. We agree with other commenters that argue that the burdens of the suggested obligations would exceed the benefits and we do not want to unnecessarily delay technology transitions.⁴³¹ The Enforcement Bureau will investigate

⁴²⁷ See *supra* paras. 108-113.

⁴²⁸ AT&T Reply at 44 n.166.

⁴²⁹ *Graphnet*, 17 FCC Rcd at 1139-41, paras. 27, 29.

⁴³⁰ See, e.g., Wholesale DS-0 Coalition Comments at 10-11 (asserting that "the Commission should require ILECs to file *prima facie* evidence demonstrating any assertion that the ILEC has rebutted this presumption"); XO Comments at 23-24 (arguing that independent LECs "should be required to file a certificate with the Commission in advance of discontinuances," that the certificate "should lay out the grounds for its proposed rebuttal reflecting the specific circumstances," that such a certification "should be required at least 60 days in advance of the discontinuance and a copy should be served, and such service certified to, on all competitive LECs purchasing the wholesale service in the affected area."); Birch et al. Comments at 9 (asserting that we should "require an incumbent LEC to file a certification explaining why discontinuance, reduction, or impairment of the legacy wholesale service . . . does not result in a discontinuance, reduction, or impairment of the wholesale customers' downstream retail services to a community or part of a community" and that we should "(1) require an incumbent LEC to file the aforementioned certification with the agency and serve it on all wholesale customers of the service at issue at least six months before the proposed discontinuance; and (2) give interested parties an opportunity to comment on the certification"); Granite Comments at 3, 10-11 (arguing that we should require independent LECs "to file a *prima facie* case so that the public can scrutinize the ILEC's case" and that [t]he required *prima facie* case must include substantial evidence, not mere assertions").

⁴³¹ See, e.g., Verizon Reply at 13-14 (stating that these proposed procedural requirements would prolong the section 214 process and increase the associated burdens); AT&T Comments at 55-57 (asserting that requiring independent LECs to file certifications rebutting the presumption or to maintain a record of the facts and analysis they relied on to determine that the presumption was rebutted would be burdensome and inefficient and would eliminate whatever streamlining benefits an incumbent LEC would otherwise receive from not having to file a section 214 application); Cincinnati Bell Comments at 20 (arguing that the Commission would be going beyond its statutory authority to

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potential carrier violations of section 214(a) and our implementing rules and will pursue enforcement action when necessary.⁴³² End users and carrier-customers will have incentives to monitor compliance, and thus we anticipate that any issues of potential noncompliance are likely to be brought to our attention. We encourage carriers to ensure that they undertake the necessary evaluation in a systematic way, and to be diligent and thorough when making these determinations. If this approach proves unsuccessful, we will revisit this decision.

124. Our decision today will be less burdensome for carriers than the proposed rebuttable presumption and properly balances burdens with our goals of protecting the public interest and supporting technology transitions. AT&T argues that the proposed rebuttable presumption would impose enormous costs on incumbent LECs to the detriment of the public and will “tax the resources of both carriers and the Commission.”⁴³³ AT&T seems to base its arguments on the erroneous assumption that every discontinuance of wholesale service will require Commission approval.⁴³⁴ We have articulated above the circumstances in which an application is not required. AT&T further includes the procedural burden of a “case-by-case adjudication to rebut the presumption” in its burden assessment.⁴³⁵ We do not adopt the rebuttable presumption or procedures to rebut the presumption and, in fact, we allow the carrier to determine through its own internal processes whether Commission approval of its actions is necessary. We have also sought to minimize burdens and cost, and facilitate technology transitions, by not requiring carriers to submit documentation or certifications to the Commission regarding their determination that no section 214 filing is required.

125. *Other Issues.* We decline to adopt an irrebuttable presumption that discontinuance of a wholesale service necessarily results in a discontinuance, reduction, or impairment to end users.⁴³⁶ Such a presumption would require approval even where the carrier establishes that there is no actual discontinuance, reduction, or impairment to end users. We instead determine that our goals of protecting the public interest while facilitating technology transitions are best served by emphasizing and applying section 214 and precedent, with some additional clarification and direction for carriers. The approach we adopt today better distinguishes situations in which Commission scrutiny is warranted under section 214 because of potential negative impacts on retail users from situations in which scrutiny is not necessary because there is no similar risk of harm to end users. Further, our decision will be less burdensome for

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require regulatory filings to prove that something is not happening in order to justify not making a section 214 filing and that such a rule would create additional and unnecessary regulatory burdens).

⁴³² See Cincinnati Bell Comments at 20 (stating that “[i]f a carrier violates section 214 by affecting service without getting the required approval, that carrier acts at its own jeopardy”).

⁴³³ AT&T Comments at 55. AT&T also argues that this will cause unacceptable delay that will strand incumbents’ resources while the Commission rules on each application and will cause adverse effects on the deployment of next-generation services that will ultimately harm consumers. *See id.*

⁴³⁴ *See supra* notes 419, 423; *see also* ITTA July 23, 2015 *Ex Parte* Letter at 3 (stating that “[i]t is inappropriate for the Commission . . . to institute requirements that will make ILECs feel compelled to file a discontinuance application in every circumstance in an abundance of caution”).

⁴³⁵ AT&T Comments at 55-56.

⁴³⁶ *See* CCA Comments at 10-11 (asserting that “rather than a rebuttable presumption, the Commission should adopt a bright line rule that requires [independent LECs] to seek prior Commission approval in *any* situation involving the discontinuance of TDM-based wholesale service”); COMPTTEL Comments at 6, 8-9 (stating that “the Commission should find conclusively (i.e., it is not rebuttable) that the Section 214 process applies”); XO Comments at 23 (asserting that the need for section 214 approval should unequivocally be required when the wholesale service at issue is used to provide end users with last-mile access); Windstream Comments at 33 (arguing that the need for Section 214 approval should be conclusive, not rebuttable, for services used by a competitor to provision last-mile services to its retail end user and for other services, the Commission’s presumption that Section 214 approval is required should be rebuttable).

carriers than an irrebuttable presumption, as it does not presume that Commission approval is necessary in every case. We therefore prefer to take the more modest approach here that emanates from our longstanding precedent and the clear text of the statute.

126. We find unwarranted the concern that the proposed rebuttable presumption would provide an opportunity for incumbent LECs' competitors "to abuse the section 214 process to challenge changes in service that have little impact on end-user customers" and are inappropriate for adjudication under section 214.⁴³⁷ Under our decision, nothing in the Commission's section 214 process will materially change: carriers must assess the impact of their actions on the community and determine whether an application for Commission approval is required, the Commission will oversee the 214 process and ensure that any abuses are swiftly addressed, and the Commission will not consider objections to discontinuance applications that our precedent makes clear are not appropriate. The only change is that we have made clear that carriers cannot assume their actions have no impact on the community; they must undertake some internal process to determine whether a section 214 filing is required.

127. In addressing the proposed rebuttable presumption, some incumbent LECs expressed concern that costs and delays associated with waiting for Commission approval may impede their plans to move to IP-based services and assert that this process, and its accompanying costs and delays, are not in the public interest.⁴³⁸ However, concerns about delays are misplaced. First, as we make clear, all situations will not require a section 214 filing. Second, even if — after undertaking the required evaluation — a carrier concludes it is required to file a section 214 application, that application will be granted 31 or 60 days after the Commission releases public notice of the application filing, pursuant to our existing practices, unless the Commission removes the application from streamlined processing.⁴³⁹ Further, our actions are consistent with the statutorily mandated goal of ensuring that the public not suffer discontinued, reduced, or impaired service without Commission oversight.

128. We reject the suggestion that we should not "equate the robustness of retail competition with the availability of retail service" when interpreting section 214(a).⁴⁴⁰ This sets up a false dichotomy.⁴⁴¹ Section 214(a) is not written to apply only to loss of a monopoly market. In fact, section

⁴³⁷ AT&T Comments at 53.

⁴³⁸ See, e.g., *id.* at 65; AT&T Reply at 42; Verizon Comments at 26 (stating that "[w]hen carriers must continue offering services for longer than they intended during the resultant delay, their plans to transition to newer products and services can be impeded or put on hold while the Section 214 process plays out" and that carriers are "forced to expend resources supporting outdated services for an indefinite period"); CenturyLink Comments at 20 (asserting generally that the proposed discontinuance requirements would "hobble the IP transition, harming consumers"); CenturyLink Comments at 17 (arguing that there are many competitive alternatives, "consumers are 'discontinuing' service more rapidly than ILECs can transition their networks to accommodate users' demands for non-legacy services," and "expansive new discontinuance limitations would undermine rather than promote, consumer interests").

⁴³⁹ See 47 C.F.R. § 63.71(d) (stating that a domestic non-dominant carrier's discontinuance application will be granted automatically after 31 days and a domestic dominant carrier's discontinuance application granted automatically after 60 days, unless we notify the carrier during the interim period that its application will not be automatically granted). In the Further Notice accompanying this Order, we seek comment on whether to alter these time periods.

⁴⁴⁰ AT&T Comments at 55.

⁴⁴¹ AT&T attempts to suggest that the extent of retail competition is beyond the ambit of section 214, based on the fact that "Congress added the 'discontinue, reduce, or impair' portion of § 214(a) during World War II, when telephone service was still provided to communities on a monopoly basis." *Id.* at 54. But Congress enacted a forward-looking statute that does not tie the relevant evaluation to the specific market conditions of the monopoly era. The text of the statute simply states that "[n]o carrier shall discontinue, reduce, or impair service to a community" absent approval. 47 U.S.C. § 214(a)(3). The statute does not say, as it could, that "no carrier shall

(continued...)

214(a) is concerned with discontinuances, reductions, and impairments of any service to a community or part of a community. Moreover, we find that assessing the effect of discontinuances on competition in the market and its resulting effect on consumers further ensures that the Commission is able to make the determination required by section 214 regarding whether the public convenience and necessity will be adversely affected by the discontinuance.⁴⁴² Our actions here help to protect the public interest and minimize harm to consumers by preventing potentially abrupt discontinuances of service and preventing harm to competition that would ultimately harm the public. These actions also provide clarity and certainty to carriers during this time of technology transitions.

129. We reject ITTA's proposal that we "adopt a safe harbor to limit liability" pursuant to which "if the ILEC [or other carrier] determines in the process of conducting its evaluation that" its action "would not impact its own retail end users (assuming, hypothetically, that it had retail end users that would be implicated), then no discontinuance application would be required."⁴⁴³ Adopting such a safe harbor would be tantamount to reversing the clarification that we adopt because it would foreclose a carrier's duty to consider the full impact of its discontinuance of service on the community of end users and improperly permit it to consider only the slice of the community that it serves directly.

130. We decline to adopt the suggestions of commenters to make other modifications to the section 214 process to benefit competitive LECs at this time. Thus, we do not interpret the statutory phrase "community, or part of a community" to include platform providers and other competitive LECs, in addition to retail customers, as suggested by some commenters.⁴⁴⁴ Such an interpretation would be inconsistent with precedent, and we decline to do so at this time. We continue to believe that our touchstone under section 214(a) is the ultimate impact on the community served. Competitive LECs play an important role in providing (at least some of) the benefits of competition in enterprise services to many communities, but within the framework of section 214(a) ensuring that competitive LECs remain able to compete is a means to ensure that our communications landscape serves the public, rather than an end in itself.

(Continued from previous page) _____

discontinue, reduce, or impair *the only service available* to a community." Moreover, the availability of substitutes is explicitly a part of our evaluation of whether an application should be granted. *See infra* Section IV.A. (discussing this factor in our evaluation).

⁴⁴² *See, e.g.*, Full Service Network et al. Comments at 6 (stating that the rebuttable "presumption would be invaluable in maintaining the full spectrum of available service offerings for retail customers during this transition period"); Full Service Network et al. Reply at 9 (stating that "[g]iven the importance of competition from CLECs relying on wholesale alternatives, the Commission was justified in adopting its rebuttable presumption"); NASUCA Reply at 22 ("A service discontinuance that harms wholesale competition harms the community that was served by the competitors."); Birch et al. Comments at 8-10 (asserting that "granting incumbent LECs a right to unilaterally discontinue wholesale services gives the incumbents the power to raise rivals' costs and harm competition" and that "[u]nchecked exercise of this power would result in higher business broadband prices and slower, less efficient technology transitions"); *see also* CCA Comments at 2, 7 (emphasizing the need to ensure that incumbent LECs "do not use the deployment of IP networks and services as a means to stymie competition"); Full Service Network et al. Reply at 3-4 (agreeing with and emphasizing the Commission's "determination to protect 'competition where it exists today, so that the mere change of a network facility or discontinuance of a legacy service does not deprive small and medium-sized business, schools, libraries, and other enterprises of the ability to choose the kind of innovative services that best suit their needs'" (quoting *Notice*, 29 FCC Rcd at 14969, para. 2)). *But cf.* AT&T Reply at 49 (stating that "even if the Commission may give some consideration to competition under the public convenience standard of § 214, it may not use the statute to protect the business interests of particular competitors who fail to innovate and invest"); CenturyLink Comments at 20 (stating that "the requirements contemplated by the [*Notice*] would render ILECs' offerings far more expensive than their competitors', placing a heavy thumb on the economic scale and effectively *reducing* competition").

⁴⁴³ ITTA July 23, 2015 *Ex Parte* Letter at 2.

⁴⁴⁴ *See, e.g.*, COMPTEL Comments at 6-8; Birch et al. Reply at 20-22; CCA Comments at 10-11; Full Service Network et al. Comments at 5; Full Service Network et al. Reply at 7.

b. Preserving the Benefits of Competition by Maintaining Reasonably Comparable Wholesale Access to Last-Mile Services

131. Adoption of an interim rule to ensure continued access to necessary wholesale inputs will facilitate continued availability of existing competing options, reduce disputes, and provide the clarity and certainty that all carriers need to accelerate their transition to all-IP infrastructure while the Commission grapples with longer-term questions. At the same time, adoption of a flexible, balanced framework will facilitate prompt transitions by incumbent LECs. Our ultimate goal is to ensure that both incumbent and competitive LECs are able to transition to IP as promptly and effectively as possible. The central issue underlying the arguments of all stakeholders on this issue is whether incumbent LECs are subject to substantial competition in the provision of the packet-based services that will replace the services being discontinued and therefore have every incentive to price competitively to retain the wholesale business. Whether and where such competitive alternatives exist sufficient to constrain rates, terms, and conditions to just and reasonable levels is strongly disputed and the subject of complex analysis we currently are conducting in the special access proceeding.⁴⁴⁵ By the interim rule that we adopt today, which will remain in place only until the special access proceeding is resolved,⁴⁴⁶ we are establishing a balanced, flexible principle that will facilitate the ability of carriers and customers alike to navigate the transition successfully and ensure that small- and medium-sized business, schools, libraries, and other enterprise customers continue to enjoy the benefits of competition.

132. Accordingly and for the reasons discussed below, we adopt an interim rule that incumbent LECs that seek section 214 authority prior to the resolution of the special access proceeding to transition to all-IP by discontinuing, reducing, or impairing a TDM-based special access or commercial wholesale platform service (as specified further herein) that is currently used as a wholesale input by competitive carriers must as a condition to obtaining discontinuance authority provide competitive carriers reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions.⁴⁴⁷ The interim condition to which incumbent LECs must commit to obtain discontinuance authority will remain in place only for a limited time — specifically, the Commission will have adopted and implemented the rules and policies that end the reasonably comparable wholesale access interim rule when: (1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective.⁴⁴⁸ As explained below, the reasonably comparable wholesale access condition that we adopt applies to two categories of service: (1) special access services at DS1 speed and above; and (2) commercial wholesale platform services such as AT&T's

⁴⁴⁵ See generally *Data Collection Order*, 27 FCC Rcd at 16341, para. 57 (examining “where the data and our analysis demonstrate that competition is not sufficient to discipline the marketplace”).

⁴⁴⁶ See *infra* para. 132 (identifying specifically when the interim rule will terminate).

⁴⁴⁷ Although section 214 applies to all carriers, the reasonably comparable wholesale access condition apply only to the services specified herein.

⁴⁴⁸ See *infra* para. 140. The Commission's special access proceeding involves a comprehensive evaluation of the correct policies for the long-run concerning access to a key form of competitive inputs and technology change — special access. Special access is the non-switched dedicated transmission of voice and data traffic between two points. See *Access Charge Reform et al.*, CC Docket No. 96-262 et al., Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14226, para. 7 (1999) (*Pricing Flexibility Order*) (defining “special access services” as services that “encompass all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an interexchange carrier's (IXC) point of presence, where an IXC connects its network with the local exchange carrier's (LEC) network, or between two discrete end user locations”). The Commission's *Pricing Flexibility Order* relaxed much of this traditional price regulation for incumbent LECs in competitive areas; however, the factors used to determine the level of competition an incumbent LEC faces in a given area are the topic of much debate and will be a main focus of the special access proceedings.

Local Service Complete and Verizon’s Wholesale Advantage.⁴⁴⁹ As detailed below, we evaluate whether an incumbent LEC provides reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions based on the totality of the circumstances, and our evaluation takes into account five of the specific factors for which we sought comment in the *Notice*.⁴⁵⁰ The reasonably comparable wholesale access requirement is a *condition* to a grant of a discontinuance application imposed under our authority pursuant to section 214(c) of the Act, as further explained below.⁴⁵¹ When an incumbent carrier files an application for approval to discontinue, reduce, or impair a TDM-based service, the Commission will evaluate whether approval should be granted according to the longstanding criteria by which it evaluates such applications.⁴⁵² Thus, the reasonably comparable wholesale access interim rule applies as an interim condition in addition to and separate from the multifactor evaluation of whether to grant the application. If the Commission grants approval, then by interim rule the incumbent LEC will be subject to the reasonably comparable wholesale access requirement as a condition on the grant of authority pursuant to section 214(c) of the Act. To ensure clarity for this interim rule and to assist with compliance and enforceability, we codify the reasonably comparable wholesale access condition in a new subsection to section 63.71 of our rules.⁴⁵³

133. The Commission received many comments on maintaining wholesale access. Competitive LECs, industry and consumer advocacy organizations, several state commissions and other government entities, businesses, schools, and healthcare facilities support the Commission’s tentative conclusion to require incumbent LECs that seek section 214 authority to provide competitive carriers wholesale access on equivalent rates, terms, and conditions.⁴⁵⁴ These parties also generally support the

⁴⁴⁹ References to wholesale inputs with respect to the reasonably comparable wholesale access condition, unless stated otherwise, applies to these two categories of services.

⁴⁵⁰ See *Notice*, 29 FCC Rcd at 15013-14, para. 111.

⁴⁵¹ 47 U.S.C. § 214(c) (“The Commission shall have power to issue such certificate . . . and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require”); see also *infra* paras. 153-157.

⁴⁵² See *infra* para. 145, note 497 (describing the criteria by which the Commission evaluates discontinuance applications). The Further Notice proposes articulating specific factors by which the Commission will evaluate one of the factors within its multifactor test in the context of certain technology transitions. See *infra* Section IV.A.

⁴⁵³ See NASUCA Comments at 26 (“This should not be an ILEC-by-ILEC commitment; it should be a Commission rule that applies to all those planning to discontinue, reduce or impair legacy services.”). Compliance with the reasonably comparable wholesale condition does not excuse an incumbent LEC’s obligation to comply with other applicable law, including applicable provisions of the Act.

⁴⁵⁴ See XO Comments at 23 (“XO submits that the need for section 214 approval should unequivocally be required when the wholesale service at issue [is] used to provide end users with last-mile access.”); Birch et al. Comments at 5-8 (listing several reasons the Commission “should adopt this proposed ‘Equivalent Wholesale Access’ requirement for discontinued incumbent LEC DSn special access services.”); Full Service et al. Comments at 6; Wholesale DS-0 Coalition Comments at 5 (noting its strong support for the Commission’s proposal); CCA Comments at 8-9; NASUCA Comments at 25-26; COMPTTEL Comments at 16; Granite Comments at 11; Public Knowledge Comments at 16; Ad Hoc Comments at 17; Utilities Telecom Council Comments at 12; NY PSC Comments at 12; Pa. PUC Comments at 16; Mich. PSC Comments at 9; Edison Electric Institute Comments at 8; BT Americas Reply at 3-4; *supra* notes 19-22 (providing comments from enterprise customers); see also Letter from James Belcore Saloom, Assistant Chief Counsel, SBA Office of Advocacy, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al. at 2 (filed June 23, 2015) (“To prevent incumbents from raising barriers to competition when modernizing their networks, the FCC should also adopt its proposal to require incumbent providers to offer equivalent wholesale rates, terms, and services to competitive providers when it grants such applications. This is particularly important given that the FCC is still evaluating whether current pricing, terms and conditions for special access are reasonable.”); Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (July 27, 2015) (“[T]here are close to 300 letters in the docket from end-user customers asking the Commission to preserve competitive choice. They are a diverse representation of education centers, health care providers, school districts, fire fighters, financial institutions, and ‘mom & pop’ companies.”).

principles proposed by Windstream as an appropriate method to evaluate whether incumbent LECs satisfy the equivalency requirement for wholesale access. Some parties support the Windstream principles with modifications, as discussed below.⁴⁵⁵ Many incumbent LECs, ITTA, Corning, and USTelecom and other industry groups oppose the Commission's tentative conclusion and adoption of specific factors to define "equivalent wholesale access."⁴⁵⁶ Incumbent LEC commenters argue there is sufficient competition in the wholesale access marketplace that such use of the section 214 discontinuance process is unnecessary and will stifle the technology transitions and harm innovation.⁴⁵⁷

134. We recognize the importance of preserving opportunities to continue to provide the competition that competitive LECs have brought to the enterprise market.⁴⁵⁸ Competitive LECs are the primary source of competition for wireline communications services purchased by enterprise customers, including government, healthcare, schools, and libraries.⁴⁵⁹ COMPTTEL explains that Ethernet over Copper (EoC) services built using DS1s and DS3s as wholesale inputs allow small and medium-sized

⁴⁵⁵ See Ad Hoc Comments at 17; CCA Comments at 9; Wholesale DS-0 Coalition Comments at 6 (stating the Commission should adopt the Windstream principles with minor modifications); XO Comments at 26; Birch (supporting the Windstream principles with additional criteria); COMPTTEL Comments at 21; Granite Comments at 12-13 (recommending adoption of the Windstream principles with some refinements); Sprint Comments at 3; Public Knowledge Comments at 16; NASUCA Comments at 25; Full Service Networks et al. Comments at 8; Letter from Karen Reidy, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) (COMPTTEL July 29, 2015 *Ex Parte* Letter at 1 ("[T]he factors identified in the record by competitors will allow for both incumbents and competitors to better plan for the discontinuance process.")).

⁴⁵⁶ See generally Corning Comments at 11-12; see also AT&T Comments at 57-64; AT&T Reply at 47-51; Verizon Comments at 22-27; Verizon Reply at 15-19; ITTA Comments at 9-13.

⁴⁵⁷ USTelecom argues that the FCC could establish a presumption that incumbent LECs are no longer dominant in most or all voice markets nationwide because competitive LECs and cable providers control over 45 percent of the market for business voice services, attempting to draw a parallel with the FCC's finding that there is effective competition for cable companies in the market for multichannel video programming (MVPD) services because the direct broadband satellite (DBS) providers have captured 34 percent of MVPD subscribers. See Letter from Diane Griffin Holland, Vice President Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 3 (filed June 24, 2015). However, we find USTelecom's comparison to be inapposite because, despite the relatively similar degrees of market share, the DBS providers do not rely on incumbent cable operators to provide their products to customers whereas competitive LECs rely on the networks and services of incumbent LECs. Compare Notice, 29 FCC Rcd at 14972 para. 6, with Amendment to the Commission's Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act, MB Docket No. 15-23, Report and Order, FCC 15-62, paras. 8-9 (rel. June 3, 2015) (*Effective Competition Order*). In addition, "effective competition" for cable systems is a term of art established in the Communications Act via specific tests, and such tests do not apply in the context of competition between incumbent LECs and competitive LECs. See *Effective Competition Order* at para. 1 n.1.

⁴⁵⁸ See Notice, 29 FCC Rcd at 14969, para. 2; see also supra notes 19-22 (listing letters from various businesses asking the Commission to preserve their competitive options and pricing).

⁴⁵⁹ See Windstream Comments at 5; see also *id.* at 6-7 (providing comparisons of non-residential expenditures on wireline communications); Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, WC Docket No. 05-25 at 1 & Attach. at 1 (filed June 24, 2015) (USTelecom June 24, 2015 *Ex Parte* Letter) (stating that competitive LECs and cable operators control over 45 percent of business lines). We note that according to the Commission's most recent Local Telephone Competition Report, competitive LECs using leased copper and fiber facilities provide substantially more business lines than cable operators. See Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of December 31, 2013* at 9, Fig. 10 (Oct. 2014) (showing that the number of non-incumbent LEC retail switched access lines using fiber and copper loops is 19.8 million lines and using coaxial cable is 1.5 million lines); see also supra note 24 (citing statement from Windstream comparing the second quarter 2014 non-residential expenditures on wireline communications on services provided by competitive LECs (26%) all non-LECs combined (16%)).

businesses to realize many of the same efficiencies of Ethernet technology that previously only were available to larger enterprise customers.⁴⁶⁰ Moreover, XO states that it currently provides EoC from over 565 local serving offices and to approximately 953,000 buildings.⁴⁶¹ The continued existence of these competitive options enhances the ability of enterprise customers to choose the most cost-effective option for their business or organization.

135. The record contains compelling comments alleging that competitive LECs will be unable to serve their retail customers at competitive rates, terms, and conditions without reasonable access to incumbent LEC last-mile inputs. As such, their end-user customers could potentially face higher communications costs and less competitive choice. We seek to avoid the situation where a competitive LEC may irrevocably lose business as a result of the technology transitions and loss of wholesale inputs even though such wholesale inputs may ultimately be made available as a result of the special access proceeding. Although some commenters disagree, competitive LECs maintain they are still dependent on incumbent LEC last-mile inputs to serve small- and medium-sized customers.⁴⁶² In particular, competitive LECs, which often serve their customers pursuant to long-term contracts, question whether they may continue to serve these customers if the wholesale input prices that they relied on when negotiating their end-user contracts materially increase when incumbent LECs discontinue their legacy services, such as DS1 and DS3 special access services, and replace them with packet-based services at different rates, terms, and conditions.⁴⁶³ Competitive LECs assert that in the majority of cases there are no alternative sources for the necessary wholesale inputs, and the incumbent LEC rates for proposed replacement services are unreasonably high.⁴⁶⁴ As Windstream notes, a replacement of a DS1 service

⁴⁶⁰ COMPTTEL Reply at 6; *see also, e.g.*, Birch et al. Comments at 1-2; TelePacific Reply at 1-4.

⁴⁶¹ *See* XO Comments at 5 n.8 (comparing its deployment in 2009 when it offered EoC in fewer than 350 local serving offices).

⁴⁶² *See* Windstream Comments at 2 (“For its small and medium-sized business customers, Windstream’s competitive operations typically must rely on the incumbent’s existing infrastructure in the last mile”); BT Americas Reply at 2 (“[L]ast mile access in the US is still controlled by US incumbents regardless of whether the access is TDM or Ethernet-based.”); Birch et al. Comments at 5 (“[C]ompetitive carriers continue to rely on incumbent LEC TDM-based DS1 and DS3 special access services to serve a large number of customer locations across the country. And in most of those locations, there are no viable alternatives to purchasing these legacy wholesale inputs from the incumbent LEC.”). *But see* AT&T Comments at 49 (arguing that competitive LECs “are not truly complaining that they will be unable to continue providing [their] services – only that it may (allegedly) cost them more to do so”); Cincinnati Bell Comments at 20 (“The same service may be available as a retail offering independent of the wholesale version of the service, so there is no basis for presuming that there will be any effect on service to a community or part of a community.”).

⁴⁶³ Notice, 29 FCC Rcd at 15011-12, para. 107; *see also* Windstream April 28, 2014 *Ex Parte* Letter at 7; Windstream Comments at 22-23 (stating that competitors must make multi-year contractual commitments to retail business customers in the absence of commensurate commercial assurances from wholesale providers).

⁴⁶⁴ *See supra* para. 10, notes 35, 36, 458; *infra* para. 137, note 470; Letter from John T. Nakahata, Counsel, Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 5 (filed July 20, 2015) (Windstream July 20, 2015 *Ex Parte* Letter) (stating that “ILECs have insurmountable advantages in serving the vast majority of business locations because, as a legacy of their historical monopolies, they already possess facilities into every building, and they have the overwhelming majority of customers over which to amortize the costs of deploying fiber”); *id.* at 6 (stating that “a recent Current Analysis report shows that Level 3 has approximately 30,000 lit buildings, and XO has approximately 4,000, a miniscule fraction of the approximately 20 million business buildings in the United States” (citing Brian Washburn, U.S. WAN Services Update: A Look at Access Fiber, SDN, NFV, APIs and Automation, Current Analysis at 2-3 (Jan. 22, 2015))); GeoResults Q3/2014 GeoAnalytic Report); *id.* at 7-8 (“In 2013 ILECs and their affiliates made up nearly 82 percent of the local wholesale transport market, which includes last-mile connectivity for wireless cell towers, commercial building connections, and data center and aggregation points. AT&T, Verizon, and CenturyLink alone hold 70 percent of this market.” (citing ATLANTIC-ACM, U.S. Telecom Wired and Wireless Sizing and Share Report (Sept. 2014))). Windstream has submitted a CostQuest study that it states “demonstrates that ILECs continue to enjoy a dramatic
(continued...) ”

with a 2 Mbps Ethernet service in Kings Point, Florida would result in an 800 percent input price increase to Windstream.⁴⁶⁵ This type of rate increase, far beyond the bounds of reasonable comparability, may result in certain geographic areas or certain classes of customers, including enterprise consumers, government, healthcare, schools, and libraries facing fewer competitive options and potentially higher rates — ultimately harming the public that these institutions and enterprises serve.⁴⁶⁶

136. We conclude that in the absence of any interim protection, competition from competitive LECs could be irrevocably lost depending on the answers to key factual questions that we are not yet able to answer. To the extent the wholesale prices of replacement packet-based services are unreasonably high, competitive LECs may be unable to modify the terms of their long-term retail contracts to recover the increased cost of the wholesale inputs without losing customers or losing revenue and potentially exiting the market, to the detriment of its customers and the public they serve. Moreover, in offering new contracts to customers, competitive LECs could in these circumstances be forced to raise their prices, so a switch to packet-based services could weaken the constraint competitive LECs place on incumbent LEC market power. These results would delay the positive effects of the technology transitions on competition and the economy. Thus, without our interim reasonably comparable wholesale access rule, the prices competitive LECs must pay for wholesale inputs could substantially increase, thereby substantially increasing the costs to their customers. We want to ensure that technology transitions continue to positively affect competition to the benefit of end-user retail customers and the economy at large. Therefore, we conclude we should limit potential temporary disruptions by requiring that wholesale inputs continue to be offered on reasonably comparable rates, terms, and conditions until the Commission develops longer-term policies for such services after a full analysis of the special access market.

137. The reasonably comparable wholesale access interim rule will ensure existing competition is not diminished by bridging the gap until the Commission's special access proceeding is

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advantage over CLECs in the average cost per building of new last-mile fiber deployment” and that “[t]hus, competition for most business service customer locations likely will continue to depend on CLECs’ being able to lease ILEC last-mile inputs so that they can connect their CLEC fiber backbone facilities to individual customer locations.” Letter from John T. Nakahata, Counsel, Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed June 8, 2015). *But see* Letter from Patrick S. Brogan, Vice President, Industry Analysis, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (July 30, 2015) (USTelecom July 30, 2015 *Ex Parte* Letter) (“We ask that the Commission not draw conclusions regarding the feasibility of competitive network deployment, or make even interim policy decisions related to the need for wholesale access, based on the results of this CostQuest study [because] [n]either the cost nor the revenue assumptions underlying the analysis sufficiently reflect current marketplace realities.”).

⁴⁶⁵ See Windstream Comments at 20 (“The pricing disparity is even more significant for purchasers that do not operate under commercial agreements or commitment plan discounts: \$126.00 for a DS1 circuit under the 36-month tariffed rate, versus \$1,075.00 for a 2 Mbps Ethernet circuit under AT&T’s publicly available 36-month rate for Switched Ethernet, Interactive Class of Service.”); *see also* Windstream Reply at 3.

⁴⁶⁶ See Birch et al. Comments at 19; *see also* Letter from Scott Saxon, General Manager, Barbara B. Mann Performing Arts Hall, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 23, 2015) (“bring large-scale musicals, symphonies, and other events to fruition, we rely on a competitive broadband and IT services provider to meet our organization’s individual needs such as online & telephone ticket sales, show production, lighting and set design.”); Letter from Jack Young, Owner and Principal, Cherry Tree Dental, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 15, 2015) (“Simply put, we rely on our phone and Internet service to be available to our patients. Without reliable access our business would not survive. Regularly, we review our contract and choose the provider that offers not only the best rate, but also the most reliable service.”); Letter from Larry Jonczak, Director Information Services, Lakes Regional Community Center, to Tom Wheeler, Chairman, FCC, GN Docket No. 13-5 et al., at 1 (filed June 22, 2015) (“By keeping the marketplace open for more competition, the FCC will help ensure that life-saving organizations like ours have the power to choose the broadband provider that is the best fit for our needs and growth.”).

complete.⁴⁶⁷ As stated above, data show that competitive LECs currently are the principal source of competition to incumbent LECs in the enterprise market.⁴⁶⁸ Competitive LECs provide broadband services that “are vital inputs for small and medium business and enterprise users, including mobile carriers.”⁴⁶⁹ The Commission recognizes the critical role that wholesale access to last-mile inputs plays in promoting competition and has emphasized the “technology transitions should not be used as an excuse to limit competition that exists.”⁴⁷⁰ In addition, the City of New York expressed concern about the cost of replacement services, “both in its role as a consumer advocate and in its role as a large customer.”⁴⁷¹ Ad Hoc Telecommunications Users Committee also expresses concern about continued availability of competitive services from the perspective of retail customers.⁴⁷² Moreover, Public Knowledge, NASUCA and state public service commissions also recognize that retail customers will be harmed if competitive LECs do not have sufficient access to wholesale inputs.⁴⁷³ We find these arguments persuasive that action is needed.

138. In the *Notice*, we sought comment on whether an “equivalent” standard of wholesale access or a “reasonably comparable” standard would best achieve our goals.⁴⁷⁴ We now conclude that the “reasonably comparable” standard best comports with our goals of promoting technology transitions by all parties and maintaining competition-facilitating wholesale access to critical inputs as we continue our special access rulemaking proceeding. The approach that we adopt facilitates prompt transitions to IP by incumbent LECs because it removes issues that may otherwise pose barriers to transitions while the special access proceeding remains pending and provides as much flexibility as possible consistent with the goal of preserving competition. It also reflects our commitment to accelerated and seamless technology transitions by preserving the benefits of the competition that exists today. Because our goal is to accelerate carriers’ transition to all-IP infrastructure through creating clear rules of the road, we

⁴⁶⁷ See *supra* para. 132 (defining the point of time at which the reasonably comparable wholesale access condition will expire).

⁴⁶⁸ See *supra* para. 134; Windstream Comments at 5-7 (providing GeoResults data that competitive LECs are the primary source of competition for wireline communications services purchased by nonresidential customers, including government, schools and libraries, health care and other organizations).

⁴⁶⁹ *Wireline Bureau Seeks Comment on Business Broadband Marketplace*, Public Notice, WC Docket No. 10-188, 25 FCC Rcd 13138 (Wireline Comp. Bur. 2010); see also CCA Comments at 2 (“CCA’s members are significant purchasers of high-capacity telecommunications services, given the need to backhaul traffic from cell sites to mobile switches. CCA therefore has a vital interest in ensuring that procompetitive rules remain in place to enable competitive carriers to offer cost-effective solutions to mobile service providers.”).

⁴⁷⁰ *Notice*, 29 FCC Rcd at 14972-73, para. 6; see also COMPTTEL Comments at 10 (“Competitive LECs represent an innovative force for the advancement of communication services in general, and a nearly *exclusive* force for making those innovative services available to small and medium-sized commercial customers.”).

⁴⁷¹ City of New York Comments at 6.

⁴⁷² Ad Hoc Comments at 17 (“Continued access to such inputs is critical to the ability of competitive carriers to provide a check on the ILECs’ market dominance.”); see also CCA Comments at 11 (“[N]ot only to facilitate their own retail offerings to end users, but also to provide cellular backhaul, special access, and other services to wireless providers.”).

⁴⁷³ See Public Knowledge Comments at 16 (stating that “there is no reason that a newer, better technology should lead to higher prices for equivalent or inferior service”); NY PSC Comments at 9 (“When copper facilities are broadly retired without a similarly functional and priced alternative wholesale product being available, the cost of providing telecommunications services, including broadband, to small and medium size businesses by CLECs can become a significant hardship.”); Mich. PSC Comments at 9 (“As demonstrated in some carrier-to-carrier disputes, a disconnection of parts of the wholesale services provided by an ILEC to an interconnected CLEC can affect the CLECs’ retail customers.”); NASUCA Comments at 8 (“Customers need protection, and they need competition; neither one alone will suffice to preserve the enduring values of the Act.”).

⁴⁷⁴ *Notice*, 29 FCC Rcd at 15012-13, para. 110.

recognize the importance of balancing the goals of preserving current levels of competition through interim wholesale access requirements pending resolution of the special access proceeding, with avoiding unduly costly impediments to competition in innovation and the technology transition. We agree with CenturyLink that the Commission's role in facilitating the transitions should not be to "perpetuate the specific characteristics (and costs)" associated with the legacy TDM-based services, but instead should be focused on "facilitating a shift to the services and features that actual customers demand."⁴⁷⁵ Our reasonably comparable standard is consistent with this goal. We do not require incumbent LECs to maintain multiple networks or to forego the advantages of new technologies or services to fulfill these requirements; indeed, these competition-preserving requirements are necessary precisely because we anticipate that incumbent LECs will continue to have incentives to transition. Accordingly, and for the reasons stated herein, we reject arguments that we should adopt an "equivalent" wholesale access standard out of concern that it would impose potentially unnecessarily high costs on incumbent LECs that could unduly deter the pace of transitions and thereby diminish the supply or quality of replacement services.⁴⁷⁶

139. We agree with CenturyLink that incumbent LECs should be required to provide no more than a "reasonably comparable" alternative.⁴⁷⁷ Our interim rule adopts such an approach. We recognize concerns that temporarily basing rates for higher speed IP-based services that replace discontinued TDM wholesale inputs on legacy rates, terms, and conditions may create disincentives for innovation,⁴⁷⁸ and we find that a moderated "reasonably comparable" approach best balances ensuring ongoing competition with minimizing disincentives for incumbent LECs.

140. As stated above, the record convinces us that there is a substantial risk that competition could be lost in the absence of the interim wholesale access condition that we adopt. However, we recognize that we are acting based on the best information available at present while we are separately conducting a related in-depth analysis, and we adopt a time-limited interim measure for this reason. We will be able to evaluate the state of competition and need for regulation with far greater certainty and granularity once we complete our evaluation of the special data collection. Incumbent LECs assert that

⁴⁷⁵ CenturyLink Comments at 24.

⁴⁷⁶ See, e.g., Windstream Comments at 4 (stating that "in the post-IP transition world, competitors still will need equivalent access to last-mile facilities and services to continue offering business services to millions of customers"); see also COMPTTEL Comments at 20; Wholesale DS-0 Coalition Comments at 4; Birch et al. Comments at 8.

⁴⁷⁷ Letter from Melissa Newman, Senior Vice President, CenturyLink, to Marlene H. Dortch, Secretary, FCC, Docket No. GN 13-5 et al., Attach. at 4 (filed June 19, 2015) (CenturyLink June 19, 2015 *Ex Parte* Letter) (recommending that the Commission adopt "a presumption that it will grant requests to discontinue TDM voice service as long as the affected retail customers have a reasonably comparable alternative available to them."); see also Verizon Comments at 28 ("Establishing a strict equivalence standard in practice could make it unnecessarily difficult to discontinue legacy services that consumers do not want or need. Instead of protecting competition, which is thriving without this tentative conclusion, a strict service equivalence standard would protect only individual competitors."); USTelecom June 24, 2015 *Ex Parte* Letter at 2 (stating that "the Commission should not accept the invitation to require that replacement products be provided at the same price as legacy products").

⁴⁷⁸ See, e.g., AT&T Comments at 59-62 (claiming that instead of fostering innovation through competition, these measures reduce economic incentives to innovate only to "shield less innovative competitors from the consequences of technical progress . . . sound regulatory policy—like sound antitrust policy—would never risk jeopardizing valuable innovation for the sake of preserving static competition"); see also USTelecom Comments at 11-12 (stating that requiring incumbent LECs to provide next generation IP-based offerings under equivalent rates and terms they provided TDM-based services deprives them of the opportunity to recover significant sunk costs thereby creating a disincentive to innovate and impeding progress on the technology transition); CenturyLink Comments at 20 ("The NPRM's approach would impose constraints on broadband innovation and infrastructure investment' and leave ILECs and their customers saddled with costly redundant systems and duplicative processes." (internal quotation marks omitted)).

they are subject to substantial competition in the provision of packet-based special access services and have every incentive to price competitively to retain the wholesale business.⁴⁷⁹ Verizon asserts that “it is better for an ILEC if . . . consumer[s] take . . . retail service from one of the incumbent LEC’s wholesale customers – and therefore generates wholesale revenues for the ILEC – instead of one of the many available intermodal options competitors offer.”⁴⁸⁰ The reasonableness of the incumbent LEC arguments depends on the availability of competitive alternatives to constrain the discontinuing incumbent LEC’s rates, terms, and conditions for packet-based special access services to just and reasonable levels. Whether and where such competitive alternatives exist is precisely the analysis we currently are conducting in the special access proceeding.⁴⁸¹ The Commission is in the process of comprehensively evaluating its special access rules by analyzing data collected from both providers and users of special access services.⁴⁸² Our review of such data will provide the objective foundation for a thorough analysis of competition in the special access service marketplace. Such analysis will support our adoption of the appropriate rules and policies to ensure access to critical wholesale inputs at just and reasonable rates, terms, and conditions over time and in connection with technology changes. Given that we do not yet have the benefit of evaluation of the special access data, we find that the flexible interim approach that we adopt strikes an appropriate middle course that avoids any unduly strong assumptions about the ultimate outcome of our evaluation.⁴⁸³

141. If we were to fail to adopt any wholesale access requirement, we risk allowing the benefits of competition to be lost irrevocably. At the same time, we have come to the conclusion that adopting an “equivalent wholesale access” requirement would go too far in advance of determinations yet to be made in the special access proceeding by exporting in its entirety the complex tariffed framework currently applicable to incumbent LEC DS1 and DS3 services and applying it to replacement services. Given the factual disputes that underpin the parties’ arguments, which we will examine in the special access proceeding, we find that the middle course that we adopt today strikes the correct balance between preserving competition and promoting transitions by all parties during the interim period of factual uncertainty before the resolution of the special access proceeding.⁴⁸⁴ We agree with the New York PSC that “legacy policies regarding wholesale access and obligations should be reviewed so as not to burden ILEC investment in more reliable, robust and innovative networks.”⁴⁸⁵ We find that the standard that we adopt accomplishes this goal. We also disagree with ITTA that our actions are “premature” in light of

⁴⁷⁹ See AT&T Comments at 61 (stating that AT&T offers wholesale services in markets that are often “highly competitive” and must compete for customers only by providing the best value); see also CenturyLink Comments at 3-4; Verizon Comments at 27-28; Verizon Reply at 7-8.

⁴⁸⁰ Verizon Comments at 28.

⁴⁸¹ See *Data Collection Order*, 27 FCC Rcd at 16324, para. 13 (requiring parties to submit information to allow a comprehensive analysis of competition in the special access market).

⁴⁸² See *id.* at paras. 13-55. The deadline for responding to the mandatory collection is currently September 25, 2015. See *supra* note 28.

⁴⁸³ Cf. COMPTTEL July 29, 2015 Ex Parte Letter at 1 (“[I]t is important that these rules remain in place until the Commission completes a comprehensive market analysis for the relevant market and ensures that consumers . . . do not lose their choice in service or service provider.”).

⁴⁸⁴ See *supra* para. 132 (defining the point of time at which the reasonably comparable wholesale access condition will expire); *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*2005 Special Access NPRM*).

⁴⁸⁵ NY PSC Comments at 13-14.

any actions the Commission may take as part of that proceeding.⁴⁸⁶ We do not attempt to prejudice any findings in the special access proceeding in this Order. Rather, by limiting the duration and stringency of the equivalent wholesale access requirement proposed in the *Notice*, we are striking the right balance by taking interim measures to ensure that competition does not decrease as incumbent LECs discontinue their legacy services while facilitating such transitions as the Commission continues to consider long-term special access policies.⁴⁸⁷

142. We reject arguments that adopting a wholesale requirement is bad policy.⁴⁸⁸ These arguments misconstrue the modest, time-limited nature of the requirements we adopt and fail to take into account the “reasonably comparable” standard that we adopt. CenturyLink cautions that “exit approval requirements are among the very most intrusive forms of regulation . . . [and] are only appropriate when retail customers will be left without any reasonably comparable alternative.”⁴⁸⁹ Since our interim rule is specifically designed to ensure the availability of reasonably comparable offerings to retail customers by ensuring competitors maintain access to reasonably comparable wholesale inputs, we find it appropriate to avoid precisely the situation that CenturyLink describes as warranting action. As discussed above, it is not yet clear whether (or where) competitive alternatives exist that are sufficient to constrain a discontinuing incumbent LEC’s rates, terms, and conditions for replacement services.⁴⁹⁰ Absent such alternatives, competitive LECs and their customers could be left with less choice and higher prices.⁴⁹¹ To ensure technology transitions do not harm our core value of competition, prophylactic action is necessary to ensure that the competition that exists today is not undermined, at least until the Commission completes its full, data-driven evaluation of the special access market.

143. Some commenters further assert that a wholesale access condition will “micromanage” technology decisions or network upgrades.⁴⁹² We disagree. As discussed herein, the interim rule the Commission has established is flexible in nature and avoids rigid prescriptions. It also is limited in duration and scope so as not to overburden the incumbent LECs or impede their technology transitions.

⁴⁸⁶ ITTA Comments at 10 (stating that “any Commission action regarding wholesale access or notification to competitive carriers would be premature given that the Commission is currently examining such issues in the special access data collection proceeding”).

⁴⁸⁷ See *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket Nos. 05-25, RM-10593, Order on Reconsideration, 29 FCC Rcd 10899 (Wireline Comp. Bur. 2014) (*Data Collection Reconsideration Order*). The Commission expects to release a Report and Order addressing issues raised in the *Data Collection Reconsideration Order*. We reject as improperly prejudging the final outcome of the special access proceeding CenturyLink’s proposal that we adopt a “glide path” pursuant to which “[r]ates for existing circuits would gradually adjust to the market rate for the IP replacement product.” CenturyLink June 19, 2015 *Ex Parte* Letter, Attach. at 6; see also Letter from Melissa E. Newman, Senior Vice President, Federal Policy and Regulatory Affairs, CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 24, 2015) (reiterating recommendation of “glide path” approach).

⁴⁸⁸ Cf., e.g., AT&T Comments at 61; Verizon Comments at 22; Verizon Comments at 26 (“When carriers must continue offering services for longer than they intended during the resultant delay, their plans to transition to newer products and services can be impeded or put on hold while the Section 214 process plays out. And they are forced to expend resources supporting outdated services for an indefinite period.”); USTelecom June 24, 2015 *Ex Parte* Letter at 1 (stating that “new rules, interim or otherwise, are not necessary to evaluate whether the loss of TDM-based services in a particular community would adversely affect the public convenience and necessity, because existing rules are adequate to identify and address any potential harms”).

⁴⁸⁹ CenturyLink Comments at 6.

⁴⁹⁰ See *supra* paras. 135-136.

⁴⁹¹ See *supra* paras. 135-137.

⁴⁹² Verizon Comments at 22; see also AT&T Comments at 45; CenturyLink Reply at 24.

Of note, the condition applies only when an incumbent LEC discontinues a TDM special access or commercial wholesale platform service used as a wholesale input (as opposed to when it offers that service alongside new IP-based services). And within those bounds, this rule will ensure that competitive LECs continue to access wholesale last-mile inputs at reasonably comparable rates, terms, and conditions during the technology transitions while the Commission continues its review of special access market.

144. Some commenters also claim that there is sufficient intermodal competition so an interim wholesale access condition is not necessary to ensure businesses, government, and other organizations have choice, competitive prices, and innovative service offerings.⁴⁹³ Verizon and USTelecom point to the growing broadband market share of mobile and cable providers as proof that competitors are successfully serving the enterprise market over their own last-mile facilities or wholesale arrangements and therefore no additional regulation is necessary.⁴⁹⁴ We are encouraged by the growth in intermodal competition; however, we do not wish to prejudice the special access proceeding's comprehensive data evaluation. As discussed above, competitive LECs are dependent on incumbent LEC last mile wholesale inputs to provide service to enterprise customers, governments, schools and libraries, and other organizations.⁴⁹⁵ Our goal, as reiterated throughout this Order, is to encourage the accelerated technology transitions to IP while we continue to evaluate claims about competitiveness in the special access market. Our interim reasonably comparable wholesale access condition is a light-handed, temporary regulation to avoid transition delays due to diminished competition while the Commission conducts an analysis of the special access marketplace.

145. We also decline to adopt a presumption in favor of approving discontinuance of a retail service if at least one competitive alternative is available.⁴⁹⁶ Under our precedent, the Commission evaluates a range of factors to determine whether to grant a discontinuance application.⁴⁹⁷ We do not see

⁴⁹³ See Verizon Comments at 27-28; see also Verizon Reply at 7; USTelecom Reply at 10-11.

⁴⁹⁴ See Verizon Comments at 27-28 (“As of year-end 2013 there were more than 310 million wireless voice connections in the U.S. as of 2013, more than twice the number of in-service access lines. And cable companies and other providers are delivering Ethernet and other high-capacity services that vigorously compete with incumbent providers’ special access services, with cable companies exceeding \$10 billion in business services revenue in 2014.”); see also USTelecom Comments at 11 (“Overall, cable industry business services revenue has grown from \$4 billion in 2009 to an estimated \$10 billion in 2014.”). *But see, e.g.,* Windstream July 20, 2015 *Ex Parte* Letter at 7 (“GeoResults data shows that cable’s competitive significance falls off substantially as business locations grow in size, and cable is particularly weak with respect to business customers with more than one location.” (citing Windstream Comments at 9-11)); Letter from Thomas Jones, Counsel to Granite Telecom., LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 27, 2015) (Granite July 27, 2015 *Ex Parte* Letter) (stating that the CIOs of Brooks Brothers and Pier 1 Imports “have found that (1) fixed wireless services are unreliable and often require the deployment of equipment that is not a realistic option for retail locations, (2) mobile wireless service is not a viable solution for the companies’ in-store needs, and (3) cable company facilities do not serve a large percentage of their locations (in fact, Mr. Laudato stated that Pier 1’s most recent survey concluded that existing cable plant does not reach approximately 90 percent of Pier 1’s store locations) and that it is prohibitively expensive to pay a cable company to deploy new loop facilities to a store location”). USTelecom asserts that the CostQuest model “does not accurately reflect the economics of the actual marketplace.” USTelecom July 30, 2015 *Ex Parte* Letter at 2.

⁴⁹⁵ See *supra* para. 134 & note 459; see also Windstream Reply at 29 (stating that incumbent LECs and their affiliates made up nearly 82% of the local wholesale transport market).

⁴⁹⁶ See CenturyLink Comments at 20; see also CenturyLink June 19, 2015 *Ex Parte* Letter Attach. at 4.

⁴⁹⁷ In evaluating an application for discontinuance authority under section 214(a), the Commission considers five factors that are intended to balance the interests of the carrier seeking discontinuance authority and the affected user community: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations. See *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22742, para. 8. As explained above, (continued...)

a reason to deviate from these longstanding and clearly articulated criteria by which we evaluate section 214(a) applications, which already take into account whether alternatives are available.⁴⁹⁸ Moreover, our existing criteria better capture and balance the public interest than would CenturyLink's proposal to give the availability of a competitive alternative new primacy. Thus, we are not convinced that this proposal is in the best interest of the public that consumes communications services, which must be our primary consideration.⁴⁹⁹ Further, at present we grant the vast majority of applications within 31 or 60 days of release of the Commission's public notice of the application filing, and we are not currently convinced that this process needs to be further expedited.⁵⁰⁰

146. *Scope of Service Covered.* Because of our intent to prevent potential irrevocable loss of competition during the pendency of the special access proceeding, we apply the reasonably comparable wholesale access interim rule to special access services. However, we agree with Verizon that applying the reasonably comparable wholesale access condition to lower speed special access services is not consistent with our efforts to guide and accelerate the technological revolutions that are underway.⁵⁰¹ Accordingly, we will only apply the reasonably comparable wholesale access condition to special access services at or above the DS1 level. While there is evidence in the record that there is a demand for commercial wholesale platform services that include voice grade circuits equivalent in speed to DS0 level special access service, there is no evidence of significant demand for stand-alone DS0 service.⁵⁰² That is, competitive carriers have not asserted they will be unable to serve their retail customers at reasonably comparable rates, terms, and conditions without comparable access to incumbent LEC DS0 replacement services. We thus do not find on this record that competitive LEC will likely irrevocably lose business as a result of the technology transitions without access to DS0 special access wholesale services.⁵⁰³ We accordingly conclude that the purpose of our wholesale access condition — to promote technology transitions by maintaining current competition — is satisfied if competitors can access replacement services for discontinued TDM-based special access service at or above a DS1 level.

147. While we categorically exclude special access DS0s from the reasonably comparable wholesale access interim rule, we recognize the importance of competition in basic voice service to businesses and other enterprises. If an incumbent LEC discontinues a TDM-based wholesale voice arrangement that includes DS0 local loops, switching, and transport in a commercial unbundled network element platform (UNE-P) replacement arrangement, such as AT&T's Local Service Complete and

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the reasonably comparable wholesale access interim rule applies as an interim condition in addition to and separate from the multifactor evaluation of whether to grant the application. *See supra* para. 132.

⁴⁹⁸ *See supra* note 497. We address this factor in greater detail in the Further Notice, *infra* Section IV.A.

⁴⁹⁹ *See generally* 47 U.S.C. § 214; 47 C.F.R. § 63.71; *Western Union*, 74 FCC 2d at 296, para. 7.

⁵⁰⁰ In the Further Notice, we seek comment on whether to alter or extend the time periods established under 47 C.F.R. § 63.71.

⁵⁰¹ *See* Letter from Maggie McCreedy, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed June 12, 2015) (Verizon June 12, 2015 *Ex Parte* Letter) (“[T]he proposed equivalence standard would be particularly burdensome for providers seeking to grandfather or discontinue DS0 dedicated services. Many of these services have been supplanted by more recent technology. These outdated services often rely on equipment that manufacturers no longer build or support. Providing an ‘equivalent’ service with equivalent functionality to these old and slow services is both technically difficult and costly.”).

⁵⁰² *See infra* paras. 147-148 (discussing competitive LEC reliance on commercial wholesale platform services such as AT&T's Local Service Complete and Verizon's Wholesale Advantage).

⁵⁰³ We also note that Verizon asserts that “the proposed equivalence standard would be particularly burdensome for providers seeking to grandfather or discontinue DS0 dedicated services” and cites the example of its efforts to provide DS0 equivalent services over fiber in six wire centers where it has fully transitioned to a fiber network — noting that “necessary equipment to provide a single fiber based DS0 equivalent at a customer location can cost more than \$30,000.” Verizon June 12, 2015 *Ex Parte* Letter at 1.

Verizon's Wholesale Advantage (commercial wholesale platform service), under the interim rule the incumbent LEC must offer the replacement service at reasonably comparable rates, terms, and conditions.⁵⁰⁴ Large, well-known companies — including Starbucks, Sears, Bed Bath and Beyond, Panera, Tory Burch, Domino's, Simon, and Scholastic — and education, community, and governmental organizations — such as YMCA of San Francisco, Scholastic, and Washington Metropolitan Area Transit Authority — have filed letters with the Commission expressing concern about the lack of competitive options if competitive LECs lose access to commercial wholesale platform service.⁵⁰⁵ Based on the record, we conclude that these IP-replacements services should be subject to the reasonably comparable wholesale access condition so competitive LECs may continue to serve multi-location business customers that have modest demands for voice service.

148. Certain competitive LECs depend significantly on commercial wholesale platform services.⁵⁰⁶ These competitive LECs offer multi-location businesses voice services at each location by combining value-added services with underlying TDM-based telephone services purchased at wholesale from incumbent LECs.⁵⁰⁷ These competitors also argue that the combined platform services are necessary as a complete wholesale input to serve customers with lower bandwidth needs.⁵⁰⁸ We are persuaded by

⁵⁰⁴ AT&T argues that before the Commission can condition the withdrawal of commercial wholesale platform services on the availability of reasonably comparable replacement services, it must address the basis for its jurisdiction over wholesale voice platform services because they are local in nature, do not appear in any interstate tariffs, and are not classified as section 251 unbundled network elements. Letter from Frank S. Simone, V.P. Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 31, 2015) (AT&T July 31, 2015 *Ex Parte* Letter). However, the interim reasonably comparable condition will apply to commercial wholesale platform services only in the limited context of section 214(a) discontinuances, thereby obviating AT&T's concern about our overall jurisdiction over such services. *See infra* para. 199 (“In determining the need for prior authority to discontinue, reduce, or impair service under section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, i.e., the using public.”) (quoting *Graphnet*, 17 FCC Rcd at 1140, para. 29 (emphasis added)).

⁵⁰⁵ *See* Letter from Michael B. Galvin, General Counsel, Granite, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1-4 and Attach. (filed June 23, 2015) (Granite June 23, 2015 *Ex Parte* Letter) (providing letters from 183 entities that conduct business at over 60,000 locations in all fifty states); *see also* Granite July 27, 2015 *Ex Parte* Letter at 2 (stating that the CIOs of Brooks Brothers, and Pier 1 Imports “explained that only companies like Granite have been willing and able to offer TDM-based telephone service to all of the companies’ store locations” and that Pier 1 CIO “Mr. Laudato explained that incumbent LECs have been unwilling to provide Pier 1 service outside of the incumbent LECs’ territory”).

⁵⁰⁶ *See Fones4All Petition for Expedited Forbearance under 47 U.S.C. § 160(C) and Section 1.53 from Application of Rule 51.319(D) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End-Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, Memorandum Opinion and Order, 21 FCC Rcd 11125, 11126, para. 2 n.7 (2006); *see also* AT&T Voice Services, Local Wholesale Complete, http://www.business.att.com/content/productbrochures/w_att_local_wholesale_complete.pdf (explaining that AT&T's product “is an end-to-end wholesale local service solution that is available to local voice service telecommunications carriers across AT&T's incumbent serving areas”); Verizon Partner Solutions, Wholesale Advantage, <https://www2.verizon.com/wholesale/solutions/category/Wholesale+Advantage.html> (explaining that the wholesale offering is “a nationwide, local service, contractual offering that lets you purchase and rebrand Verizon narrowband, circuit switched services and features at competitive and predictable pricing.”).

⁵⁰⁷ *See* Letter from Thomas Jones, Counsel to Granite Telecommunications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., Attach. at 4 (filed June 3, 2015) (Granite June 3, 2015 *Ex Parte* Letter) (stating that 57% of the location Granite serves have only 1 or 2 lines and another 20% have only 3 or 4 lines); *see also* Wholesale DS-0 Coalition Comments at 3 (stating their customers “include national companies and other entities that need a small number of voice lines at a large number of disparate, often suburban, rural and remote, locations”).

⁵⁰⁸ Wholesale DS-0 Coalition Comments at 4 (claiming they “provide multi-location telecommunications services, often on a nationwide basis. And in turn, [they] are dependent on the ILEC for reasonably-priced wholesale inputs (continued...)”).

evidence in the record that competitive LECs are unable to offer their multi-location services without access to the wholesale platform replacement service pursuant to agreements that are reasonably comparable to the entire wholesale platform agreements for the discontinued service with incumbent LECs.⁵⁰⁹ Moreover, the information in the record does not suggest that the costs of providing this commercial wholesale platform replacement service are significantly different than those of the TDM-based service.⁵¹⁰ That said, we reject a strict equivalency standard and deem the provision of a substitute on “reasonably comparable” rates, terms, and conditions most appropriate to ensure continued opportunities for competition while avoiding deterring transitions or adopting an unduly prescriptive rule. Moreover, we are not imposing any special access regulation on switching or transport elements, as they are not special access services.⁵¹¹ We also are not resurrecting any UNE-P-type regulation on these commercial offerings.⁵¹² Rather, we are imposing the interim reasonably comparable wholesale access condition on the commercial wholesale platform service, which includes not only switching and transport but also voice (i.e., DS0 speed) loops. As such, an incumbent LEC’s IP replacement for its commercial wholesale platform service must be offered at reasonably comparable rates, terms, and conditions during the pendency of the special access proceeding.⁵¹³ This will protect against the loss of competition by multi-location enterprise customers that rely on low-bandwidth voice services during the pendency of the special access proceeding and the Further Notice.⁵¹⁴

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necessary to serve these customers, which often do not require high-capacity network services.”); *see also* Letter from Karen Reidy, COMPTel, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed May 21, 2015) (COMPTel May 21, 2015 *Ex Parte* Letter) (stressing that “the application of this [wholesale access] standard not be limited to last-mile services, but must encompass other critical wholesale input services such as AT&T Wholesale Complete and Verizon’s Wholesale Advantage services”).

⁵⁰⁹ *See supra* para. 147 & note 508; *see also* Wholesale DS-0 Coalition Comments at 3 (stating that “these customers benefit from the efficiency of having one service supplier that can arrange for their communications needs across the country, rather than contracting with multiple telecommunications companies to provide services on a location-by-location basis”); Granite June 23, 2015 *Ex Parte* Letter at 1-4 and Attach. (filed June 23, 2015) (providing numerous letters from multi-location retail customers, including Starbucks, Sears Holding Company, Bed Bath & Beyond and Panera Bread expressing concern about lack of competitive options if Granite and similarly situated competitive LECs lose access to commercial wholesale platform services).

⁵¹⁰ *See* Verizon June 12, 2015 *Ex Parte* Letter at 3-4 (explaining that Verizon offers “[c]ommercial UNE-P replacement products [that] are market-based responses to competitive pressures, and in the six wire centers that Verizon migrated to all-fiber facilities, Verizon provided Wholesale Advantage – our UNE-P commercial replacement product - onto the new fiber facilities with no change in rates, terms, or conditions”). However, with respect to the cost to provide DS0 service, Verizon claims “that necessary equipment to provide a single fiber based DS0 equivalent at a customer location can cost more than \$30,000.” *Id.* at 1.

⁵¹¹ *See supra* note 448 (explaining that special access is “the non-switched dedicated transmission of voice and data traffic between two points”).

⁵¹² *See* USTelecom June 24, 2015 *Ex Parte* Letter at 2 (cautioning the Commission not to “resurrect abandoned requirements to provide UNE-P-type replacement services under the guise of preserving existing competition”).

⁵¹³ *See* Granite June 3, 2015 *Ex Parte* Letter, Attach. at 6 (“In 51% -85% of our customer locations, the ILECs will be the only provider available to the small business market if wholesale use of RBOC/ILEC network is not continued.”); *see also* Wholesale DS-0 Coalition Comments at 4 (“Further, many of the businesses that the Commenters serve are not in residential areas where cable companies often focus deployments, and wireless-based services lack the features and reliability necessary for business operations in many locations.”).

⁵¹⁴ *See, e.g.*, Granite June 3, 2015 *Ex Parte* Letter, Attach. at 1 (explaining the customers it serves using incumbent wholesale voice service includes 4,800 companies in a wide-spread geographic footprint in over 400,000 customer locations); *see also* Letter from Eric J. Branfman, Counsel to the Wholesale Voice Line Coalition, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al. at 1 (filed June 11, 2015) (explaining competitive LECs such as Xchange, TelePacific, BullsEye, Impact, New Horizon, Access Point, and Granite serve “multilocation businesses that have relatively modest needs for voice communications at each location (most frequently 1-10 lines)” and that

(continued...)

149. This extension of our reasonably comparable wholesale access condition is necessary to further the technology transitions underway. Verizon argues that the fact that incumbent LECs offer on a “voluntary” basis commercial wholesale platform service “is the best evidence these customers will continue to have options.”⁵¹⁵ We are encouraged by the availability of these TDM offerings in the marketplace. However, we note that section 214(a) requires carriers to obtain Commission authority to discontinue, reduce, or impair service to a community, or part of a community, without respect to whether the service was initially provided on a voluntary basis.⁵¹⁶ Pursuant to this section 214 framework, we are persuaded that the temporary condition we adopt today for commercial wholesale platform services is warranted in order to provide certainty and clarity during these stages of the technology transitions, in which the perceived, looming sunset of TDM service raises questions as to whether end-user customers will continue to receive competitive options for their multi-location, low-bandwidth businesses.

150. In reaching these conclusions, we reject the argument that the interim reasonably comparable wholesale access condition “must be limited to DS1 and DS3 special access services.”⁵¹⁷ With respect to special access, we include within the scope of the condition all special access services at or above DS1 speed to provide both competitive and incumbent LECs with greater flexibility than would be available if we limited speed intervals more rigidly. And for the reasons stated above, we reject the argument that we should exclude commercial wholesale platform services, which provide a crucial input for services on which many multi-location businesses depend.⁵¹⁸

151. *Timing.* We also reject the contention that we should establish a date certain by which the reasonably comparable wholesale access condition will sunset. Under such an approach, competition may be lost irrevocably due to the absence of workable wholesale inputs during any gap between the end of the condition and the effective date of special access rules and/or policies.⁵¹⁹ Further, adoption of a date certain sunset increases uncertainty in the market by leaving all parties uncertain as to whether their rights and obligations will be altered substantially due to the passage of time in the interim of adoption of effective special access rules and/or policies. These results would be contrary to the purpose of the

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“[t]he locations are widely dispersed, and often in suburban, exurban and rural areas where no competitive carrier has facilities and it is not economical for a CLEC to construct facilities duplicating the ILEC’s, given the very limited demand at each location”).

⁵¹⁵ Verizon Reply at 9. We note that section 214(a) requires carriers to obtain Commission authority to discontinue, reduce, or impair service to a community, or part of a community, without respect to whether the service was initially provided on a voluntary basis. See 47 U.S.C. § 214(a).

⁵¹⁶ See 47 U.S.C. § 214(a). Our section 214 authority addresses AT&T’s assertion that before including commercial wholesale platform services under the revised section 214 discontinuance regulations, the Commission must “address the fact that the ILECs have been providing these services on a voluntary basis under commercially negotiated contracts since the obligation to provide the unbundled network element platform was struck down by the Courts.” AT&T July 31, 2015 *Ex Parte* Letter at 2.

⁵¹⁷ Letter from Maggie M. McCreedy, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 27, 2015) (Verizon July 27, 2015 *Ex Parte* Letter); see also Letter from Melissa E. Newman, Senior Vice President, CenturyLink, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 24, 2015) (“We also stated that reasonably comparable wholesale services should apply only to DS1s and DS3s, and not to commercial platform services.”).

⁵¹⁸ See *supra* paras. 147-148.

⁵¹⁹ Cf. Letter from Diane Griffin Holland, Vice President, Law & Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 29, 2015) (USTelecom July 29, 2015 *Ex Parte* Letter) (“[W]e encourage[] the adoption of a two-year limit on the reasonably comparable wholesale interim measure, in lieu of tying that requirement to the completion of the special access proceeding.”); Verizon July 27, 2015 *Ex Parte* Letter at 1 (arguing that “those interim rules must . . . sunset by a date certain”); ITTA July 23, 2015 *Ex Parte* Letter at 2 (“We urged the Commission to consider a sunset of 2-3 years to ensure that this measure is, indeed, temporary.”).

interim rule that we adopt herein. Additionally, adopting a date certain sunset would create an undesirable incentive for parties that benefit from the status quo in the absence of the condition to attempt to forestall completion of the special access proceeding.⁵²⁰ In contrast, the standard for termination that we adopt protects against the irrevocable loss of competition during the full interim period until completion of the special access proceeding and provides certainty to all parties regarding their rights and obligations until that time. We emphasize that we intend fully for the condition to be interim and short-term in nature, and consistent with that goal we have adopted a specific and foreseeable endpoint.⁵²¹ Moreover, the Commission and its staff is working hard to bring the special access proceeding to as rapid a conclusion as possible.

152. We seek comment in the Further Notice about whether or not the reasonably comparable wholesale access condition, as it applies to the commercial wholesale platform service, should be extended beyond the completion of the special access proceeding.⁵²² Even though commercial wholesale platform services are not special access services, the timing we adopt is appropriate because the special access proceeding provides a foreseeable and definitive point in the future at which we can reassess the efficacy and necessity of the requirement that we adopt and will entail a comprehensive evaluation of competition pursuant to which the Commission intends to adopt a set of rules and/or policies that may have wide-ranging effects on telecommunications competition. We reject Granite's argument that we should not specify the term for the condition as to commercial wholesale platform services at this time and instead merely seek comment on the appropriate term.⁵²³ We find that this approach would leave a key aspect of our requirements too vague and that the lack of predictability inherent in this approach risks deterring investment. We also reject Granite's argument that we should extend the condition "until such time as the Commission adopts rules governing the economic regulations governing incumbent LEC wholesale voice services in the pending *IP-Enabled [Services]* proceeding" in response to the Notice of Proposed Rulemaking issued in 2004 in that proceeding. In our view, the special access proceeding provides a more clearly foreseeable point at which to reevaluate appropriate duration of the reasonably comparable wholesale access interim rule as to commercial wholesale platform services.⁵²⁴

153. *Legal Authority.* We find the Commission has authority under section 214 to condition an incumbent LEC's authorization to discontinue TDM-based services by requiring the incumbent LEC to offer the IP replacement wholesale service on reasonably comparable rates, terms, and conditions and

⁵²⁰ USTelecom argues that "the Commission has always placed a premium on facilities-based competition over less-sustainable competition models" and that "competing providers would be well-served to focus on decreasing their dependence on incumbent local exchange carrier legacy facilities rather than slowing down the transition" such that "[a] hard deadline . . . would ultimately do more to ensure the success of the transition than would a wait-and-see approach." USTelecom July 29, 2015 *Ex Parte* Letter at 1. This argument presupposes that a less regulated special access market will be preferable for competition in the long run, an issue the Commission cannot resolve until it completes its review of the relevant data. In the interim, the reasonably comparable standard that we adopt best preserves the benefits of the status quo and best charts a course between the competing risks of (1) irrevocable loss of competition due to the elimination of potentially necessary inputs and (2) deterrence of transitions and facility construction due to overly prescriptive regulation.

⁵²¹ We specifically reject arguments that we should adopt a purportedly "interim" standard that is unmoored from any specific and foreseeable endpoint. *See infra* para. 152 & note 523.

⁵²² *See infra* para. 244; *see also, e.g.*, Letter from Thomas Jones, Counsel to Granite Telecommunications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed June 12, 2015) (Granite June 12, 2015 *Ex Parte* Letter) (stating that "it would be inappropriate to sunset the equivalent access requirement as applied to wholesale voice upon the completion of the pending special access rulemaking since that rulemaking does not address wholesale switching or wholesale shared transport, two key components of wholesale voice arrangements").

⁵²³ *See* Granite June 12, 2015 *Ex Parte* Letter at 1-2.

⁵²⁴ *See id.* (citing *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004)).

therefore disagree with arguments to the contrary.⁵²⁵ Section 214(c) states the Commission “may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require.”⁵²⁶ The Commission has the discretion to condition a 214 authorization and regularly does so when necessary to protect the public interest.⁵²⁷ Specifically, in the *December 2014 Connect America Fund Order*, we held the Commission “has discretion to grant a discontinuance request in whole or in part, and may attach conditions as necessary to protect consumers and the public interest.”⁵²⁸ Although the Commission could impose the reasonably comparable wholesale access condition on a case-by-case basis, we find it less administratively burdensome and clearer to the parties to include the condition as part of the section 214 rules for a limited time until the Commission concludes the special access proceeding.⁵²⁹ Moreover, we find that an industry-wide rule is preferable to a case-by-case analysis as the reasonably comparable condition is time-limited and will only apply when (1) an incumbent LEC has determined that end-user customers will experience a discontinuance, reduction, or impairment of service; or (2) is unable to conclude that end-user customers will not experience a discontinuance, reduction, or impairment of service. In these limited circumstances where an incumbent LEC is seeking discontinuance authority under section 214(a), a temporary, industry-wide reasonably comparable condition is warranted to encourage technology transitions and competitive choice.

154. Further, we find that our authority under section 214(a) supports adoption of the reasonably comparable wholesale access interim rule. As discussed above, consistent with section 214(a) and precedent, a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to retail end users, including a carrier-customer’s retail end users.⁵³⁰ We find that as incumbent LECs transition from TDM-based services to IP, competitive LECs may be unable to obtain wholesale replacement services at reasonably comparable rates, terms, and conditions, and lack of wholesale alternatives will adversely affect its retail customers and harm the public interest. And, as discussed above, as a matter of statutory interpretation, these retail customers are part of the community identified in section 214(a) and thus it is consistent with precedent to address their needs through section 214 when services are discontinued.⁵³¹ This is the best interpretation of the relevant statutory language and helps us

⁵²⁵ See, e.g., Verizon Comments at 28.

⁵²⁶ 47 U.S.C. § 214(c).

⁵²⁷ See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order, 29 FCC Rcd 15644 (2014) (*December 2014 Connect America Order*); see also *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22742, para. 8; cf. *Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket No. 10-56, Memorandum Opinion and Order, 26 FCC Rcd 4238, 4249, para. 25 (2011) (“Our analysis recognizes that a proposed transaction may have both beneficial and harmful consequences. Our public interest authority enables us, where appropriate, to impose and enforce transaction-related conditions targeted to ensure that the public interest is served by the transaction.”); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18032, para. 10 (1998) (stating that the Commission may attach conditions to the transfers).

⁵²⁸ *December 2014 Connect America Order*, 29 FCC Rcd at 15673, para. 61.

⁵²⁹ We reject AT&T’s claim that the Commission is obligated to consider the facts of each individual discontinuance application to apply the wholesale access condition. See AT&T June 16, 2015 *Ex Parte* Letter, Attach. at 7 (citing *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 776-77 (D.C. Cir. 1974)). As stated above, we could adopt the condition on a case-by-case basis but find our approach here less administratively burdensome and clearer to parties. In a case-by-case analysis, we would find the condition necessary as to the class of applications that we identify here in order to ensure the technology transitions are successful and promote the public interest by maintaining currently levels of competition.

⁵³⁰ See *supra* para. 107 & note 384 (citing Commission precedent in *BellSouth Telephone* and *Western Union*).

⁵³¹ See *supra* paras. 108-113.

to ensure that technology transitions do not thwart the public policy objective, enshrined in the Telecommunications Act of 1996, to promote competition. The rule changes we adopt in this rulemaking process ensure that section 214 of the Act continues to be implemented in an effective manner throughout the technology transitions process. For these reasons, we are not persuaded by the argument that the Commission's application of section 214 conditions to wholesale services exceeds its statutory authority.⁵³²

155. Some commenters claim that our interpretation of section 214 cannot be squared with other provisions of the Act.⁵³³ That is, they claim that there are statutory provisions directed to competition between carriers, including sections 201, 202, 251, and 252, and they claim that the Commission cannot impute competition provisions into section 214.⁵³⁴ We are not persuaded by this argument. The mere fact that the Act contains provisions designed to open markets to competition does not preclude the Commission from considering competition in the wholesale last-mile input market as part of its section 214 public interest analysis.⁵³⁵ The wholesale access condition and requirements we adopt in this Order ensure that section 214 is implemented in a way that maintains its effectiveness in the technology transition context. Moreover, we consider the pro-competition provisions of the 1996 Act as a whole, and thus disagree that competition is considered as a factor in sections 251, 201, and 203 but not 214, as competitive access to wholesale inputs ultimately affects end users. We further disagree with ITTA that "established law" prohibits the reasonably comparable wholesale access interim condition.⁵³⁶ The Commission's "public convenience and necessity" mandate includes pro-competition considerations more strongly now than prior to enactment of the Telecommunications Act of 1996.⁵³⁷

156. It is not necessary for us to satisfy the substantive and procedural requirements of section 205 to adopt the interim reasonably comparable wholesale access condition, contrary to AT&T's assertion otherwise.⁵³⁸ Sections 205 and 214 are distinct and independent sources of authority. The D.C. Circuit has confirmed that "Section 214(c) does, in [the court's] judgment, authorize the Commission to restrict"

⁵³² *Cf.*, e.g., AT&T Comments at 57-58; AT&T Reply at 42-43; Verizon Comments at 22-28; CenturyLink Comments at 15-17; CenturyLink Reply at 14-20; ITTA Comments at 9-13.

⁵³³ *See*, e.g., AT&T Comments at 58; *see also* ITTA Comments at 12; CenturyLink Comments at 13 (claiming the Commission "should resist calls to use the Section 214 process as a back-door means of applying expansive new regulation"); USTelecom June 24, 2015 *Ex Parte* Letter at 1-2 (stating "the Commission's discretion under section 214 is not an appropriate mechanism to address concerns with wholesale last mile inputs").

⁵³⁴ AT&T Comments at 58 nn.156-57 (citing early case law and Commission orders to support its position that the Commission may not indirectly attach conditions to a section 214 discontinuance application that should be directly addressed in other statutes or rules).

⁵³⁵ *See supra* para. 114 (stating that the Commission's 214 analysis showing that in certain circumstances service impacts on carriers are cognizable under section 214 if they ultimately impact their end users and the public interest); *see also* Windstream Reply at 20 ("Rather than expanding Section 214(a)'s scope, the proposed ground rules would clarify the long-standing discontinuance factors in the complex post-1996 Act environment in which CLECs rely on ILEC last-mile services to provision their own solutions to enterprise users, and recognize the availability of such wholesale services has a direct impact on end user service.").

⁵³⁶ *See* ITTA Comments at 10.

⁵³⁷ *See*, e.g., 47 U.S.C. § 257(b) ("In carrying out subsection (a) of this section, the Commission shall seek to promote the policies and purposes of this chapter favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity."); *see also* 47 U.S.C. § 1302(b); Windstream Reply at 4; Windstream Apr. 17, 2015 *Ex Parte* Letter at 2 ("Cases cited by the ILECs predate the 1996 Telecommunications Act and the introduction of both deregulation and local telecommunications competition."); XO Comments at 25.

⁵³⁸ *See* Letter from James P. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 14, 2015) (AT&T July 14, 2015 *Ex Parte* Letter). *But see* Windstream July 20, 2015 *Ex Parte* Letter.

section 214 applicants outside of the tariffing process “in derogation of the legislative compromise embodied in Sections 203-205” so long as “it has affirmatively determined that ‘the public convenience and necessity [so] require.’”⁵³⁹ Indeed, on many occasions the Commission has granted section 214 applications conditioned on obligations regarding pricing.⁵⁴⁰ For the reasons articulated herein, we affirmatively determine that the public convenience and necessity requires imposition of the interim reasonably comparable wholesale access condition when certain discontinuance applications are granted,⁵⁴¹ and therefore our action comports with section 214(c) and the Act as a whole.

157. It would be incongruous for section 205 to restrict our authority under section 214 given the different scope of the two provisions — while our section 205 authority applies to “any charge, classification, regulation, or practice of any carrier or carriers,” the reasonably comparable wholesale access condition applies *only* if a carrier voluntarily discontinues a specified service during the interim period.⁵⁴² Additionally, we note that a number of the cases cited by AT&T specifically support the Commission’s authority to take action to preserve the status quo on a limited-term basis, and our action today preserves certain key aspects of the market status quo pending completion of the special access proceeding.⁵⁴³ For the same reasons as articulated above with respect to section 205, we reject AT&T’s

⁵³⁹ *MCI Telecomm. Corp. v. FCC*, 561 F.2d 365, 377 (D.C. Cir. 1977) (quoting 47 U.S.C. § 214(c)); *see also MCI Telecomm. Corp. v. FCC*, 580 F.2d 590, 593 (D.C. Cir. 1978) (stating that “[t]he only limitation on the” role of tariffing “relevant to th[e] case is found in Section 214(c) of the Act”). AT&T asserts that the 1977 *MCI* court “did not address, and had no occasion to address, the much different situation presented here.” Letter from James P. Young, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 6 (filed July 29, 2015) (AT&T July 29, 2015 *Ex Parte* Letter). But of course courts only address the facts in front of them. Nonetheless, the decision clearly stands for the proposition that section 214(c) authorizes conditions “in derogation” of sections 203-205 so long as the Commission determines that the public interest so requires.

⁵⁴⁰ *See, e.g., Application of AT&T for Authority Under Section 214(a) of the Communications Act of 1934, as Amended, to Supplement Existing Facilities*, Docket No. 20288, Memorandum Opinion and Order, 50 FCC 2d 501, 510-11, paras. 25-26 (1974), *petitions for modification and reconsideration denied* 51 FCC 2d 1087 (1975), *petition for review on other grounds dismissed sub. nom. AT&T v. FCC*, 602 F.2d 401 (D.C. Cir. 1979) (“If . . . Section 214 authorization were not required, we would be limited to suspending the tariff for a maximum of three months and designating it for hearing. However, Section 214 authorization is required . . . Thus, it is well within our authority to condition the grants to AT&T as provided herein . . . [F]or a period of twelve months from the release of this Order or pending the results of the hearing herein instituted, whichever occurs first, we shall require a condition of their authorization that [specified] services . . . be offered at overall rates no lower than those under which AT&T’s existing private line data services are offered pursuant to its [applicable tariff].”); *Application filed by Qwest Commc’ns Int’l Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4223, Appx. C § III (2011) (conditioning grant of application for transfer of control on, among other things, CenturyLink’s commitment not to raise rates for certain existing or new fiber customers for a period of seven years following the merger closing date); *AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Rcd 5662, 5808, Appx. F at para. 3 (2007) (requiring AT&T/BellSouth to offer to certain customers “a broadband Internet access service at a speed of up to 768 Kbps at a monthly rate . . . of \$10 per month”); *Application of Cricket License Company, LLC, et al., Leap Wireless Int’l, Inc., and AT&T Inc. for Consent to Transfer Control of Authorizations*, WT Docket No. 13-193, Memorandum Opinion and Order, 29 FCC Rcd 2735, 2804-05, paras. 169-71 (WTB/IB 2014) (describing pricing commitments). The condition applies only if an incumbent LEC voluntarily discontinues a specified service and offers an IP service in the same geographic market(s). Thus, Commission precedent regarding “voluntary transactions” is relevant to understanding the scope of our section 214(c) authority here. *Cf. AT&T July 29, 2015 Ex Parte* Letter at 6 (“The only other cases cited by Windstream are Commission orders granting Section 214 approval of ‘voluntary transactions’ such as mergers . . .”).

⁵⁴¹ *See supra* paras. 131-150.

⁵⁴² 47 U.S.C. § 205(a) (emphasis added).

⁵⁴³ *See Competitive Telecomm. Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (“Avoidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule.”); *Competitive Telecomm. Ass’n v. FCC*, 117 F.3d 1068, 1074 (8th Cir. 1997) (agreeing with the Commission’s assertion that

(continued...)

contention that the prior grant to AT&T of forbearance for certain non-TDM services poses an “insurmountable legal bar[.]”⁵⁴⁴ Section 214(c) provides sufficient authority to condition the voluntary discontinuance of TDM-based special access and commercial wholesale platform services, and AT&T does not claim that the Commission granted forbearance as to these TDM services. Thus it simply is irrelevant whether forbearance has been granted as to IP service because the Commission has sufficient authority under section 214 as to the discontinuance of TDM service.⁵⁴⁵

158. *Enforcement.* We further find that to continue efficient network transitions and avoid possible delays, competitive LECs that believe an incumbent LEC has violated the reasonably comparable wholesale access condition must be able to seek enforcement action.⁵⁴⁶ We thus agree with Windstream’s argument and find that incumbent LECs should not preclude their wholesale customers that receive an IP replacement service under the Commission’s reasonably comparable wholesale access condition from disclosing the rates, terms, and conditions to a regulator in the context of an action before the Enforcement Bureau.⁵⁴⁷ We further agree that an enforcement action subject to this prohibition would include formal complaints, informal complaints, and any mediation processes, provided the wholesale customer seeks confidential treatment of such rates, terms, and conditions.⁵⁴⁸

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“congressional intent on another matter of great importance in the Telecommunications Act of 1996 justifies [the] temporary diversion from the Act’s cost-based mandate” and thus denying a petition for review of interim pricing rules adopted by the Commission to avoid an adverse effect on universal service based on conflicting deadlines imposed by Congress); *MCI Telecomm. Corp. v. FCC*, 750 F.2d 135, 141 (D.C. Cir. 1984) (“Substantial deference must be accorded an agency when it acts to maintain the status quo so that the objectives of a pending rulemaking proceeding will not be frustrated.”); cf. AT&T July 14, 2015 *Ex Parte* Letter at 6 n.2. AT&T’s contentions rest on the idea that if we preserve a status quo, it must specifically be the “status quo in the *Ethernet* market.” AT&T July 29, 2015 *Ex Parte* Letter at 6 n.22. But in light of the rapidly transitioning marketplace and given our goal of avoiding the irrevocable loss of competition, we find that the relevant status quo is that of the overall market, encompassing multiple transmission technologies. This un-blinkered framework best comports with the direction in section 214(a) and (c) to consider the public convenience and necessity.

⁵⁴⁴ AT&T July 14, 2015 *Ex Parte* Letter at 2-4 (citing *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (*AT&T Forbearance Order*)).

⁵⁴⁵ To conclude otherwise would improperly nullify section 214(c) by suggesting that it must be supplemented by a second source of authority. AT&T’s arguments presume that section 205 regulation of IP would be, but for forbearance, the only permissible means to achieve the policy adopted herein. But it is not nor is it surprising that the Commission has available multiple sources of authority to implement a policy — the Commission regularly identifies multiple sources of authority to justify its actions. See, e.g., *Amendment of the Commission’s Rules with Regard to Commercial Operations in the 3550-3650 MHz Band*, GN Docket No. 12-354, Report and Order and Second Further Notice of Proposed Rulemaking, 30 FC Rcd 3959, 4092, para. 453 (2015); *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Fourth Report and Order, 30 FCC Rcd 1259, 1334-35, para. 205 (2015); *Applications Filed by Qwest Communications International Inc. and CenturyTel, Inc. d/b/a CenturyLink for Consent to Transfer Control*, WC Docket No. 10-110, Memorandum Opinion and Order, 26 FCC Rcd 4194, 4214, para. 44 (2011); *USF/ICC Transformation Order*, 26 FCC Rcd at 18151, para. 1412.

⁵⁴⁶ We note the Commission’s longstanding precedent that “the Section 208(b)(1) deadline shall apply to . . . those matters that would have been included in tariffs but for the Commission’s forbearance from tariff regulation.” Letter from Malena F. Barzilai Senior Government Affairs Counsel, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 3 (filed June 12, 2015) (quoting *Implementation of the Telecommunications Act of 1996*, CC Docket No. 96-238, Report and Order, 12 FCC Rcd 22497, 22513, para. 37 (1997)).

⁵⁴⁷ See Windstream Comments at 31-32.

⁵⁴⁸ *Id.*; see also 47 C.F.R. §§ 0.457, 0.459.

(i) **Totality of the Circumstances Evaluation for Reasonably Comparable Wholesale Access**

159. Because of the flexible nature of our reasonably comparable wholesale access standard, we recognize the need for a similarly flexible case-by-case approach to evaluating the reasonable comparability of rates, terms, and conditions. This approach also is beneficial because it recognizes that circumstances in each market will vary, as will the rates, terms, and conditions associated with the discontinued service and the replacement service. We therefore adopt a “totality of the circumstances” test for evaluating compliance with the “reasonably comparable wholesale access” condition. Notwithstanding the flexible approach that we adopt, we are cognizant of the importance of providing guidance to parties.⁵⁴⁹ In the *Notice*, we sought comment on six specific ground rules to facilitate the IP transition by establishing objective standards and clear criteria for applying the proposed “equivalent wholesale access” standard. Specifically, the *Notice* sought comment on six principles proposed by Windstream to apply as the specific conditions of the proposed “equivalent wholesale access” standard when an incumbent LEC is discontinuing a legacy service. Given our adoption of a “reasonably comparable” standard, we find that Windstream’s specific proposals — which focus on ensuring equivalency — are inappropriate for adoption verbatim.⁵⁵⁰ However, for the reasons stated below, in evaluating whether the reasonably comparable wholesale access requirement is fulfilled, we will consider the following questions, adapted from five of Windstream’s proposals, as well as any other relevant evidence:

- *Will Price per Mbps Increase?* Will the price per Mbps of the IP replacement product exceed the price per Mbps of the TDM product that otherwise would have been used to provide comparable special access service at 50 Mbps or below?⁵⁵¹
- *Will A Provider’s Wholesale Rates Exceed Its Retail Rates?* Will an incumbent’s wholesale charges for the replacement product exceed its retail rates for the corresponding offering?
- *Will Reasonably Comparable Basic Wholesale Voice and Data Services Be Available?* Will the price (net of any and all discounts) of wholesale voice service purchased under a commercial wholesale platform service be higher than the price of the existing TDM wholesale voice service it replaces, and the price (net of any and all discounts) for the lowest capacity level of special access service at or above the capacity of a DS1 increase?
- *Will Bandwidth Options Be Reduced?* Will wholesale bandwidth options include the same services retail business service customers receive from the incumbent LEC?
- *Will Service Delivery or Quality Be Impaired?* Will service functionality and quality, OSS efficiency, and other elements affecting service quality be equivalent or superior compared to what is provided for TDM inputs today? Will installation intervals and other elements

⁵⁴⁹ Cf. USTelecom Comments at 11 (stating that it is unclear what constitutes “equivalent services” as well as “equivalent rates, terms, and conditions”).

⁵⁵⁰ See Verizon Reply at 16 (“Windstream’s principles . . . largely amount to an effort to convert Section 214 into a source for regulating special access and Ethernet rates.”).

⁵⁵¹ Providing reasonably comparable pricing, terms, and conditions should be reasonably achievable by the incumbent LECs, as the record is replete with references to the efficiencies inherent in IP-based networks and services and the cost savings that the incumbent LECs should realize from transitioning away from TDM networks and services. See Verizon Comments at 5-8 (stating that the “business case for fiber deployment assumed operational savings from the lower costs associated with serving customers over fiber and from retiring copper where it was no longer needed”); COMPTTEL Comments at 21 (stating that incumbent LECs are implementing new technologies because they are economically more efficient than older (TDM) technologies; therefore, pricing of the replacement product logically should be “considerably less expensive on a Mbps basis”); see also *Notice*, 27 FCC Rcd at 14973-74, para. 7; AT&T Comments at 62; Windstream Reply at 18.

affecting service delivery be equivalent or superior compared to what the incumbent delivers for its own or its affiliates' operations?⁵⁵²

160. We adopt these specific questions to provide guidance as to what constitutes reasonably comparable wholesale access and provide additional guidance on their meaning below. We will examine responses to these questions holistically, including the evidence concerning the motivation for an incumbent LEC's actions. We emphasize that no one question is dispositive, and we will evaluate each situation individually based on the totality of the circumstances, including but not limited to consideration of these questions.

(a) Will Price per Mbps Increase?

161. For the reasons set forth below, as part of any evaluation of compliance with the reasonably comparable wholesale access condition, we would inquire, "Will the price per Mbps of the IP replacement product exceed the price per Mbps of the TDM product that otherwise would have been used to provide comparable special access service at 50 Mbps or below?" A positive response would weigh toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered, particularly if there is not a sound reason for a given rate increase.

162. Competitive LECs argue that this inquiry (framed as a requirement by Windstream) is necessary to ensure the continued availability of wholesale access to last-mile inputs at a cost to competitive LECs that will enable them to remain effective competitors.⁵⁵³ In addition, Windstream and Birch et al. assert that many small- and medium-sized businesses and multi-location businesses benefit from the availability of TDM-based special access services.⁵⁵⁴ As discussed above, incumbent LECs and other commenters object to a wholesale access condition as a whole, but do not address this specific issue.⁵⁵⁵ They argue that pricing conditions attached to a section 214 discontinuance application are unlawful and would impede deployment of next generation services. However, as discussed above, we find that requiring reasonably comparable levels of wholesale access to services when incumbent LECs transition their legacy networks is necessary to preserve the Commission's core value of competition during the pendency of the special access proceeding. This specific question that we will ask goes to the price relationship between TDM and IP products that is the heart of the interim reasonably comparable wholesale access condition that we adopt.

163. We ask this question on a "price per Mbps" basis to emphasize flexibility for both incumbent and competitive LECs. Unlike DS1s, Ethernet services do not have to be offered in 1.5 Mbps increments. We agree with CenturyLink and other incumbent LECs that IP-based technologies allow greater flexibility in speed offerings compared to TDM.⁵⁵⁶ We wish to preserve this flexibility for incumbent LECs so that they can respond to market demands in deciding speeds for their Ethernet service offerings. But to preserve this flexibility and to avoid rendering the reasonably comparable wholesale access condition toothless, it is necessary to ask whether price comparability is available across the speeds that the incumbent LEC offers. This specific question that we will ask goes to the price relationship between TDM and IP products that is the heart of the interim reasonably comparable wholesale access

⁵⁵² See Notice, 29 FCC Rcd at 15013, para. 111; Letter from Jennie B. Chandra, Vice President — Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 10 (filed Sept. 26, 2014).

⁵⁵³ See, e.g., Windstream Comments at 3 (arguing that a pricing requirement would ensure against "unreasonably discriminatory schemes in which the ILEC would price its retail services below its wholesale service, or refuse to make some IP offerings available to wholesale users").

⁵⁵⁴ Windstream Reply at 15-16.

⁵⁵⁵ See *supra* para. 133.

⁵⁵⁶ See CenturyLink Comments at 9-10 ("Ethernet services are economical substitutes for DS1 and DS3 facilities and provide speeds many times higher than those legacy offerings.").

condition that we adopt. Moreover, because we recognize speed offerings between TDM and IP may vary, incumbent LECs are able to offer IP speeds that have no TDM predecessor offering at exactly equal speeds. Because it is not possible to calculate rates solely on a “one-to-one” basis, it is necessary to inquire about the rate to be calculated based on a “per Mbps” speed of service denominator.

164. We will generally limit our inquiry regarding price per Mbps to replacement services at or below 50 Mbps.⁵⁵⁷ In doing so, we reject arguments by the Wholesale DS-0 Coalition, Granite, and others that this inquiry (framed as a requirement in the *Notice*) should not have a maximum speed.⁵⁵⁸ The underlying purpose of our reasonably comparable wholesale access condition is to preserve for a limited time the opportunities for competition that exist today. Inquiring about rate equivalency at any speed would go too far because it would create obligations regarding price for speeds that are not offered as TDM services and thus not related to the discontinuance of TDM services.⁵⁵⁹ The 50 Mbps figure, as the nearest “round number” above the DS3 speed, is a sensible dividing line that allows incumbent LECs to offer tomorrow’s speeds without price limitation while we inquire as to whether substitutes and near-substitutes for today’s services remain available to competitive LECs at reasonably comparable rates. We find that this bright-line cutoff strikes the best balance between preserving the competition that exists and leaving incumbent LECs flexibility to invest in and deploy service improvements. However, if the only replacement service for a DS3 special access service available to competitive LECs is higher than 50 Mbps, then we will inquire about the next-highest-speed offering so that DS3 replacement services, which are important for competitive LECs to serve their end-user customers, are not excluded from our inquiry.⁵⁶⁰

165. With respect to special access services, we believe that the incumbent LECs’ DS1 and DS3 generally available tariffed rates at the time of discontinuance, including discounts associated with three- and five-year term and volume discount plans, are the appropriate interim benchmark for measuring the rate relationship between IP-based replacement service and the discontinued service during our inquiry and will provide an efficient and objective measure for both incumbent LECs and their wholesale customers to determine rate comparability.⁵⁶¹ We find that anchoring our evaluation of this

⁵⁵⁷ Based on the record, 50 Mbps appears to be the closest standard speed offering to a DS3 offering of 44.736 Mbps. See Windstream May 15, 2015 *Ex Parte* Letter at 2.

⁵⁵⁸ Cf., e.g., Wholesale DS-0 Coalition Comments at 6-7 (arguing that not only should the Commission require that the price for IP services offered to replace TDM-based special access service at 50 Mbps or below not be permitted to increase, but that this prohibition should apply to *all* wholesale services such that on a per-line basis, “wholesale rates for any replacement product not exceed the legacy per-line rate”); Granite Comments at 11-13 (“It is important that on a per-line basis, wholesale rates for any IP replacement products . . . not exceed the TDM per-line rate.”).

⁵⁵⁹ The vast majority of the special access inputs used by competitive LECs are at or below the DS3 speed level of 44.736 Mbps. See XO Comments at 9 (stating it is a major purchaser of DS1 and DS3 special access services); see also *id.* at 26 (“XO is dependent in many locations upon ILEC DS1 and DS3 services to access end user customers, having no competitive alternatives.”); Windstream May 15, 2015 *Ex Parte* Letter at 2-3 (“[Windstream] is a service provider for the University of Arkansas for Medical Sciences (UAMS) Center for Distance Health, which uses DS1 special access services and other services to connect more than 400 rural health care facilities to specialists via live, two-way video and enables rural patients to access cutting-edge medical treatment. Through its Arkansas SAVES (Stroke Assistance through Virtual Emergency Support) program, UAMS uses DS1 connectivity to link rural stroke patients to specially trained vascular neurologists, enabling the administration of a clot-busting drug that, when given soon after onset of a stroke, significantly improves patients’ chances of recovery.”).

⁵⁶⁰ See *supra* paras. 134-135.

⁵⁶¹ We specifically will inquire about the rates, terms, and conditions associated with three- and five-year term and term-and-volume discount plans as a pricing benchmark given the fact that a significant share of special access purchases takes place at those terms and that they therefore function as reasonably representative interim pricing arrangements. We acknowledge that these pricing options still encompass a variety of different pricing arrangements. Rather than attempt to address all aspects of these varied arrangements, we will evaluate these issues as they arise and leave it to the parties to resolve these details in good faith in their negotiations. We expect that,

(continued...)

question concerning IP rates to DS1 and DS3 rates creates predictability, simplicity, and clarity due to the prevalence of DS1 and DS3 services on the market today. Specifically, under this inquiry, for IP services at or below 12 Mbps, we will calculate the TDM benchmark per Mbps rate based on the DS1 TDM service it offered in the area; for IP services above 12 Mbps and at or below 50 Mbps, we will calculate the TDM benchmark per Mbps based on the DS3 service it offered in the area.⁵⁶² We adopt a 12 Mbps threshold for calculating comparable rates for replacement services based on DS1 pricing because it most closely replicates the options that exist today since it is technologically infeasible to bond DS1 special access services to provide more than 12 Mbps in capacity. We inquire about replacement services above 12 Mbps based on comparisons to DS3 prices since the only viable TDM special access option for delivering more than 12 Mbps service to a customer location is a DS3 service.⁵⁶³

166. *Wholesale Platform Services Approach.* We recognize that this initial inquiry, which is evaluated on a per Mbps basis, is not directly relevant to commercial wholesale platform services. Thus, with respect to pricing for such services, we will focus on the inquiries below and not this first inquiry. Nevertheless, for clarity and parallelism we set forth here our benchmarking approach for such services. In contrast to our inquiry for special access services, we adopt an individualized approach to the interim benchmark for our inquiry with respect to commercial wholesale platform services. Under this approach, we will ask whether the competitive LEC is able to take the IP-replacement service at reasonably comparable rates, terms, and conditions to the service taken before discontinuance.⁵⁶⁴ We agree with Granite that, “[p]arties to wholesale TDM-based voice agreements know the prices in their agreements.”⁵⁶⁵ Unlike the special access services discussed above that are offered on tariffed rates, commercial wholesale platform services are non-tariffed commercial offerings. Thus, we adopt an inquiry for these services that is based on market-negotiated rates, terms, and conditions, as such an inquiry is administratively more straightforward to implement.

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other things being equal, we would deem it to be reasonably comparable and thus compliant with the wholesale access condition for parties to treat existing pricing arrangements as a default setting for rates for replacement services. This approach will facilitate technology transitions in the interim until the Commission completes its current review of special access regulation. To ensure that current levels of competition are not curtailed as we facilitate technology transitions, we also include within the scope of our reasonably comparable wholesale access requirement new customers and existing customers who wish to purchase additional services; reasonably comparable rates, terms, and conditions must be offered to such entities and not only to existing customers as to existing services. Finally, we will inquire whether purchasers that make volume commitments under tariffed special access discounts are being penalized through loss of a discount or through shortfall or early termination penalties for purposes of services discontinued as a result of an incumbent LEC’s technology transition. Similarly, we will inquire whether replacement services are counted toward fulfillment of a purchaser’s volume commitment where TDM services have been discontinued. In both instances, it would be inconsistent with the purpose of the reasonably comparable wholesale access standard that we articulate if competitors suffer changes that are not reasonably comparable because of an incumbent LEC’s unilateral decision to transition technologies. *See* Windstream June 12, 2015 *Ex Parte* Letter at 2-3.

⁵⁶² *See* Windstream Apr. 17, 2015 *Ex Parte* Letter, Attach. at 1-2 (providing hypothetical examples to demonstrate application of the proposed principles).

⁵⁶³ *See* Windstream May 15, 2015 *Ex Parte* Letter at 3 (“It is not technologically feasible to bond DS1 special access circuits to provide more than 12 Mbps in capacity, so if a wholesale purchaser seeks to deliver more than 12 Mbps service to a customer location, the only viable TDM special access option is DS3 service.”). We recognize that 12 Mbps is an approximate figure but nonetheless use it for convenience.

⁵⁶⁴ *See infra* paras. 172-173.

⁵⁶⁵ Granite June 12, 2015 *Ex Parte* Letter at 2.

(b) Will A Provider's Wholesale Rates Exceed Its Retail Rates?

167. For the reasons set forth below, as part of any evaluation of compliance with the reasonably comparable wholesale access condition, we would inquire, “Will an incumbent’s wholesale charges for the IP replacement product exceed its retail rates for the corresponding offering?” A positive response would weigh toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered, particularly if the rate disparity is significant or if there is not a sound reason for any differences in offerings. It remains an open question whether there are suburban, remote, rural and other areas not served by cable or other modes of service where the only competition that exists at the retail level is between an incumbent LEC and a competitive LEC that needs wholesale access from the incumbent LEC in order to compete at the retail level.⁵⁶⁶ We recognize that competitive LECs continue to play the most significant role in competing with incumbent LECs for enterprise telecommunications business.⁵⁶⁷ As a result, depending on the competitive state of various markets, there may be an incentive for the incumbent to charge higher rates at the wholesale level in order to prevent or disadvantage competition at the retail level. Whether and where such competitive alternatives exist is precisely the analysis we are conducting in the special access proceeding. Absent such alternatives, competitive LECs and their customers will likely be left with less choice and higher prices.⁵⁶⁸

168. We find that this inquiry is necessary to verify the offering of reasonably comparable wholesale access, which ensures that competitive LECs are able to compete. We further find that this inquiry concerning discrimination includes related costs such as the imposition of special construction charges and timing of provisioning.⁵⁶⁹ The guarantee of competitive wholesale access free of unreasonable discrimination has played a bedrock role in facilitating the market competition that exists today. Until we are able to reach appropriate long-term conclusions about the state of the wholesale access market in the special access proceeding, we find it necessary, as an interim measure, to inquire whether and to what degree discrimination exists between retail and wholesale customers to determine whether reasonably comparable rates, terms, and conditions are being offered.

(c) Will Reasonably Comparable Basic Wholesale Voice and Data Services Be Available?

169. For the reasons set forth below, as part of any evaluation of compliance with the reasonably comparable wholesale access condition, we would inquire, “Will the price (net of any and all discounts) of wholesale voice service purchased under a commercial wholesale platform service be higher than the price of the existing TDM wholesale voice service it replaces, and the price (net of any and all discounts) for the lowest capacity level of special access service at or above the capacity of a DS1 increase?” A positive response to any of these questions would weigh toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered, particularly if there is not a

⁵⁶⁶ Cf., e.g., Wholesale DS-0 Coalition Comments at 3-4.

⁵⁶⁷ See Letter from Jennie B. Chandra, Vice President—Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, at 6 (filed Aug. 7, 2014) (Windstream Aug. 7, 2014 *Ex Parte* Letter) (providing a chart based on data compiled by an independent market research firm estimating that competitive LECs accounted for 26% of non-residential customer expenditures on wireline communications during the second quarter of 2014).

⁵⁶⁸ See *supra* para. 135.

⁵⁶⁹ See Letter from Jennie B. Chandra, Vice President—Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed June 8, 2015) (asserting that an incumbent LEC informed Windstream, its wholesale customer, that fiber-based facilities would require thousands of dollars in special construction charges and take 90-120 days to complete and then informed Windstream’s retail customer that the incumbent LEC could provide it with a fiber-based retail service with no special construction charges within two weeks).

sound reason for a rate increase. We emphasize that this pricing-related factor — given that pricing is at the heart of commercial negotiations — will be extremely important in our analysis.

170. *Pricing for data services.* We will evaluate whether the incumbent LECs price their lowest capacity level of IP-based special access service providing speeds equal to or greater than a DS1 at wholesale rates that exceed the generally available tariffed rates for DS1 services at the time of discontinuance, including discounts associated with three and five year term and term and volume discount plans — and if there is a price discrepancy, we will evaluate its scope. We find that this inquiry is important to evaluate whether competitive LECs retain access to replacements for DS1 service at reasonably comparable rates, terms, and conditions. Incumbent LECs argue that imposing specific speed and rate requirements for next generation IP-based services in parity with TDM-based technology requirements interferes with their ability to innovate and compete.⁵⁷⁰ We agree for the reasons stated above. At the same time, there is significant evidence in the record demonstrating a significant continued reliance upon basic service levels at this time.⁵⁷¹ Therefore, to evaluate whether reasonably comparable rates, terms, and conditions are being offered, we will focus with particularity on whether competitive LECs are offered a replacement service priced comparably to DS1 service.

171. This question is distinct from the first question articulated above because it is not calculated on a per Mbps basis; we simply ask whether the lowest capacity level at or above DS1 to be offered is offered at the DS1 rate. This more stringent component of any evaluation will help to obviate the risk that an incumbent LEC would only offer higher speed services and thereby cutoff any replacement similar to DS1s because such a change would be unlikely to constitute reasonably comparable rates, terms, and conditions.⁵⁷² Without any focus on the price relationship of the closest IP equivalent to the current pricing for basic service, incumbent LECs could avoid a rate standard “by simply offering only high capacity (and therefore higher priced wholesale inputs).”⁵⁷³ We expect the efficiencies inherent in the provision of IP service will ensure that even if incumbent LECs maintain rates equal to or below TDM rates for the DS1 replacement service, the resulting rates will allow incumbent LECs to recover their investment in marginally faster IP services.⁵⁷⁴

172. *Pricing for wholesale voice services.* We further will evaluate whether incumbent LECs price their replacement wholesale voice service, purchased under a commercial agreement, net of any and

⁵⁷⁰ See, e.g., Verizon Comments 28-29 (stating that IP-based services “may have different functionalities features and costs . . . but be perfectly acceptable substitutes for a service an ILEC wants to discontinue . . . and the key question for the Commission is whether options exist for the end user, not whether they exist for particular competitors.”); see also ITTA Comments at 12 (stating that “these principles would preclude ILECs from adjusting their rates for various components of the IP replacement product, require ILECs to offer a minimum number of bandwidth options, and limit changes ILECs may wish to make with respect to service delivery options and other terms and conditions that take into account the nature of the IP replacement product”); AT&T Comments at 59-62; USTelecom Comments at 11-12.

⁵⁷¹ See, e.g., Utilities Telecom Council at 13 (citing Public Knowledge et al. May 12, 2014 Letter at 2-3).

⁵⁷² See Windstream July 20, 2015 *Ex Parte* Letter at 7-8 (noting that “[i]n 2013 ILECS and their affiliates made up nearly 82 percent of the local wholesale transport market, which includes last-mile connectivity for wireless cell towers, commercial building connections, and data center and aggregation points. AT&T, Verizon, and CentryLink alone hold 70 percent of this market.”) (citing ATLANTIC-ACM, U.S. Telecom Wired and Wireless Sizing and Share Report, September 2014 (estimating market share based on 2013 data)); Windstream Reply at 15-16.

⁵⁷³ COMPTTEL Comments at 22.

⁵⁷⁴ See Sprint Comments at 5 (“IP services are less costly and more efficient than the TDM services they are replacing.”); see also Full Service Network et al. Reply at 2 (“Verizon did replace roughly half of its existing copper network with fiber—which is cheaper to build and maintain while providing unlimited, inexpensive bandwidth”); CWA Comments at 4 (“Competition drives capital to those markets that promise the highest return on investment. This is good news for consumers in places . . . [where providers] are building or have announced plans to build all-fiber networks . . .”).

all discounts, greater than the price of the existing TDM wholesale voice service it replaces, and if so to what degree. We agree with Granite that both the incumbent and competitive LECs know the prices of their commercial wholesale platform services, and those prices can be readily applied to replacement products.⁵⁷⁵ We find this is an appropriate evaluation to promote technology transitions by helping to ensure that competitive carriers can continue to provide multi-location enterprise services pursuant to commercial wholesale platform arrangements.

173. We find this additional inquiry to evaluate the comparability of rates, terms, and conditions for commercial wholesale platform arrangements builds on the other inquiries that we adopt and our proposals in the *Notice*.⁵⁷⁶ This additional language to the third question emphasizes treatment of “basic service” for this important service used by competitive LECs to serve a large sector of enterprise customers in many locations with low bandwidth needs.⁵⁷⁷ The first question discussed above is not on point for commercial wholesale platform services, since that inquiry is based on a per Mbps offering at the DS1 level and above, not a platform offering that includes loops, switching and transport.⁵⁷⁸ We further clarify that we will ask our other specific questions, particularly the fifth question as to whether there will be impairment in service quality or delivery, as to these commercial wholesale platform services.

(d) Will Bandwidth Options Be Reduced?

174. For the reasons set forth below, as part of any evaluation of compliance with the reasonably comparable wholesale access condition, we would inquire, “Will wholesale bandwidth options include the same services retail business service customers receive from the incumbent LEC?” A negative response would weigh toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered, particularly if the range of offerings is significantly more limited or if there is not a sound reason for any differences in offerings. We recognize that any wholesale access standard could be obviated “by simply offering only high capacity (and therefore higher priced wholesale inputs).”⁵⁷⁹ We will therefore ask this question as a part of our totality of the circumstances inquiry to facilitate a determination of whether rates, terms, and conditions of replacement services are reasonably comparable. We find that the existing services an incumbent LEC makes available to retail business service customers provides baseline from which to conduct our evaluation because incumbent LECs find it convenient to provide these services in the market. Sprint argues that an incumbent LEC, at a minimum, should be required to offer the same variety of speed offerings that it currently offers in TDM-based services, “or the speed offerings of its retail IP services, whichever is greater.”⁵⁸⁰ While we agree that we should evaluate the relationship between the speeds of IP offerings to retail business customers and to competitive LECs, we decline to focus our inquiry on whether incumbent LECs retain TDM-based speeds. Such an inquiry may improperly lock incumbent LECs into legacy speed offerings, which is contrary to the purpose of the flexible reasonably comparable wholesale access condition that we adopt.

(e) Will Service Delivery or Quality Be Impaired?

175. For the reasons set forth below, as part of any evaluation of compliance with the reasonably comparable wholesale access condition, we will inquire, “Will service functionality and quality, OSS efficiency, and other elements affecting service quality be equivalent or superior compared to what is provided for TDM inputs today? Will installation intervals and other elements affecting service

⁵⁷⁵ Granite June 12, 2015 *Ex Parte* Letter at 2.

⁵⁷⁶ See *Notice*, 29 FCC Rcd at 15013, para. 111.

⁵⁷⁷ See *supra* note 514.

⁵⁷⁸ See *supra* paras. 147-148.

⁵⁷⁹ See *supra* para. 171 (quoting COMPTTEL Comments at 22).

⁵⁸⁰ Sprint Comments at 4.

delivery be equivalent or superior compared to what the incumbent LEC delivers for its own or its affiliates' operations?" A negative response to either question would weigh toward a conclusion that reasonably comparable rates, terms, and conditions are not being offered, particularly if the level of difference is significant or if there is not a sound reason for any impairment. We are persuaded that quality of service and reliable installation and delivery are important so that wholesale customers can continue to compete.⁵⁸¹ Therefore, in considering whether reasonably comparable rates, terms, and conditions are available, we will examine the factors identified by the question above. As discussed herein, competitive LECs are dependent on wholesale inputs to serve their retail customers and if the service delivery or quality of the IP replacement service is unduly impaired, these carriers likely will be unable to provide competitive services to their customers.⁵⁸²

176. We agree with competitive LECs and enterprise customers that at least in areas where incumbent LECs face competition only from their wholesale customers, the incumbent LECs may have an incentive to disadvantage their wholesale customers by degrading the quality of the wholesale service.⁵⁸³ Given the inherent efficiencies of IP-based service,⁵⁸⁴ we do not believe that this component of our inquiry — or the overall reasonably comparable wholesale access condition — will be unduly burdensome, and we anticipate that the costs of compliance generally will be lower than (or at a minimum will not exceed) the costs of compliance with similar obligations as to TDM services.⁵⁸⁵

(f) Other

177. Although the Commission will consider the questions discussed above as part of the totality of the circumstances test, the Commission is not limited to these questions in its analysis and may consider other evidence. For example, in the 2011 *Data Roaming Order*, the Commission held that it would consider "other relevant factors in determining the commercial reasonableness of the negotiations,

⁵⁸¹ See, e.g., Windstream April 28, 2014 *Ex Parte* Letter at 11; cf. AT&T Comments at 42-43 (stating that next generation services are "expected to significantly improve the features, functionality, and quality of service available to consumers"); see also *id.* at 62 ("No one has questioned or can question that the transition to all-IP networks will greatly enhance the efficiency of telecommunications services and provide a far more capable platform for future innovation."); CenturyLink Reply at 25 ("These next-generation offerings provide new and improved functionalities not available from the legacy services. Consumers are abandoning POTS for the mobility and convenience of wireless services and the lower cost, greater capacity and flexibility of VoIP and other IP-enabled features.")

⁵⁸² We note the Commission addressed discrimination issues with respect to broadband Internet access service in its *Open Internet Order*, when it declined to forbear from sections 201 and 202 of the Act for broadband Internet access service. The Commission found that broadband providers are "gatekeepers" to end-users of broadband Internet access service and antidiscrimination provisions are necessary to protect the public interest from harmful effects. See *Open Internet Order*, 30 FCC Rcd at 5810, para. 444. We find a similar rationale applies in the context of the reasonably comparable wholesale access interim rule since incumbent LECs control the last-mile inputs competitive LECs need to serve their customers and technology transitions may create a predicate for discriminatory acts that could harm enterprise consumers and organizations.

⁵⁸³ See, e.g., Windstream Comments at 13, Fig. 5 (showing data that the primary reason customers do not switch broadband providers is service quality and price).

⁵⁸⁴ See *supra* note 551.

⁵⁸⁵ For instance, AT&T states that this technology transition "will 'dramatically reduce network costs, allowing providers to serve customers with increased efficiencies that can lead to improved and innovative product offerings and lower prices.'" AT&T Comments at 3-4 (quoting *Notice*, 29 FCC Rcd at 14973-74, para. 7); see also Letter from John T. Nakahata, Counsel to Windstream Services, LLC, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed July 27, 2015) ("No party has disputed the conclusions of the CostQuest white paper Windstream filed that demonstrated that costs for fiber-based Ethernet service have declined over time." (citing Jennie B. Chandra, Vice President, Public Policy and Strategy, Windstream, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at Attach B., CostQuest, Network Cost Differentials Over Time (filed June 8, 2015))).

providers' conduct, and the terms and conditions the proffered data roaming arrangements.⁵⁸⁶ Similarly, here we may consider evidence as to these and other issues provided by the incumbent LEC, competitive LEC, and other parties.

(ii) Inquiries and Requirements Not Adopted

178. *Backdoor Price Increases.* In the *Notice*, we sought comment on whether, as a part of a wholesale access condition, to prohibit price hikes from being effectuated via significant changes to charges for network to network interface (NNI) or any other rate elements, lock-up provisions, early termination fees (ETFs), special construction charges, or any other measure.⁵⁸⁷ We agree that it would be a cause for concern if incumbent LECs evaded the interim wholesale access condition through improper workarounds, and emphasize that our “reasonably comparable” standard allows us to evaluate the totality of the circumstances, including any apparent attempts at evasion.⁵⁸⁸ However, given the complexity of these issues — which extend significantly beyond what otherwise was raised in the *Notice* — and given that we are examining a number of them in other proceedings,⁵⁸⁹ we decline to take any additional specific actions on these issues at this time.

179. *Other Requests.* We decline to include any rate publication requirement in our evaluation of compliance with the reasonably comparable wholesale access condition. Birch proposes that the Commission require incumbent LECs to “memorialize all of the rates terms, and conditions governing [the incumbent LEC’s] Replacement Service offerings on its website.”⁵⁹⁰ Moreover, Windstream also proposes that incumbent LECs publish the TDM rates for the services being discontinued.⁵⁹¹ We do not find sufficient evidence to impose publication obligations on incumbent LECs. Given the interim nature of the reasonably comparable wholesale access condition, we are highly skeptical that a publication requirement would carry significant value despite its clear costs. In addition, we agree with CenturyLink that this requirement would go beyond merely preserving the essence of the status quo to create an obligation that does not presently exist for TDM services that are discontinued, and therefore is contrary to the overall framework and purpose of our reasonably comparable wholesale access obligation.⁵⁹²

180. We also decline to include additional requirements to our evaluation of the reasonably comparable wholesale access condition. Specifically we decline to impose a certification requirement proposed by some commenters as it is unclear the timing of certification, and requiring certification is inherently backward-looking, i.e., it is best suited to confirming that an entity has already complied with a regulatory obligation. We find that the condition we adopt to govern the discontinuance process is better suited to ensuring forward-looking, ongoing compliance on an interim basis. And we see no need at this

⁵⁸⁶ See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Second Report and Order, 26 FCC Rcd 5411, 5453, para. 87 (2011) (*Data Roaming Order*), aff’d sub nom. *Cellco Partnership v. FCC*, 700 F.3d 534 (D.C. Cir. 2012).

⁵⁸⁷ See *Notice*, 29 FCC Rcd at 15013, para. 111.

⁵⁸⁸ See, e.g., COMPTTEL Comments at 22 (explaining that incumbents LECs should not be able to assess special construction charges for example when fiber for any of the incumbent LEC’s services, retail and/or wholesale, already connects to the location addressed by a wholesale order or when an incumbent LEC must modify an existing facility to bring it into compliance with applicable codes).

⁵⁸⁹ See generally *2005 Special Access NPRM*, 20 FCC Rcd 1994; see also *Data Collection Order*, 27 FCC Rcd 16318.

⁵⁹⁰ Birch et al. Comments at 11-14; see also Wholesale DS-0 Coalition Comments at 5-7.

⁵⁹¹ Windstream Comments at 30 (stating that “when an ILEC is granted a Section 214 discontinuance to end TDM services, it should be required to post all of its TDM rates for the discontinued wholesale services on its website, including optional volume and term plans, in a uniform format set by the Wireline Competition Bureau”).

⁵⁹² See CenturyLink Reply at 14-15 (claiming these proposals are “oppressive requirements premised on the view that their own business interests trump the public interest in new deployment”).

time to adopt additional “belt and suspenders” methods to ensure compliance when doing so imposes costs — even if incrementally small — when it is not clear that doing so will result in any benefit. For the same reasons, we decline to include any audits or specific performance metrics.⁵⁹³ We note that in the Further Notice we seek comment on possible revisions to rule 63.71 to provide additional notice to customers that use the proposed discontinued TDM service as a wholesale input.⁵⁹⁴

III. ORDER ON RECONSIDERATION

181. On December 23, 2014, the United States Telecom Association (USTelecom) filed a Petition for Reconsideration of the Declaratory Ruling (*Declaratory Ruling*) that accompanied the Notice.⁵⁹⁵ For the reasons set forth below, we deny USTelecom’s Petition.

A. Background

182. Along with the Notice, the Commission adopted the *Declaratory Ruling*, which clarified that when analyzing whether network changes constitute a “discontinuance, reduction, or impairment of service” under section 214, the Commission applies a “functional test” encompassing “the totality of the circumstances.”⁵⁹⁶ The Commission found this clarification was necessary in order to terminate an industry controversy that arose after Hurricane Sandy. In 2012, Hurricane Sandy destroyed much of the legacy network in the barrier islands of New York and New Jersey. The following year, Verizon proposed to serve affected customers with network facilities and services that differed in meaningful ways from those available prior to Sandy.⁵⁹⁷ Consumers complained the new network may not support certain third-party services and devices (fax machines, DVR services, credit card machines, medical devices, etc.) that functioned well on the legacy network.⁵⁹⁸ Verizon argued that because these services and devices were not described in its tariff, network changes resulting in their loss could not be considered a “discontinuance, reduction, or impairment of service” under section 214(a).⁵⁹⁹

183. In the *Declaratory Ruling*, the Commission found that “[t]he purpose of a tariff is not to define the full scope of the service provided” and that Congress did not intend section 214(a) “to allow

⁵⁹³ Cf. Windstream Comments at 30-31 (proposing incumbent LECs have outside auditors audit their compliance with the proposed equivalent wholesale access condition every two years and the Commission should direct the Wireline Competition Bureau to adopt performance indicators “such as install time, repair time, and number of troubles and repeat troubles” for incumbent LEC replacement services).

⁵⁹⁴ See *infra* paras. 237-238.

⁵⁹⁵ See USTelecom Petition.

⁵⁹⁶ Notice, 29 FCC Rcd at 15017-18, para. 117.

⁵⁹⁷ Verizon subsequently decided to rebuild its network in Fire Island, New York with fiber. Verizon’s discontinuance application relating to the NJ barrier islands currently is pending. See Letter from Frederick E. Moacdieh, Executive Director — Federal Regulatory Affairs, Verizon, to Ms. Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-150, Attach. (filed June 7, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7022424983>.

⁵⁹⁸ Verizon New York Inc. and Verizon New Jersey Inc.’s Second Response to Information, Data, and Document Request, WC Docket No. 13-150, at 11 (filed Sep. 4, 2013), <http://appsint.fcc.gov/ecfs/comment/view?id=6017466091> (VZ Second Response to Information Request); see also, e.g., Comments of AARP, WC Docket No. 13-150, at 15-16 (filed July 29, 2013) (stating that the substitution of Voice Link eliminates a common carrier network that has supported a wide variety of technologies and services of benefit to consumers, and jeopardizes public safety because it is incompatible with Life Alert systems and security systems); Comments of Public Knowledge, WC Docket No. 13-150, at 7-12 (filed July 29, 2013) (asserting that Voice Link is a downgrade from wireline telecommunications); Comments of New Jersey Div. of Rate Counsel et al., WC Docket Nos. 13-149 and 13-150, at 14 (filed July 29, 2013) (stating that even if alternatives to these services are available, “consumers would bear the additional cost”).

⁵⁹⁹ Verizon points out that “[s]uch devices and services were not, however, offered by Verizon as a ‘POTS feature or service capability’ of its telecommunications services.” VZ Second Response to Information Request at 11.

the carrier to define the scope of ‘service’ via its tariff.”⁶⁰⁰ The Commission further noted that “[t]he value of communications networks derives in significant part from the ability of customers to use these networks as inputs for a wide range of productive activities,” and “[a]n important factor in this analysis is the extent to which the functionality [at issue] traditionally has been relied upon by the community.”⁶⁰¹

184. In its Petition, USTelecom first asserts that the *Declaratory Ruling* is procedurally infirm because the Commission’s “new” definition of “service” constitutes a legislative rule for which a notice of proposed rulemaking and comment period is required under the Administrative Procedure Act.⁶⁰² USTelecom argues that the Commission impermissibly expanded the definition of “service” because the Commission and several courts historically have equated tariff and contract terms with the “service” offered by providers. Second, USTelecom argues the “new definition [of service] is impermissibly vague and, instead of terminating a controversy or removing uncertainty, it creates unnecessary confusion.”⁶⁰³

185. Several commenters support USTelecom’s Petition, arguing that the *Declaratory Ruling* violates the Due Process Clause⁶⁰⁴ because it substantively changes the application of section 214(a), and that therefore the Commission was required to give notice and an opportunity to comment.⁶⁰⁵ These commenters also agree with USTelecom’s forecast that the *Declaratory Ruling* will result in a “regulatory guessing game,” and will create particular difficulties for small, high-cost carriers.⁶⁰⁶ Specifically, they argue carriers have no way of knowing every piece of third-party equipment used in connection with offered services, nor can carriers presage which third-party incompatibilities the Commission will deem requires an application.⁶⁰⁷

186. Opposing commenters argue the *Declaratory Ruling* does not create a new substantive rule, but rather that the Commission declared its interpretation of an existing rule in order to provide necessary clarity.⁶⁰⁸ They assert that clarifications do not qualify as the type of substantive change for which a rulemaking is necessary.⁶⁰⁹ Several of these commenters note that USTelecom does not cite any instances where the Commission interpreted “service” differently from how it is defined in the *Declaratory Ruling*.⁶¹⁰ They also assert that the cases relied upon by USTelecom are inapposite to its arguments.⁶¹¹ Finally, opposing commenters find USTelecom’s concerns about vague and amorphous standards disingenuous, noting that the Commission articulated the specific concerns giving rise to the

⁶⁰⁰ Notice, 29 FCC Rcd at 15015-16, para. 115.

⁶⁰¹ *Id.* at 15016-18, paras. 116, 119.

⁶⁰² USTelecom Petition at 2-7.

⁶⁰³ *Id.* at 7-9.

⁶⁰⁴ Verizon Comments at 2. In this section, “Opposition,” “Comments,” and “Reply” are used to denote filings in response to the USTelecom Petition, with reference to the date filed only when that date differs from January 23, 2015 for Oppositions/Comments and January 30, 2015 for Replies.

⁶⁰⁵ *See id.* at 1-2; NCTA Comments at 1; GVNW Comments at 2; NTCA Reply at 3; AT&T Reply at 2.

⁶⁰⁶ *See* GVNW Comments at 2; Verizon Comments at 8; NTCA Reply at 3-4; AT&T Reply at 8-10.

⁶⁰⁷ *See* AT&T Reply at 1, 9-10; GVNW Comments at 2; NTCA Reply at 3-5.

⁶⁰⁸ *See* Granite Opposition at 3; Rural Broadband Policy Group Opposition at 2; COMPTTEL Opposition at 2; Public Knowledge Opposition at 5.

⁶⁰⁹ *See* Granite Opposition at 7-9.

⁶¹⁰ *See id.*; COMPTTEL Opposition at 3; Public Knowledge Opposition at 6.

⁶¹¹ *See* Public Knowledge Opposition at 5; Granite Opposition at 5-8; COMPTTEL Opposition at 4-5.

Declaratory Ruling — i.e., the ability of devices and functionalities such as 9-1-1 location accuracy, alarm monitoring, medical alert capabilities, and fax machines to work on carriers' networks.⁶¹²

B. Discussion

187. We find that USTelecom's arguments are meritless. First, the *Declaratory Ruling* did not require a notice and comment period because it does not substantively change existing rules. The Commission's interpretation only clarified section 214. Second, the *Declaratory Ruling* is not impermissibly vague. For the reasons set forth below, we deny USTelecom's Petition.

1. The Clarification in the Declaratory Ruling Is Not a Legislative Rule and Thus Did Not Require a Notice and Comment Period

188. USTelecom claims that the analysis set forth in the *Declaratory Ruling* is a new legislative rule requiring notice and comment under the APA. We disagree. The *Declaratory Ruling* clarified a misconception held by at least one incumbent LEC that an incumbent LEC's tariff is the sole source to which the Commission will look in determining what constitutes the "service" offered by the incumbent LEC. Per the Commission's rules, the Commission may issue declaratory rulings "terminating a controversy or removing uncertainty",⁶¹³ therefore, its effort at eliminating confusion on this issue was entirely appropriate. The clarification in question comports with section 214, with existing Commission regulations, and with Commission precedent. As explained in greater detail below, the *Declaratory Ruling* therefore does not constitute a legislative rule.

a. The Commission Has Never Used Tariffs to Exclusively Define the Scope of Service

189. As stated in the *Declaratory Ruling*, "the purpose of a tariff is not to define the full scope of the service provided."⁶¹⁴ Rather, a tariff's purpose is to provide "schedules showing all charges for itself and its connecting carriers . . . and showing the classifications, practices, and regulations affecting such charges."⁶¹⁵ The Commission has never stated that its evaluation of whether a "service" is discontinued *only* examines the service offering detailed within a tariff or contract. Nor is there anything in section 214 or the Commission's rules establishing such limited parameters. As stated in the *Declaratory Ruling*, tariffs cannot define the scope of a "service" under section 214(a) given that there are circumstances in which the Commission has forbore from tariffing requirements but in which section 214 obligations remain intact. For example, when AT&T, Embarq, and Frontier were granted forbearance from tariffing requirements, the Commission stated, in no uncertain terms, that the services at issue remained subject to section 214.⁶¹⁶ USTelecom's preference to tether our section 214 analysis to tariff language would yield potentially absurd results.⁶¹⁷ For example, under USTelecom's view, any rate

⁶¹² See, e.g., Granite Opposition at 2, 4-5.

⁶¹³ 47 C.F.R. § 1.2(a).

⁶¹⁴ Notice, 29 FCC Rcd at 15015, para. 115.

⁶¹⁵ 47 U.S.C. § 203(a).

⁶¹⁶ See *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, WC Docket No. 06-125, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18712, 18727, paras. 11, 39 (2007); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19485-86, 19500, paras. 12, 38 (2007).

⁶¹⁷ USTelecom Petition at 4.

increase could be construed as a discontinuance and would therefore trigger section 214's approval process. Such an outcome would be inconsistent with section 214(a) and Commission precedent and is precisely why the Commission does not limit its section 214 evaluation to the four corners of the tariff.⁶¹⁸

b. USTelecom's Reliance on Other Sources is Misplaced

190. *The Brand X Case is Inapposite.* Given that section 214 contains no "clear" law stating that service is solely defined by what a provider offers its customers, USTelecom attempts to find it elsewhere. These attempts are unavailing. For example, USTelecom cites the *Brand X* case to support its conclusion that services are strictly "defined by the terms of its federal tariff, or in the case of telecommunications services that have been detariffed, in its contracts with its customers."⁶¹⁹ However, in *Brand X*, neither the Court nor the Commission focused on the carrier's tariff or other contractual language in defining the service; instead, the Commission (and later the Court) explicitly relied on the consumer's point of view when determining how to classify the types of services customers receive from Internet service providers and whether consumers truly had been "offered" certain services at all.⁶²⁰ Therefore, *Brand X* does not support USTelecom's argument that the Commission strictly relies upon tariff language when defining services.

191. *Filed Tariff Doctrine Is Also Inapplicable.* USTelecom next turns to the filed tariff doctrine to contend that the tariff "'conclusively and exclusively enumerate[s] the rights and liabilities' of the carrier and its customer."⁶²¹ But it cannot show that the filed rate doctrine somehow controls the scope of section 214(a). First, the filed rate doctrine only applies to tariffed offerings. Therefore, it is irrelevant to detariffed services under contract. Moreover, it is not clear how the filed rate doctrine could "conclusively and exclusively" control the meaning of section 214(a) when the Commission has forborne from tariffing requirements in circumstances in which section 214(a) still applies. Second, nothing in section 214 references section 203 or otherwise indicates section 214 defines "service" to only include the written terms of a carrier's offering. As stated in the *Declaratory Ruling*, such an interpretation would be contrary to Commission precedent.⁶²² Third, it is reasonable to define "service" differently for purposes of the filed rate doctrine and the market exit framework in section 214 because they serve different purposes. The filed rate doctrine is intended to prevent price discrimination against end users by guaranteeing providers offer similarly situated customers equivalent terms and conditions.⁶²³ In that context, a rigid focus on the specific terms and conditions of the tariff is wholly appropriate. However, section 214 broadly directs the Commission to ensure that "neither the present nor future public

⁶¹⁸ See *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980) ("The attendant burdens would be enormous. Likewise, such a construction would be at odds with the scheme of carrier initiated tariff filings which is at the heart of the Communications Act.").

⁶¹⁹ USTelecom Petition at 5.

⁶²⁰ See *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 988-89 (2005) ("Instead, whether that service also includes a telecommunications 'offering' 'turn[ed] on the nature of the functions the end user is offered . . .'" (emphasis added)); *id.* ("Seen from the consumer's point of view, the Commission concluded, cable modem service is not a telecommunications offering because the consumer uses the high-speed wire always in connection with the information-processing capabilities. . . ." (emphasis added)); *id.* ("Instead, 'offering' can reasonably be read to mean a 'stand-alone' offering of telecommunications, i.e., an offered service that *from the user's perspective*, transmits messages unadulterated by computer processing." (emphasis added)).

⁶²¹ USTelecom Petition at 5 (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (emphasis in original)).

⁶²² *Notice*, 29 FCC Rcd at 15015-16, para. 115.

⁶²³ For a general description of the filed rate doctrine, see, e.g., *Qwest Commc'ns Corp. v. Farmers & Merch. Mut. Tel. Co.*, 24 FCC Rcd 14801, 14810, para. 21 (2009); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

convenience and necessity will be adversely affected” by discontinuance of service.⁶²⁴ As one commenter noted, the “totality of circumstances” standard detailed in the *Declaratory Ruling* does not compromise the filed tariff doctrine’s non-discrimination principle.⁶²⁵ However, limiting the meaning of the term “service” under section 214(a) to only what is contained in a provider’s tariff could cause the public to lose services upon which it has come to rely, directly affecting the public convenience and necessity so central to section 214.⁶²⁶ The two statutes serve distinct purposes within the Act, and USTelecom’s direct comparisons are unconvincing.

c. The Declaratory Ruling Does Not Rise to the Level of Legislative Rule Under Longstanding Precedent

192. USTelecom argues that the Supreme Court’s decision in *Shalala v. Guernsey Memorial Hospital* demonstrates that notice and comment were required for the *Declaratory Ruling*.⁶²⁷ However, the Court in *Shalala* held interpretive rules only require a notice and comment period when they adopt positions inconsistent with existing regulations.⁶²⁸ Because it merely confirms and clarifies existing precedent, the *Declaratory Ruling* does not require notice and comment under *Shalala*. USTelecom does not cite a single Commission rule or adjudication adopting a definition of “service” contradicted by or inconsistent with the *Declaratory Ruling*.⁶²⁹ Furthermore, much of the precedent USTelecom relies upon confirms that the *Declaratory Ruling* merely removed uncertainty and does not rise to the level of a legislative rule.

193. For example, USTelecom references several D.C. Circuit cases where the court distinguishes between interpretative rules and legislative rules. Yet in each case USTelecom cites, the court found the agency in question departed from previous rules that were well-defined. In each case, the court found the agency’s shift in policy was the critical factor transforming what was ostensibly an interpretation into a legislative rule.⁶³⁰ However, in this matter, USTelecom has not identified the prior rule or decision that is purportedly inconsistent with the *Declaratory Ruling* because no such rule or decision exists. Moreover, the Supreme Court recently held that notice and comment is not required even for subsequent updates to interpretative rules.⁶³¹ This effectively overturned much of the D.C. Circuit precedent upon which USTelecom relies.

194. The *Declaratory Ruling* does not contradict any existing regulations, nor does it create any new obligations for providers. It simply clarifies how the Commission analyzes discontinuance under section 214. USTelecom’s inability to identify any rule the Commission diverted from distinguishes this matter significantly from the cases USTelecom cites and is fatal to the Petition. Indeed, the only changes USTelecom identifies are speculative, including “increase[d] delays”⁶³² and the prospect of having to seek pre-determinations from the Commission regarding what constitutes discontinuance.⁶³³ We conclude these concerns are overstated and that the *Declaratory Ruling* ultimately creates less work and eliminates

⁶²⁴ 47 U.S.C. § 214(a).

⁶²⁵ COMPTEL Opposition at 5-6.

⁶²⁶ *See id.*

⁶²⁷ *See* USTelecom Petition at 3.

⁶²⁸ *See Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 100 (1995).

⁶²⁹ *See, e.g.*, Public Knowledge Opposition at 5; Granite Opposition at 6-8.

⁶³⁰ *See U.S. Telecom Ass’n v. FCC*, 400 F.3d 29, 30 (D.C. Cir. 2005); *Sprint Corp. v. FCC*, 315 F.3d 369, 374-77 (D.C. Cir. 2003); *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1036 (D.C. Cir. 2003).

⁶³¹ *See Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199 (2015).

⁶³² USTelecom Petition at 7.

⁶³³ *See id.* at 9.

confusion for providers in the midst of technology transitions by clarifying the circumstances in which an application is required.

195. As we have explained, USTelecom identified no previous Commission rules, interpretations, or adjudications from which the *Declaratory Ruling* deviates so substantively as to require resort to the rulemaking process. The *Declaratory Ruling* did nothing more than amplify the meaning of an existing rule. We reject USTelecom's assertion that the *Declaratory Ruling* was procedurally improper.

2. The Clarification Set Forth in the Declaratory Ruling Is Not Impermissibly Vague or Ambiguous

196. We also disagree with USTelecom's contention that the *Declaratory Ruling* is obscure. To the contrary, as explained below, the standard set forth in the *Declaratory Ruling* is straightforward, consistent with the statutory language, and consistent with Commission precedent. Additionally, for the reasons stated below, we find that USTelecom exaggerates carriers' supposed inability to identify the relevant products and services subject to section 214.

197. *Role of Tariff Clear.* The *Declaratory Ruling* clarifies the non-dispositive role that a tariff plays in the functional test that it articulates. The *Declaratory Ruling* clearly states this standard: "Thus, while a carrier's tariff definition of its own service is important evidence of the 'service provided,' ...[a]lso relevant is what the 'community or part of a community' reasonably would view as the service provided by the carrier."⁶³⁴ The functional test in the *Declaratory Ruling* simply clarifies that if relevant evidence indicates the "service provided" includes features outside of the carrier's definition in the tariff, then these features are relevant to the evaluation of whether a "service" has been discontinued. It bears repeating that the *Declaratory Ruling* does not simply dispense with the provider's service description. Tariffs remain a relevant data point in the discontinuance analysis. The *Declaratory Ruling* does not mean "every prior feature no matter how little-used or old-fashioned, must be maintained in perpetuity"⁶³⁵ or that "every functionality supported by a network is de facto a part of a carrier's 'service.'"⁶³⁶ Finally, it does not, as USTelecom fears, mean that the community's perception "trump[s] the language of a tariff including any limitations therein."⁶³⁷ To the contrary, the *Declaratory Ruling* only clarifies that a tariff is not the end of the inquiry; the community and its traditional reliance on a given functionality plays a relevant part in the analysis — along with the tariffs.

198. *Consistent With Section 214 Language.* The functional test articulated by the *Declaratory Ruling* directly stems from the terms of the statute. Congress' regard for the community is clear from section 214's statutory language given that: (1) what triggers the prior approval provision of section 214(a) is the discontinuance, reduction, or impairment of service "to a community or part of a community"; and (2) the statute is designed to prevent harm to present and future "public convenience and necessity."⁶³⁸ Thus, rather than being solely fixated on the service provider's viewpoint, the statute itself is actually largely centered on impact on the public. While nothing in section 214 indicates Congress intended "service" to mean "as defined by the carrier," Congress' focus on community perception and effects is baked into the text of the statute. Therefore, the Commission's incorporation of consumer impact into the discontinuance analysis is entirely consistent with and necessary to accomplish the purposes of section 214 and should not present a point of confusion for affected parties.

⁶³⁴ Notice, 29 FCC Rcd at 15016, para. 115.

⁶³⁵ *Id.* at 15018, para. 118.

⁶³⁶ *Id.* at 15018, para. 119.

⁶³⁷ USTelecom Petition at 6.

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

199. *Consistent With Past Commission Actions.* Furthermore, the *Declaratory Ruling's* commitment to incorporating community perception and community effects into its analysis is consistent with prior Commission actions. For example, regarding section 214, the Commission has repeatedly stated: "In determining the need for prior authority to discontinue, reduce, or impair service under section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, i.e., the using public."⁶³⁹ Additionally, the community-focused discontinuance analysis in section 214 is supported by the Commission's approach to common carrier services in other contexts. There have been several incidents where the Commission looked beyond the scope of the service as defined by the carrier in its tariff to other possible uses; therefore, the *Declaratory Ruling's* focus on the community rather than just the tariff language is consistent with past Commission decisions.⁶⁴⁰ This precedent provides guidance to carriers on when an application must be filed.

200. *USTelecom Exaggerates Carriers' Inability to Identify Relevant Services and Devices.* USTelecom argues that it will be unable to determine which relevant services and devices constitute the "service" provided to consumers.⁶⁴¹ However, as one commenter notes, the services identified in the *Declaratory Ruling* are the very services for which carriers frequently market and sell additional lines to customers.⁶⁴² The *Declaratory Ruling* specifically details the kinds of concerns that gave rise to it, including loss of 9-1-1 location accuracy and inability to use existing home security, medical monitoring, fax machines, credit card billing, DVRs, and other services.⁶⁴³ Finally, as noted in the *Declaratory Ruling*, section 68.110(b) of the Commission's rules currently requires carriers to provide notice to customers when changes in the providers' facilities, equipment, operations, or procedures "can be reasonably expected to render any customer's terminal equipment incompatible with the communications facilities of the provider . . . or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance . . . to allow the customer an opportunity to maintain uninterrupted service."⁶⁴⁴ Carriers, including USTelecom's members, have access to a database of terminal equipment certified as compliant with Part 68's requirement that terminal equipment not harm carriers' networks.⁶⁴⁵ Carriers are therefore well aware of many of the forms of terminal equipment in use by their customers on TDM networks. They also are well aware of the technical specifications of that equipment and whether changes to their facilities, etc. will affect the ability of that terminal equipment to

⁶³⁹ *Graphnet*, 17 FCC Rcd at 1140, para. 29 (emphasis added); accord *Southwestern Bell Tel. Co., US West Commc'ns, Bell Atlantic Tel. Cos., Bellsouth Tel. Cos. Applications for Authority Pursuant to Section 214 of the Communications Act of 1934 to Cease Providing Dark Fiber Service*, File Nos. W-P-C-6670, W-P-D-364, Memorandum Opinion and Order, 8 FCC Rcd 2589, 2597, para. 42 (1993); *Western Union*, 74 FCC 2d at 296, para. 7.

⁶⁴⁰ See, e.g., *Preserving the Open Internet; Broadband Industry Practices*, GN Docket No. 09-191, WC Docket No. 07-52, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13073-74, paras. 26-27 (2009) (stating that the Commission, through "the *Computer Inquiries* [proceedings] ensured an open telecommunications platform that would support the rapidly evolving computer market" by "creat[ing] a dichotomy between basic and enhanced services" where, because "basic services were the platforms upon which enhanced services would be built, the Commission sought to ensure that they would be provided in an open and transparent manner"); *Hush-A-Phone Corp. v. U.S.*, 238 F. 2d 266, 269 (D.C. Cir. 1956) (reversing a Commission decision dismissing a complaint against carriers for disallowing use of a "hush-a-phone" device, holding that the tariff restrictions "are an unwarranted interference with the telephone subscriber's right reasonably to use his telephone in ways which are privately beneficial without being publicly detrimental").

⁶⁴¹ See USTelecom Petition at 4.

⁶⁴² See Granite Opposition at 9.

⁶⁴³ See Notice, 29 FCC Rcd at 15016-17, para. 116.

⁶⁴⁴ 47 C.F.R. § 68.110(b).

⁶⁴⁵ See *2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, CC Docket No. 99-216, Report and Order, 15 FCC Rcd 24944, 24946, paras. 1-2 (2000).

effectively connect to the carriers' networks. Considering all of this, we do not find USTelecom's claims that carriers will be unable to navigate the thicket of devices they "may not even know exist" to be credible.⁶⁴⁶

201. In sum, the standard for discontinuance review set forth in the *Declaratory Ruling* is clear, consistent with the Commission's past actions, and consistent with current provider obligations. We therefore reject USTelecom's claims about the supposed vagueness and inscrutability of the *Declaratory Ruling*.

IV. FURTHER NOTICE OF PROPOSED RULEMAKING

A. Establishing Clear Standards to Streamline Transitions to an All-IP Environment

202. We seek comment on specific proposals for possible criteria against which to measure "what would constitute an adequate substitute for retail services that a carrier seeks to discontinue, reduce, or impair in connection with a technology transition (e.g., TDM to IP, wireline to wireless)." We sought comment on this topic in the *Notice*, asking wide-ranging questions, and believe that the specific proposals that we raise here will facilitate development of a sufficient record to allow us to fully establish highly effective, clear, and technology-neutral criteria.⁶⁴⁷ The Commission remains dedicated to providing carriers the guidance and clarity they need to implement new technologies at scale as quickly as possible. We will benefit from more targeted input in order to adopt rules that are carefully tailored to address the issues presented by the ongoing technology transitions process and that will stand the test of time.

203. Our purpose is to adopt clear criteria that will eliminate uncertainty that could potentially impede the industry from actuating a rapid and prompt transition to IP and wireless technology. We recognize that our existing case-by-case approach may not provide sufficient guidance as to what constitutes an adequate substitute with regard to cutting-edge technology transitions, and we recognize that as a result carriers may be more inclined to pursue half-measures that merely "test the water." Such outcomes reduce innovation and are inconsistent with our overarching goal of advancing the public interest and ensuring "that we protect consumers, competition, and public safety."⁶⁴⁸

204. The Commission always has applied certain criteria in evaluating the adequacy of alternative services in the context of section 214 discontinuance applications.⁶⁴⁹ The Commission has engaged in a highly fact-specific analysis based on the situation presented and has not codified any specific criteria by which it evaluates the adequacy of substitute services. The record we received in response to questions in the *Notice* about adequate substitutes included a range of public interest organizations, state utility commissions, competitive LECs, telecommunications service consumers, and others advocating that we should define attributes of an adequate substitute,⁶⁵⁰ and other commenters, particularly larger incumbent LECs, urging us not to do so.⁶⁵¹

⁶⁴⁶ USTelecom Petition at 4.

⁶⁴⁷ See *Notice*, 29 FCC Rcd at 15006, para. 93; see also Utilities Telecom Council Comments at 11-12 ("UTC also emphasizes that in addition to voice services, the Commission should be also focused on data services, because they both affect utility reliability and resiliency, as well as security and safety.").

⁶⁴⁸ See *Notice*, 29 FCC Rcd at 15006, paras. 92-93.

⁶⁴⁹ See, e.g., *AT&T Corp. Application for Authority under Section 214 of the Communications Act, as amended, to Discontinue the Offering of High Seas Service and to Close its Three Radio Coast Stations (KMI, WOM and WOO)*, File No. ITC-MS-19981229-00905, Memorandum Opinion and Order, 14 FCC Rcd 13225, 13229-39, paras. 9-11, 13233, para. 16 n.27 (Int'l Bur. 1999) (*AT&T High Seas Service Order*); *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22745-48, paras. 14-21.

⁶⁵⁰ See, e.g., Mich. PSC Comments at 8-9; Pa. PUC Comments at 16; Public Knowledge et al. Comments at 8-9; CWA Comments at 13 ("The telecommunications industry and consumers both need to know the minimum service characteristics they can expect from the telecommunications network."); NASUCA Reply at 21; Edison Electric

(continued...)

205. Commenters have not swayed us from our belief that establishing criteria for evaluating the adequacy of replacement services will benefit industry and consumers alike by providing certainty. Indeed, we believe that by establishing and codifying such criteria, we provide transparency and certainty in an area that has been subject to case-by-case evaluation without formal rule-based guidance.⁶⁵² We believe that it is important to ensure that key aspects of service such as connection persistence and quality, 9-1-1 service, and service for individuals with disabilities remain available. We agree with Public Knowledge that establishing clear principles that ensure the availability of key functions post-transition will likely increase public acceptance of alternative technologies, thus decreasing resistance to services based on next-generation technologies.⁶⁵³

206. We agree with incumbent LECs that the Commission must evaluate the availability of alternative services from sources other than the carrier seeking section 214 discontinuance authority.⁶⁵⁴ It is important to note that the Commission must evaluate the adequacy of those alternative services using the same criteria as those applied to any replacement service offered by the discontinuing carrier.⁶⁵⁵ We also reiterate that the availability of adequate substitute services is just one of five factors the Commission looks at in evaluating section 214 discontinuance applications under existing precedent, to be balanced against the other factors in determining whether the public convenience and necessity will be adversely affected by discontinuance of the service at issue.⁶⁵⁶ We therefore believe that adoption of criteria by

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Inst. Comments at 8; Electronic Security Ass'n Comments at 4; Utilities Telecom Council Comments at 11; Ad Hoc Comments at 8; *see also* Wholesale DS-0 Coalition Comments at 4 (“The Commission must define what constitutes an ‘adequate substitute’ for the critical wholesale input services that the Commenters and others need to continue to provide services to their customers.”); NASUCA Comments at 5 (stressing the importance of ensuring that “transitioning and transitioned technologies maintain or enhance reliability and functionality”); Letter from Brett Kilbourne, Vice President and Deputy General Counsel, Utilities Telecom Council, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed July 24, 2015) (Utilities Telecom Council July 24, 2015 *Ex Parte* Letter) (“As a matter of technology, utilities need access to reasonable substitutes for the services that they currently receive from carriers.”); COMPTTEL July 27, 2015 *Ex Parte* Letter at 2.

⁶⁵¹ *See, e.g.*, AT&T Comments at 43; CenturyLink Comments at 24; AT&T Reply at 4; Verizon Reply at 15-16. Incumbent LECs believe that defining the attributes of an adequate substitute service would discourage carriers from innovating. *See, e.g.*, Verizon Reply at 15-16; *see also* NTCA Comments at 9-10 (“[T]he Commission must strike a balance between ensuring that carriers’ transition to IP services does not harm consumers and a discontinuance regime that promotes, rather than inhibits, that transition and the introduction of new, feature rich services.”); AT&T Comments at 45 (stating that “[t]he Commission also has not explained how a standardized set of criteria describing numerous technical requirements for alternative services could possibly be ‘technology-neutral’ or sufficiently flexible to deal with the many diverse factual settings in which discontinuance applications will arise”). A number of these commenters argue that the Commission should encourage the development of industry best practices. *See, e.g.*, NTCA Comments at 10-11; NTCA Reply at 12-13.

⁶⁵² *See* CWA Comments at 13 (“The telecommunications industry and consumers both need to know the minimum service characteristics they can expect from the telecommunications network.”). *But see* NTCA Comments at 11 (“[C]lear rules of the road’ developed by reference to best practices and realistic assessments of customer preferences—rather than regulatory fiat—will provide carriers with certainty and therefore the incentive to invest, while ensuring consumer needs are satisfied as networks continue to evolve.”).

⁶⁵³ *See* Public Knowledge et al. Comments at 7.

⁶⁵⁴ *See* Verizon Comments at 27; CenturyLink Comments at 21-23; Verizon Reply at 15-16. Moreover, there seems to be a misplaced belief that the Commission will automatically categorize any change in underlying technology or facility as a discontinuance, reduction, or impairment of service for which a carrier must seek Commission authorization under section 214. *See, e.g.*, Verizon Reply at 14-15.

⁶⁵⁵ *See AT&T High Seas Service Order*, 14 FCC Rcd at 13230-33, para. 12-16 (Int’l Bur. 1999); *Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22745-48, paras. 14-21.

⁶⁵⁶ In evaluating an application for discontinuance authority under section 214(a), the Commission considers five factors that are intended to balance the interests of the carrier seeking discontinuance authority and the affected user
(continued...)

which to measure the adequacy of available substitute services, which we will look to as part of a larger evaluation of the circumstances surrounding a proposed discontinuance, will not serve to discourage carriers from seeking to innovate and develop new communications technologies.⁶⁵⁷

1. Proposed Criteria

207. Consistent with the *Notice*, we tentatively conclude that several of the criteria proposed by Public Knowledge, listed below, are the appropriate criteria for the Commission to consider in determining whether to authorize carriers to discontinue a legacy retail service in favor of a retail service based on a newer technology.⁶⁵⁸ These proposed criteria align the Commission's dual incentives of: (1) meeting the statutory obligations to protect consumers, competition, and the public safety; and (2) resolving discontinuance applications as briskly as possible.⁶⁵⁹ We find that having clear, established criteria is consistent with the Commission's obligations and also gives applicants the information they need to ultimately be more responsive to the Commission's concerns regarding adequate substitutes.

208. Specifically, we propose that a carrier seeking to discontinue an existing retail service in favor of a retail service based on a newer technology must demonstrate that any substitute service offered by the carrier or alternative services available from other providers in the affected service area meet the following criteria in order for the section 214 application to be eligible for an automatic grant pursuant to section 63.71(d) of the Commission's rules:⁶⁶⁰ (1) network capacity and reliability; (2) service quality; (3) device and service interoperability, including interoperability with vital third-party services (through existing or new devices); (4) service for individuals with disabilities, including compatibility with assistive technologies; (5) PSAP and 9-1-1 service; (6) cybersecurity; (7) service functionality; and (8) coverage.⁶⁶¹ We seek detailed comment on these and other possible criteria below. Although much of the discussion on the proposed criteria focuses on residential end users, we also recognize that the perspective of commercial stakeholders, including enterprise end users, is vitally important. We therefore seek comment from these stakeholders regarding how and to what extent the proposed criteria inform their decision-making process. Are their service concerns identical to those of residential consumers? If not, should different or additional service metrics be considered for their purposes?

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community: (1) the financial impact on the common carrier of continuing to provide the service; (2) the need for the service in general; (3) the need for the particular facilities in question; (4) the existence, availability, and adequacy of alternatives; and (5) increased charges for alternative services, although this factor may be outweighed by other considerations. *See Verizon Expanded Interconnection Order*, 18 FCC Rcd at 22742, para. 8. The reasonably comparable wholesale access interim rule that we adopt in the Order applies as a condition on certain grants of discontinuance authority, and as such it applies separately from and subsequent to this balancing test. *See supra* Section II.B.2.

⁶⁵⁷ *See* AT&T Comments at 43 (asserting that establishing criteria such as those proposed in the *Notice* would "hinder the deployment of next-generation services").

⁶⁵⁸ Letter from Harold Feld et al., Public Knowledge, to Tom Wheeler, Chairman, FCC, GN Docket Nos. 12-353 and 13-5, at 3 (filed Jan. 13, 2014) (Public Knowledge Jan. 13, 2014 *Ex Parte* Letter).

⁶⁵⁹ As Public Knowledge et al. have noted, "[w]hen a new technology can be trusted to offer the same or better service than what customers had before (at the same or better price), customers will have no reason to object to the transition." Public Knowledge et al. Comments at 7.

⁶⁶⁰ *See* 47 C.F.R. § 63.71(d); *see also infra* Appendix B, proposed revised section 63.71(d) and new section 63.602.

⁶⁶¹ Certain commenters support the ten attributes proposed by Public Knowledge. *See, e.g.*, CWA Comments at 14; AARP Comments at 41; NASUCA Comments at 24. One of those supporters suggests reworking and combining those criteria to focus on retail services, consistent with the Commission's stated emphasis in the *Notice*, as follows: "(1) reliable and accurate access to E911; (2) constant availability, including during storms and emergencies; (3) adequate call quality; (4) compatibility with health and safety services that use the network; (5) adequate data transmission capability; and (6) affordable to consumers." CWA Comments at 14; *see also* Rural Broadband Policy Group Comments at 7 (identifying affordability as a relevant factor).

209. As an initial matter, we seek comment on when any criteria that we adopt should apply. Should their application be dependent on the nature of the existing service and the newer service to which the carrier is transitioning? What should qualify as a “service based on a newer technology”? Rather than framing the draft rule in terms of discontinuance of an “existing” service in favor of a “service based on a newer technology,” should we instead frame it in terms of discontinuance of “legacy service,” and if so how should the term “legacy service” be defined? Should the criteria apply where the replacement service offered by the requesting carrier or the alternative services available from other providers in the relevant service area are IP-based or wireless? Should they apply where the replacement or alternative service is based on next-generation technologies? If so, how should we define next-generation technologies? For purposes of this Further Notice, we will simply refer to the relevant situations in which a carrier seeks to discontinue an existing retail service in favor of a next-generation service as “technology transitions,” but we do not intend to suggest that we have reached a conclusion on when any criteria that we have adopted will apply.

210. We further tentatively conclude that if a carrier certifies in its application that it satisfies all of these criteria, then the application will be eligible for automatic grant pursuant to section 63.71(d) of the Commission’s rules⁶⁶² as long as other already-adopted applicable requirements for automatic grant are satisfied. However, if the carrier discontinuing a service during a technology transition is unable to file such a certification, or if comments or objections call into question whether a substitute or alternative service satisfies all of the criteria we adopt, then we would not automatically grant the application. Instead, the carrier would be required to submit information demonstrating the degree to which it meets or does not meet each factor, and we would weigh this information in our evaluation of whether a replacement service offered by the applicant or an alternative service offered by another provider in the relevant service area qualifies as an adequate substitute for the existing service for which the carrier seeks discontinuance authorization. We propose that for applications not subject to automatic grant, the adequate substitute evaluation would retain its traditional role as a part of our multi-factor determination of whether to grant a discontinuance application. In other words, outside of the automatic grant context, we propose that we not alter the role that the existence, availability, and adequacy of alternatives plays in our analysis; rather, we propose to channel that analysis through the criteria that we will articulate. We seek comment on this proposed approach. We recognize that with respect to the question of whether automatic grant is available, this proposal affords the adequate substitute factor a new primacy in the section 214 analysis. However, we anticipate that this approach is necessary to ensure consumer protection as technologies transition by providing the Commission sufficient time to evaluate applications that may not provide a completely adequate substitute. Further, this approach permits industry to pursue transitions flexibly because it does not mandate that all criteria must be met and continues to evaluate the adequacy of substitutes as merely one factor in the overall discontinuance analysis.

211. To the extent commenters believe a different approach is preferable, they should describe with specificity the alternative and address how it would adequately protect consumers while providing sufficient industry flexibility. To the extent commenters argue that not all of the criteria should be considered mandatory in order for an application to qualify for automatic granting, they should identify which factors would not be mandatory. If we remove an application from automatic grant, we propose weighing compliance with the criteria as a part of our overall multi-factor analysis of whether to approve a discontinuance application, and we seek comment on this proposal. Should we require that one replacement or alternative service satisfy every criterion we adopt in order to qualify for automatic grant, or is it sufficient that multiple alternative services are available which collectively satisfy all of the adopted criteria? We also seek comment on the costs and benefits of adopting a rule consistent with our tentative conclusion and on any other proposals suggested in the record. We seek comment on whether requiring this multi-factored showing from the carrier will promote or deter innovation or competition.

⁶⁶² 47 C.F.R. § 63.71(d).

212. Where a carrier is seeking to establish the adequacy of alternative retail services in the context of a section 214 discontinuance application by certifying its compliance will all of the criteria such that its application may be eligible for automatic grant, we further tentatively conclude that the certification should be executed by an officer or other authorized representative of the company and be accompanied by a detailed statement explaining the basis for such certification. The certification would be subject to the requirements of section 1.16 of the Commission's rules and be subscribed to as true under penalty of perjury in substantially the form set forth in the rule.⁶⁶³ We seek comment on whether such an approach would be consistent with the objectives of the revised service discontinuance process, particularly in evaluating the adequacy of alternative services in the context of section 214 discontinuance applications.

213. We tentatively conclude that in each case in which a carrier must demonstrate⁶⁶⁴ the existence of an adequate substitute service, the qualifying service can be a service the carrier offers, or can be an existing service offered by third parties. We also tentatively conclude that a showing as to a first-party or a third-party service will be treated equally, i.e., the criteria would not apply more stringently in one case than the other. We seek comment on these tentative conclusions and on possible alternatives. Would another approach be consistent with our precedent? Should a carrier be permitted to rely on one substitute service as to some factors and a different substitute service as to other factors, or should it be required to show that there is one service that is a fully adequate substitute for the discontinued service?

214. We would prefer to adopt bright-line objective criteria that can be applied on a national basis instead of requiring localized testing of the service to be discontinued and/or the substitute service. We recognize that the criteria that we propose may not fully achieve this goal because of the lack of specific recommendations regarding objective metrics in the record. We further recognize that a localized testing-based approach may be incompatible with our proposal to allow parties to file a simple certification at the time of the application to allow potential automatic grant. We urge all interested parties to provide bright-line objective criteria to the maximum extent possible. For instance, what metrics or standards are incorporated into large commercial or governmental contracts regarding quality of service? However, we caution that we intend to adopt criteria and will adopt a localized testing-based regime if we deem it necessary in the absence of a workable national framework. We seek comment on the relative benefits of objective bright-line criteria and a localized testing approach in this context. If we do adopt a localized testing-based approach, how long a period of testing should we require for the discontinued and/or substitute service?

215. We also seek to further develop the record on whether the application of these criteria should be dependent on the nature of the legacy service and the newer service to which the carrier is transitioning, and specifically on what should qualify as a "newer" service. Should the criteria apply where the replacement service offered by the requesting carrier or the alternative services available from other providers in the relevant service area involve fixed, mobile wireless, or fixed wireless technologies that provide VoIP or other IP-based services? Should they apply where the replacement or alternative service is based on next-generation services?

216. *Network Capacity and Reliability.* Networks must have sufficient capacity to meet end user needs. Moreover, reliability has long been a hallmark of this country's communications network. During peak traffic periods, capacity is necessary to ensure reliability;⁶⁶⁵ without reliability, capacity is of

⁶⁶³ 47 C.F.R. § 1.16; see also 47 C.F.R. § 1.17 (requiring the submission of truthful and accurate information).

⁶⁶⁴ Under our proposal, references in this sub-section to "demonstrating" or otherwise showing that a criterion is met encompass demonstration via certification where the carrier is able to seek eligibility for automatic grant or, otherwise, demonstration via the submission of evidence and information.

⁶⁶⁵ Consistent with common usage, we use the term "reliability" to describe how often a service is available for the consumer. However, we recognize that technically what we are discussing is "availability" of a service, which is

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limited use. We therefore tentatively conclude that any adequate substitute test that we adopt should evaluate whether the replacement or alternative service

will (a) afford the same or greater capacity as the existing service and (b) afford the same reliability as the existing service even when large numbers of communications, including but not limited to calls or other end-user initiated uses, take place simultaneously, and when large numbers of connections are initiated in or terminated at a communications hub, including but not limited to a wire center. This means that:

- 1) Communications are routed to the correct location
- 2) Connections are completed
- 3) Connection quality does not deteriorate under stress
- 4) Connection setup does not exhibit noticeable latency.⁶⁶⁶

217. We seek comment on this tentative conclusion. Should network capacity and reliability be a part of our adequate substitute evaluation? For purposes of implementing the Connect America Fund Phase II model-based support to price cap carriers, the Wireline Competition Bureau adopted a 100 millisecond latency metric to judge whether a service offering meets the Commission's requirement that service enable the use of real time applications.⁶⁶⁷ We seek comment on whether to adopt that same metric to judge whether "noticeable latency" occurs here and seek comment on that proposal. In addition, we propose to adopt metrics for jitter,⁶⁶⁸ packet loss,⁶⁶⁹ and through-put to provide a more complete and robust performance measurement of the service being offered to evaluate successful routing, completion of connections, and quality deterioration and ask commenters to address what specific thresholds should be adopted.⁶⁷⁰ We also propose that the required metrics be based on the defined standards for various

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defined by the International Telecommunication Union (ITU) as follows: "Availability of an item to be in a state to perform a required function at a given instant of time or at any instant of time within a given time interval, assuming that the external resources, if required, are provided." See International Telecommunication Union, Telecommunication Standardization Sector, Series E: Overall Network Operations, Telephone Service, Service Operation and Human Factors, E.800 at 7 (Sept. 2000), <http://www.itu.int/rec/T-REC-E.800-200809-I>. Public Knowledge proposed that we evaluate availability separately from reliability, but because much of its proposal focused on service during power outages (which is being addressed by the Commission through separate means, *see infra* para. 234) and because the reliability test that we propose based on its submission also addresses "availability" within its technical meaning, we do not propose a separate availability factor. See Public Knowledge Jan. 13, 2014 *Ex Parte* Letter at 3; *id.*, Attach. at 5-6, 18 (CTC Report).

⁶⁶⁶ See CTC Report at 5.

⁶⁶⁷ See *Connect America Fund*, WC Docket No. 10-90, Order, 28 FCC Rcd 15060, 15064-70, paras. 19-36 (Wireline Comp. Bur. 2013). The Wireline Competition Bureau selected the 100 millisecond standard based on the International Telecommunication Union (ITU) standards. See International Telecommunication Union, Telecommunication Standardization Sector, Series G: Transmission Systems and Media, Digital Systems and Networks, G.114 at 3 (Figure 1/G.114—Determination of the effects of absolute delay by the E-model) (May 2003), <https://www.itu.int/rec/T-REC-G.114-200305-I/en>.

⁶⁶⁸ The term "jitter" is used herein to refer to encompass IPDV (IP Packet Delay Variation) or PDV (Packet Delay Variation) as those terms are defined by ITU and Internet Engineering Task Force (IETF) documents. See, e.g., International Telecommunication Union Telecommunication Standardization Sector, Series Y: Global Information Infrastructure, Internet Protocol Aspects and Next-Generation Networks; Network performance objectives for IP-based services, Y.1541 (Dec. 2011) (ITU Y.1541), <https://www.itu.int/rec/T-REC-Y.1541-201112-I/en>.

⁶⁶⁹ The term "packet loss" used herein to encompass IPLR (IP packet Loss Ratio) as that term is defined by ITU and IETF documents. See, e.g., ITU Y.1541.

⁶⁷⁰ See *generally* Utilities Telecom Council Comments at 10 ("Utilities are also affected by the inability of IP-based services to provide the same level of functionalities as legacy copper networks and TDM services currently do. This (continued...)

classes of service in ITU-T Y.1541, adjusted for the portion of the network that is the responsibility of the provider.⁶⁷¹ We do not propose to include separate network capacity indicators as part of the adequate substitute test because measuring latency, jitter, packet loss, and speed through-put performance testing during network peak periods can demonstrate whether there is sufficient network capacity and quality. We ask how reliability (availability) can be measured by “reachability” tests conducted on a continuous basis. Such measures could include ping or other User Datagram Protocol (UDP)-based tests,⁶⁷² such as the FCC Measuring Broadband America program. Other methodologies could also be employed, such as requiring an upper limit over-subscription ratio at defined points in the network, dual homing to at least two different upstream providers, multiple links to a single upstream provider, and a utilization limit above which additional ports and links would be required. We seek comment on this proposed approach and possible alternatives. CWA suggests that in the context of voice communications, “the ability to access a dial tone within three seconds 98% of the time during the busy season - busy hour should be the minimally acceptable level of service for a network,” basing this suggestion on “the same, or substantially similar” standards maintained by 18 state public utility commissions.⁶⁷³ We seek comment on whether we should adopt this standard as a part of our evaluation and on whether and how it can apply to non-dial tone services. Should we evaluate availability separately from reliability, and if so how should we evaluate each?

218. *Service Quality.* As one commenter noted, “[c]onsumers expect their voice communications to be clear, understandable, and free of distortion.”⁶⁷⁴ We believe that this is a reasonable expectation that should not fall by the wayside when a carrier transitions its facilities from the traditional public switched telephone network to use of different technologies, and we do not believe that it should be limited to the quality of voice calls. We therefore tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates in its section 214 application that any replacement or alternative service meets the minimum service quality standards set by the state commission responsible for the relevant service area. We seek comment on this proposal. If the relevant state commission has not established such standards or lacks authority to do so, then we seek comment on what standards we should apply. In the Connect America Fund docket, parties have urged the Commission to adopt alternative measures of service quality for recipients of Connect America Fund support, such as requiring voice service to be provided with an “R Factor” score⁶⁷⁵ at or above a minimum threshold value.⁶⁷⁶ We note, however, that the R score is a network planning tool and is not designed to measure actual service quality.⁶⁷⁷ For data services, should internal network management system (NMS)

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is particularly problematic with regard to the capability of the network and service to meet the level of latency necessary to support utility applications such as SCADA and protective relaying, as well as wide area situational awareness. These utility applications require roundtrip latencies of less than 40 milliseconds, which is a challenge for IP-based services on commercial networks.”).

⁶⁷¹ See ITU-T Y.1541 at 9, 12, tbls. 1 & 2 (defining reference values for: IPTD – IP Packet Transfer Delay; IPDV – IP Packet Delay Variation; and IPLR – IP Packet Loss Ratio).

⁶⁷² See FCC, 2014 Measuring Broadband America Report - Technical Appendix at 27 (2014), <http://data.fcc.gov/download/measuring-broadband-america/2014/Technical-Appendix-fixed-2014.pdf>.

⁶⁷³ CWA Comments at 15-16 & n.20 (citing state commission requirements).

⁶⁷⁴ *Id.* at 16.

⁶⁷⁵ See Comments of Hughes Network Systems, LLC, WC Docket No. 10-90 et al., at 3-4 (filed Dec. 22, 2014).

⁶⁷⁶ *Id.*; Letter from John P. Janka, Counsel to ViaSat, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90 et al., at 2 (filed May 14, 2015).

⁶⁷⁷ R scores “are only made for transmission planning purposes and not for actual customer opinion prediction (for which there is no agreed-upon model recommended by the ITU-T).” International Telecommunication Union, Telecommunication Standardization Sector, Series G: Transmission Systems and Media, Digital Systems and Networks, G.107 at 1 (Feb. 2014), <https://www.itu.int/rec/T-REC-G.107-201402-I/en>.

tools be used to measure speed performance? Are external systems preferable, such as the Measuring Broadband America-based hardware approach?⁶⁷⁸ Are there additional performance metrics that should be considered? We also seek comment on TelePacific's suggestion that "[a]dditional metrics could include repeat trouble/repair reports, a key metric to determine whether incumbent LECs are fixing their plant, or compliance with [certain] Telcordia Standards"⁶⁷⁹ As an alternative to the approach we propose, can "network capacity and reliability" and "service quality" be measured by the same performance metrics (e.g., delay, jitter, packet loss, through-put, and availability) such that adopting them as distinct criteria is neither necessary nor desirable?

219. *Device and Service Interoperability.* We tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates that its replacement service or the alternative services available from other providers in the relevant service area allow for as much or more interoperability of both voice and non-voice devices, or newer technology-based equivalent devices, as the service to be retired. We seek comment on this tentative conclusion, as well as possible alternatives. To the extent commenters oppose adoption of such a requirement, they should identify with specificity their reasons and explain how we still can ensure that consumers are not harmed by the proposed discontinuance.

220. Certain commenters profess to be confused about what functionalities consumers consider to be essential components of their legacy service.⁶⁸⁰ However, the record is already replete with examples of such devices and services.⁶⁸¹ Indeed, AT&T acknowledged in its Proposal for Wire Center Trials that a variety of such third-party devices and services are "vitaly important to its customers."⁶⁸² And consumer response to Verizon's attempts to use its VoiceLink service as a replacement service for its damaged wireline service in the wake of Super Storm Sandy can leave no doubt regarding what

⁶⁷⁸ The Measuring Broadband America program is an ongoing nationwide study by the FCC of U.S. consumer broadband performance. See, e.g., Office of Eng'g and Tech., Consumer and Gov'tal Affairs Bur., FCC, *2014 Measuring Broadband America Fixed Broadband Report* (2014), <https://www.fcc.gov/reports/measuring-broadband-america-2014>. The program's hardware approach involves connecting a measuring device to a broadband user's work station and periodically running speed tests to remote targets on the Internet. *Id.* at Technical Appx. at 14.

⁶⁷⁹ TelePacific July 30, 2015 *Ex Parte* Letter at 3-4.

⁶⁸⁰ See, e.g., USTelecom Petition at 8-9; Verizon Reply in Support of USTelecom Petition at 3, 8.

⁶⁸¹ See, e.g., CWA Comments at 16 ("Consumers rely heavily on the ability of other services and devices to operate in conjunction with the telecommunications network . . . [including] security alarms, medical alert services, and devices to assist deaf and hearing-impaired people communicate with others. In addition, business consumers often rely on the network to work seamlessly with devices that are essential to their business operations, such as fax machines and credit card interfaces."); Wholesale DS-0 Coalition Comments at 9 (asserting that assessment of the functionality of retail and wholesale services "should include, among other things, functions relating to voice calls such as caller ID, call waiting, voicemail and other similar services, and also the replacement service's compatibility with non-call functionality of third-party customer premises equipment, fax machines, alarm systems, DSL and other high capacity Internet access services, credit card and other payment processing systems, etc."); Pa. PUC Comments at 16; CTC Report at 12 ("A rich variety of non-telephone devices successfully use the telephone network and have become important parts of our infrastructure. These include fax machines, credit card/point-of-sale terminals, ATMs, voting machines, medical monitoring or alert systems, burglar alarms, elevator phones, ringdown lines at fire stations, and intercoms for building access."); Letter from Jodie Griffin, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., Attach. at 3, 7 (filed Nov. 6, 2014) (stating that 26% of consumers surveyed keep their landline for use with a fax machine, 24% keep it for use with a medical alert device, and 17% keep it for use in connection with a home security system).

⁶⁸² Letter from Christopher M. Heimann, General Attorney, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 13-5, 12-353, Operating Plan at 15 (filed Feb. 27, 2014).

consumers believe to be essential service features.⁶⁸³ Moreover, the CTC Report contains a discussion regarding the use of various technology standards to allow for ongoing interoperability.⁶⁸⁴

221. How should we measure the level of interoperability? Should we require that the service conform to standard modem technology and, if so, how should we define that phrase for purposes of this criteria? Should we require that any VoIP device used by the network comply with the ITU T.38 standard, as proposed by CTC, or to some other standard?⁶⁸⁵ To what extent should we consider consumer trends in evaluating what third-party devices or services a substitute or alternative service should be required to support?⁶⁸⁶ Are there other ways in which to ensure the interoperability of third-party devices and services? ADT proposes that we adopt a rule governing the adoption of Managed Facilities-Based Voice Network (MFVN) standards, which it asserts have been used to ensure the continued interoperability of alarm monitoring systems during and after the transition to IP networks.⁶⁸⁷ We seek comment on whether the MFVN standards should play a role in our evaluation of the interoperability criteria or, in the alternative, on what role if any it should play in our legal framework for technology transitions. Lastly, we tentatively conclude that functionalities “in development” for a replacement service at the time a carrier submits a section 214(a) discontinuance application will not be considered in evaluating the adequacy of the replacement service. We seek comment on this tentative conclusion.

222. *Service for Individuals with Disabilities.* The importance of ensuring that consumers with disabilities can utilize assistive technologies over communications networks is indisputable.⁶⁸⁸ There are several possible areas of impact of the transition on people with disabilities, such as (1) degradation of voice service quality that may compromise the ability of users who are hard of hearing to engage in a telephone conversation, and (2) incompatibility of remote transmission technologies over IP-based

⁶⁸³ See NY PSC Comments at 8 (“The NYPSC sought comments from interested parties and stakeholders on Voice Link technology, service plans, and delivery. The vast majority of the commenters objected to Voice Link as a network replacement. Commenters were critical of Voice Link’s inferior sound quality and limited functionality (i.e., lacking support for Fax, Internet access, and other traditional copper-based telephone functions, such as operator service and long-distance provider choice).”).

⁶⁸⁴ According to CTC Technology and Energy (CTC): “Despite this diversity, the majority of non-voice devices conform to a standard modem technology, such as v.32, v. 34, v.42bis, v.44, v.90, and v.92. Even where a truly proprietary device is used, the signaling and communications and protocol is similar enough to a standard modem that a test of a range of standards should be close enough to determine whether many devices will work on an IP-transitioned line.” CTC Report at 12. CTC also notes that while older dial-up modems and fax machines fail to transmit properly over VoIP devices, this problem can be mitigated: “Technology complying with the ITU T.38 standard can mitigate this issue by allowing the VoIP ATA [analog telephone adapter] to decode or ‘read the fax or modem signal, transmit the contents to the VoIP device at the far end as IP packets, and re-encode it for the fax or modem at the receiving location.” *Id.* at 14.

⁶⁸⁵ See, e.g., *id.*

⁶⁸⁶ See Pa. PUC Comments at 16.

⁶⁸⁷ ADT Comments at 3; Letter from Geoffrey G. Why, Counsel to ADT, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al. (filed Apr. 15, 2015); *but cf.* Letter from Frank S. Simone, Vice President Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1-2 (filed June 8, 2015) (stating that a “rule governing the adoption of [MFVN] standards” is “unnecessary and inappropriate”).

⁶⁸⁸ See, e.g., Cal. PUC Comments at 16 (“The administrative vendor for the CPUC’s Deaf and Disabled Telecommunications Program (DDTP) has provided anecdotal information to the CPUC regarding customers using captioned telephones. Some users have reported to the DDTP that their service has been changed from TDM to VoIP, and they discover the change when the captioned telephone no longer works, because it is designed to use a TDM connection. In addition, closed captioners with the DDTP have informed CPUC staff that they use TDM lines to transmit closed captioning service to local television stations. These are issues the FCC should address in developing rules for the transition.”).

networks used for the provision of captioning on television or Internet-based video programming. As we noted above, one purpose of adopting criteria for evaluating the adequacy of substitute services is to ensure consumer protection. We tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates that its replacement service or the alternative services available from other providers allow at least the same accessibility, usability, and compatibility with assistive technologies as the service being discontinued. We seek comment on this tentative conclusion, as well as possible alternatives. To the extent that people with disabilities must transition to new equipment, we seek comment on what is needed to reduce the burden of obtaining such equipment, particularly for those who do not qualify for existing state and federal equipment distribution programs and for those who are replacing devices not covered by equipment distribution programs (such as individuals with medical devices that are incompatible with IP service). Should we require carriers seeking to discontinue existing services in such contexts to include in their section 214 applications information regarding the availability of IP-enabled devices that can also be distributed to selected and qualifying recipients under applicable state and federal programs? One commenter noted its “understanding that technology transitions can be made to properly function with legacy assistive technology devices (e.g., TTY terminals) through appropriate network software modifications, and/or through the general availability of IP-enabled devices that can also be distributed to selected and qualifying recipients under applicable state and federal programs.”⁶⁸⁹ Is this correct?

223. We note that as TDM networks are discontinued in favor of IP-based networks, there is an opportunity to implement IP-based real time text to replace TTY text services, as the key functionalities of both services are similar. We seek comment on whether we should require the implementation of real time text over IP networks and whether we should set an end date for the termination of TTY text services. We also seek comment on the appropriate length of a transition period during which both TTY text services and IP-based real time text would be available. We ask commenters to describe what IP-based real time text service would look like, including applicable standards, and to explain how it will be implemented. In response to the *Notice*, some commenters assert that accessibility is currently the subject of an industry-wide proceeding and thus should not be addressed “ad hoc” in this proceeding.⁶⁹⁰ We tentatively conclude, however, that we should adopt a standard regarding compatibility with assistive technologies for purposes of evaluating discontinuance applications. We seek comment on this tentative conclusion. We also seek comment on the appropriate timelines for issuing notices that existing services will be discontinued, and that new services may not be compatible with certain equipment. We further seek comment on the means of issuing such notices to ensure effective communication to the full community of people with disabilities.

224. Although we acknowledge the possible impact that the transition to IP networks may have on people with disabilities, we also recognize an opportunity to implement high definition voice (HD voice) service over IP networks. HD voice would be especially beneficial for particular consumers who are hard of hearing to be able to better understand conversations over the telephone, thereby improving accessibility of the network to such consumers and potentially reducing their reliance on intermediary relay services such as captioned telephone service (CTS) and IP captioned telephone service (IP CTS) in favor of mainstream forms of communication. We therefore propose to require providers of IP networks to include HD voice as a feature for users with disabilities and seek comment on our proposal. We ask commenters to discuss timetables for the implementation of HD voice. Lastly, although speech recognition technologies that can accurately convert speech to text are still under development, we seek comment on the state of development of such technologies, which can also assist in the development of an all-inclusive network that will allow users to migrate away from the use of CTS and IP CTS in favor of mainstream forms of communication. In particular, we ask commenters to address

⁶⁸⁹ Pa. PUC Comments at 16 n.24.

⁶⁹⁰ See, e.g., CenturyLink Reply at 25.

the technical barriers to the development of accuracy for such technologies and the length of time that it is expected to take.

225. *PSAP and 9-1-1 Service.* The ability of consumers to contact 9-1-1 and reach the appropriate Public Safety Answering Point (PSAP) and for that PSAP to receive accurate location information for the caller is of the utmost importance.⁶⁹¹ We therefore tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates that a substitute service offered by the requesting carrier or alternative services available from other providers in the relevant service area complies with applicable state, Tribal, and federal regulations regarding the availability, reliability, and required functionality of 9-1-1 service. We seek comment on this tentative conclusion as well as any possible alternatives. Specifically, should we base our evaluation on whether substitute services merely comply with any 9-1-1 regulations applicable to such services, or whether they provide as good – or better – 9-1-1 functionality as the service(s) they replace?⁶⁹² For example, would a fixed wireless service that complies with wireless 9-1-1 automatic location information (ALI) requirements be an adequate substitute for a traditional landline service that provides ALI to PSAPs at the street-address level, or would such a substitution be inadequate?⁶⁹³ Would a VoIP service that will not function during a loss of commercial power, or that provides only a limited amount of battery backup for CPE, serve as an adequate substitute to reach 9-1-1 in an emergency? What other factors should we consider for residential services? Further, what considerations should be applied to discontinuance of 9-1-1 network services and components, such as trunks and selective routers, that support the capability of individual consumers to effectively reach 9-1-1? We observe that, without ensuring adequate service to PSAPs, residential 9-1-1 service could be negatively affected.

226. Certain commenters expressed concern that questions regarding 9-1-1 service are being addressed in other proceedings and thus should not be addressed here.⁶⁹⁴ We note, however, that our 2014 *Policy Statement and Notice of Proposed Rulemaking* on 9-1-1 governance and accountability proposed only that “covered 911 service providers that seek to discontinue, reduce, or impair existing 911 service *in a way that does not trigger already existing authorization requirements* should be required to obtain

⁶⁹¹ See, e.g., John B. Horrigan, Consumers and the IP Transition: Communications Patters in the Midst of Technological Change, at 2 (2014), <http://apps.fcc.gov/ecfs/document/view?id=60000979301> (“Online Americans see the telephone as an anchor for household communications services and most believe that telephone service should support features such as emergency services . . . and location-based services. . . . 96% [of respondents] say it is very (88%) or somewhat (8%) important that the phone be able to reach emergency services such as 911 . . . [and] 59% say it is very (24%) or somewhat (35%) important that a phone be able to communicate its location.”); NTCA Comments at 9; see also *Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies*, PS Docket Nos. 13-75, 11-60, Report and Order, 28 FCC Rcd 17476 (2013) (*Continuity of Communications Order*) (requiring 9-1-1 service providers to certify annually that they have implemented certain best practices or taken reasonable alternative measures to provide reliable 9-1-1 service).

⁶⁹² See *Technology Transitions Order*, 29 FCC Rcd at 1447, para. 39 (requiring that “any service-based experiment can in no way diminish consumer access to 911/E911 emergency services” and that “we expect PSAPs to be provided with at least the same level of network access, resiliency, redundancy, and security that they enjoy under agreements and tariffs currently framing the legacy emergency network”).

⁶⁹³ See *id.* (requiring service-based experiments “to ensure that PSAPs continue to receive all consumer, phone identifying, and automatically-provided street address location information associated with a 911/E911 call, consistent with existing Commission rules and regulations”); Letter from Edyael Casaperalta, Coordinator, Rural Broadband Policy Group, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 3 (filed May 15, 2015) (stating that “911 location data lists shrink daily because new technologies do not provide the exact location of a caller and emergency responders are not equipped with the necessary information to quickly respond to the emergency”).

⁶⁹⁴ See, e.g., CenturyLink Reply at 25.

Commission approval.”⁶⁹⁵ The Commission further stated that “[w]e do not . . . intend to create duplicative obligations for entities that are already subject to Section 214(a) and associated authorization requirements” and that any new requirement for covered 9-1-1 service providers “would apply only when entities seeking to discontinue, reduce, or impair existing 911 service are not already required to obtain approval under other existing Commission rules.”⁶⁹⁶ Accordingly, we disagree that our proposal here to consider access to 9-1-1 as a criterion in our section 214 analysis would duplicate or conflict with additional measures proposed in other proceedings. Although the issues are related and reflect our overarching goal of ensuring that all Americans have reliable access to 9-1-1, we tentatively conclude that the issues raised here with respect to adequate substitution are separate from those under consideration in the 9-1-1 governance proceeding and should therefore proceed independently. We seek comment on this tentative conclusion.

227. *Communications Security.* In the *Notice*, the Commission observed that IP technologies “can create the potential for network security risks through the exposure of network monitoring and control systems to end users.”⁶⁹⁷ We sought comment “on whether the Commission should require demonstration, as part of the section 214 discontinuance process, that any IP-supported networks or network components offer comparable communications security, integrity, and reliability.”⁶⁹⁸ Several commenters expressed support for our considering network security as part of this process.⁶⁹⁹ We now tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates in its application that a substitute service offered by the requesting carrier or alternative services available from other providers in the relevant service area offer comparably effective protection from network security risks. We believe that this approach would adequately protect the interests of consumers, while preserving flexibility for providers to tailor security risk management practices to their unique needs and circumstances. We seek comment on this tentative conclusion, as well as possible alternatives. What factors should we consider in assessing whether a substitute service offers comparably effective protection from network security risks? How should we define the appropriate category of “network security risks” for this purpose? Should we consider factors such as those Public Knowledge identifies in its comments?⁷⁰⁰ For instance, should we consider the extent to which a proposed substitute service exposes users to a higher risk of spoofed calls or “man-in-the-middle” attacks (e.g., interception of fixed wireless calls using an “IMSI catcher”⁷⁰¹) that compromise a user’s ability to communicate or put personal information at risk? Should we consider the vulnerability of a proposed substitute service to physical risks (e.g., weather damage) or human risks (e.g., insider threats)?

⁶⁹⁵ *911 Governance and Accountability; Improving 911 Reliability*, PS Docket Nos. 14-193 and 13-75, Policy Statement and Notice of Proposed Rulemaking, 29 FCC Rcd 14208, 14230, para. 54 (2014) (emphasis added).

⁶⁹⁶ *Id.* at 14230, para. 54 n.121.

⁶⁹⁷ *Notice*, 29 FCC Rcd at 15008, para. 99.

⁶⁹⁸ *Id.*

⁶⁹⁹ See, e.g., Ad Hoc Comments at 15-16; Edison Electric Inst. Comments at 8; NASUCA Comments at 24; Public Knowledge Comments at 18-19; Utilities Telecom Council Comments at 11; Letter from Karen Reidy, COMPTel, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 2 (filed June 8, 2015).

⁷⁰⁰ See Public Knowledge Comments at 18-19 (“To determine new technologies’ security, the Commission should consider the degree to which the network is vulnerable to being shut down or damaged by an attack, the network’s points of failure, the ability to impersonate other users on the network, whether attackers could maliciously disconnect or activate other devices on the network, and the ability to generate spoofed calls. Carriers should be able to explain to the Commission what steps they have taken to secure new networks and what testing they have conducted. The Commission should review these reports to compare them to industry best practices and the security metrics of the existing network.” (internal footnotes omitted)).

⁷⁰¹ An “IMSI catcher” is an eavesdropping device, essentially a fake mobile tower, that intercepts cellphone calls and can be used to listen to the cellphone owner’s calls, read their texts, and track their movements.

228. Would it be sufficient for an applicant to demonstrate that the provider of the substitute service has engaged in implementation of the National Institute for Standards and Technology (NIST) Cybersecurity Framework (NSF)⁷⁰² or an equivalent risk management construct? Should an applicant also address the provider's participation in the Communications Sector Coordinating Council or other public-private initiatives to promote more secure communications networks? Should an applicant provide more detailed information regarding the provider's cyber risk management practices in general, its implementation of relevant industry best practices, or its engagement with fellow providers to address shared risks? To what extent may the Commission reasonably expect that applicants to discontinue service are in a position to provide information about the network security risks of an unaffiliated provider of a substitute service? Should the degree of detail required from an applicant depend on whether the provider of a proposed substitute service is affiliated with the applicant? What additional information, if any, would assist the Commission in evaluating the security protections afforded by a proposed substitute service?

229. *Service Functionality.* Consumers have come to expect that they may use their phone service to make calls anywhere to anyone, regardless of the network used by the call recipient.⁷⁰³ This is not always the case with other types of voice service.⁷⁰⁴ They also have come to expect that their phone service provides certain functionalities, such as caller ID, transport of touch tones, and the ability to make calling card, dial-around, collect, or third-party number billed calls, as well as certain non-call functionalities.⁷⁰⁵ Enterprise customers also rely on the functionalities available from the services they purchase.⁷⁰⁶ We tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier must demonstrate in its section 214 application that any replacement offered by the requesting carrier or alternative service available from other providers in the relevant service area permit similar service functionalities as the service for which the carrier seeks discontinuance authority.

⁷⁰² See National Institute of Standards and Technology, Framework for Improving Critical Infrastructure Cybersecurity at 3 (2014), www.nist.gov/cyberframework/upload/cybersecurity-framework-021214-final.pdf (Cybersecurity Framework).

⁷⁰³ See, e.g., CTC Report at 25.

⁷⁰⁴ See, e.g., *id.* (describing the limitations placed on users of Verizon's VoiceLink service).

⁷⁰⁵ See *id.* at 25-26; Public Knowledge et al. Comments at 10-11; see also Granite Comments at 6-7 (Functionality is "[t]he most important factor that the Commission should consider in assessing a section 214 filing . . . [T]his assessment should include not only functions relating to voice calls (e.g., the ability to use caller ID, call hunting, message waiting), but also the ILEC replacement service's compatibility with non-call functionality of third-party CPE and services that communities expect and rely upon to support home or business security and fire alarm systems, elevator alarm systems, fax machines, medical alert monitors, broadband (e.g., DSL, Ethernet over Copper), credit card processing, point of sale systems, and other functions currently supported by the PSTN."); Wholesale DS-0 Coalition Comments at 9 ("[T]he functionality of the discontinued retail or wholesale service for both residential and business customers should be the primary factor considered in these cases. Such functionality assessments should include, among other things, functions relating to voice calls such as caller ID, call waiting, voicemail and other similar services, and also the replacement service's compatibility with non-call functionality of third-party customer premises equipment, fax machines, alarm systems, DSL and other high capacity Internet access services, credit card and other payment processing systems, etc."); Ad Hoc Comments at 16 (stating that "[o]ne important use that deserves highlighting is the transmission of credit/debit card information and payment processing between point-of-sale ('POS') terminals at retail locations and banks or credit card processors" and that "[s]uch uses are ubiquitous in the US marketplace and fundamental to the efficient functioning of the American economy"); Pa. PUC Comments at 16.

⁷⁰⁶ See, e.g., Utilities Telecom Council July 29, 2015 *Ex Parte* Letter at 1 ("If the new IP service does not meet utility functional requirements, it may prevent these companies from being able to adequately monitor and control substations and other critical facilities. If the service is discontinued entirely, they may lack communications connectivity to critical infrastructure facilities. The consequences of inadequate or inoperable communications would create vulnerabilities that threaten safety and reliability.").

We seek comment on this tentative conclusion, as well as other possible alternatives. We seek comment as well on whether similar functionalities as those provided by legacy services, such as medical alert monitors and credit card processing, are feasible with new technologies and whether new end-user equipment would be required.

230. How should “service functionality” be defined? We recognize that we need additional information on this issue. How can we ensure that it will be a technology neutral evaluation? Should we require that if, for instance, a voice service with caller ID is discontinued, a replacement service or alternative service offered by another provider in the relevant service area must include the option of caller ID? Or if facsimile machines can be used over the existing service, a replacement or other alternative service must afford similar interoperability? Or if a data service is to be discontinued, such capability, or something that performs the same function, must be otherwise available?⁷⁰⁷ How do we measure the scope of “service functionality”? How can carriers gather the information needed regarding functionalities consumers consider to be essential components of their service? How can they gather “service availability” information with respect to alternative services offered by other providers in the relevant service area? And how does this proposed criterion correlate to our statement in the *Declaratory Ruling* that the relevant task in defining the scope of a carrier’s service “is to identify the service the carrier actually provides to end users” and that “[i]n doing so, the Commission takes a functional approach that evaluates the totality of the circumstances”?⁷⁰⁸

231. *Coverage.* Inherent in our longstanding evaluation of the existence, availability, and adequacy of alternative services is the question of whether the substitute service is available to the persons to whom the discontinued service has been available. Our evaluation of the nature of the substitute service is for naught if the service simply is not available to the affected customers. We therefore tentatively conclude that one criterion in any adequate substitute test that we adopt should be that the carrier demonstrates in its application that the substitute service will remain available in the affected service area to the persons to whom the discontinued service had been available. We seek comment on this tentative conclusion. Should we adopt a *de minimis* threshold by percentage of prior population or geographic area reached for which loss of coverage is tolerable?

232. Public Knowledge suggests that we focus specifically on wireline coverage when evaluating the adequacy of the substitute service.⁷⁰⁹ We recognize that as illustrated by consumer response to Verizon’s attempt to replace the wireline network destroyed by Super Storm Sandy with its wireless VoiceLink service, a significant portion of consumers view coverage equivalent to that traditionally found in wireline telephony as essential.⁷¹⁰ And commenters noted the importance of the availability of wireline coverage to rural consumers, for whom there tend to be fewer available options.⁷¹¹ Should we look differently at technologies that offer the level of coverage traditionally afforded by wireline telephony from those that do not, and if so how?

2. Consumer Education

233. As discussed in the Order above, we remain concerned about the level of consumer education and outreach around technology transitions generally. A discontinuance of an existing service on which customers presently rely creates an especially great need for customer education. It was for that

⁷⁰⁷ See Public Knowledge et al. Comments at 12 (asserting that if the transition contemplated involves a switch from copper to a “voice only” service such as Verizon’s Voice Link, this could have the effect of eliminating an Internet access service and thus could effectively eliminate the ability of remote communities to obtain Internet access at all).

⁷⁰⁸ Notice, 29 FCC Rcd at 15016, para. 115.

⁷⁰⁹ See Public Knowledge et al. Comments at 9; see also *id.*, Appx. A, at 26-27.

⁷¹⁰ See, e.g., Notice, 29 FCC Rcd at 15016, para. 116; see also CTC Report at 26.

⁷¹¹ See, e.g., Appalachian Comm’n Comments at 2-3; NASUCA Comments at 25 (“[I]n many Locales, there are no adequate substitutes for many basic telephone services.”).

reason that the January 2014 *Technology Transitions Order*, the Commission set forth an expectation that providers conducting any experiment would “engage in customer outreach and education efforts.”⁷¹² Accordingly, we propose to require that part of the evaluation of a section 214 application to discontinue a legacy retail service should include whether the carrier has an adequate customer education and outreach plan. We seek comment on this proposal, and also on whether there are particular metrics and guidance the Commission can and should provide concerning what would constitute an adequate education and outreach plan. We also seek comment on how best to work with the state commissions and Tribal governments on such education and outreach plans.

3. Other Issues

234. *Other Criteria.* Based on the record received to date, we tentatively conclude that we should not adopt the following proposals by commenters to include the following criteria in the section 214 process: (1) operability during emergencies, including power outages, because this issue is being addressed by the Commission through separate means;⁷¹³ (2) adequate transmission capability, because end users and carriers should be free to reach agreement on services at a wide range of transmission capacities; (3) affordability, because the evaluation process in this context should focus on the nature of the service and because cost is not part of the equation in determining whether an available alternative service constitutes an adequate substitute for the service sought to be discontinued;⁷¹⁴ and (4) connection persistence, because the Commission today takes other action to address that issue.⁷¹⁵ We seek comment on these tentative conclusions. Could any of these criteria be reformulated in such a way that would warrant adoption? Should we adopt any other criteria not listed above?

235. *Rural LEC Exemption.* If we determine that it is appropriate to adopt any or all of the proposed criteria, should we include an exemption for some or all of them for rural LECs, as proposed by TCA?⁷¹⁶ If so, should that exemption apply to all criteria? Or should the exemption apply to only certain criteria and, if so, which ones? And what criteria would a carrier have to meet to qualify for such an exemption? Would it be appropriate to apply it to LECs with fewer than two percent of the Nation’s subscriber lines in the aggregate nationwide?⁷¹⁷ Would some other measure be appropriate? We note that certain commenters assert that rural LECs should be exempt from any criteria for evaluating substitute services because of the often very limited options available in rural locales.⁷¹⁸ Other commenters are concerned about any such exemption given the relative scarcity of alternatives available in many rural areas.⁷¹⁹

⁷¹² *Technology Transitions Order*, 29 FCC Rcd at 1436, para. 6.

⁷¹³ *See generally Continuity of Communications Order; Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Report and Order, FCC 15-98 (adopted Aug. 6, 2015).

⁷¹⁴ We recognize the concerns about the often increased costs associated with a transition from a TDM-based service to an IP-based service. *See, e.g.*, NTIA *Ex Parte* Letter at 203; Utilities Telecom Council July 29, 2015 *Ex Parte* Letter at 2 & Attach. at 2. And we take such concerns into account when evaluating section 214 applications for discontinuance authority. *See supra* para. 206 & note 656.

⁷¹⁵ *See supra* paras. 205, 208, 216, 217, & 225 note 691.

⁷¹⁶ *See, e.g.*, TCA Comments at 5-6.

⁷¹⁷ *See* 47 U.S.C. § 251(f)(2).

⁷¹⁸ *See, e.g.*, TCA Comments at 5-6.

⁷¹⁹ *See, e.g.*, Appalachian Comm’n Comments at 2-3; Rural Broadband Policy Group Comments at 6 (“The Commission . . . must ensure that the tech transitions do not leave rural communities worse off by depriving them of a tool they already have while transitioning them to a more expensive or inferior service (or both).”); *see also* NASUCA Comments at 25 (“[I]n many Locales, there are no adequate substitutes for many basic telephone services.”).

236. *Market Power Analysis.* NASUCA proposes that, when determining the adequacy of substitutes, it would be appropriate to use the “traditional antitrust formula for determining substitutability, used in the *Qwest Phoenix Forbearance Order*.”⁷²⁰ In the *Qwest Phoenix Forbearance Order*, the Commission evaluated Qwest’s petition for forbearance using a market power analysis that is similar to that used by the Commission in many prior proceedings and by the Federal Trade Commission and the Department of Justice in antitrust reviews. Under this approach, the Commission “separately evaluate[d] competition for distinct services, for example differentiating among the various retail services purchased by residential and small, medium, and large business customers, and the various wholesale services purchased by other carriers.”⁷²¹ The Commission also considered “how competition varie[d] within localized areas in the [relevant market].”⁷²² To what extent would this market power analysis help inform an evaluation of whether adequate substitutes exist? What specific parts of the market power analysis would be beneficial when determining whether adequate substitutes exist?

B. Section 214(a) Discontinuance Process

237. In the *Notice*, the Commission sought comment on whether it should revise section 63.71 of its rules, which establishes the procedures that carriers must follow to obtain section 214(a) approval for discontinuances, including notification to affected customers.⁷²³ We noted our effort to strike the right balance between providing carriers the ability to schedule TDM discontinuance as part of their transition plans, and the need for carrier-customers to plan for the transition as well as prepare their end user customers for possible changes to offerings that depend on the discontinuing carrier’s last-mile inputs.⁷²⁴ We received some comment in response to the *Notice* regarding what parties believe is a sufficient notice period.⁷²⁵ In response to the *Notice*, XO and Birch et al. recommend requiring that carriers provide

⁷²⁰ NASUCA Comments at 25.

⁷²¹ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, WC Docket No. 09-135, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8623, para. 1 (2010) (*Qwest Phoenix Forbearance Order*).

⁷²² *Id.*

⁷²³ *Notice*, 29 FCC Rcd at 15014, para. 113; *see also* 47 C.F.R. § 63.71.

⁷²⁴ *Notice*, 29 FCC Rcd at 15014, para. 113.

⁷²⁵ *See* XO Comments at 27 (“Transitions following discontinuance may involve multiple steps until completion, as well as require deployment of new equipment and processes. Accordingly, XO proposes a notice period of two years for discontinuance of DS1 and DS3 special access tariffed and contract tariff term discount plans.”); *see also* Birch et al. Comments at 10-12 (claims that at least twelve months’ notice is necessary to avoid service disruptions to competitive LEC customers and the Commission should have flexibility to address in the discontinuance application itself if additional time is needed); Granite Comments at 9 (“Business customers need more long-term planning certainty than the brief existing section 214 process can provide. In many cases Granite’s customers insist on multi-year contracts, and the uncertainty of having to wait for an ILEC to file a section 214 application and then for the Commission’s ruling on the particular relief requested deprives Granite and other CLECs, as well as customers, of information they need to plan for the future.”); *see also* Windstream Comments at 22 (explaining that “[c]ompetitors today must make service commitments to retail customers that often establish obligations for three to five years, through 2018 or beyond” because “customers want certainty and will seek out other providers (i.e., incumbents) if competitors do not offer long-term arrangements”); Utilities Telecom Council July 23, 2015 *Ex Parte* Letter at 1 (“As a matter of process, utilities need sufficient notice in advance of when carriers anticipate the IP-transition to occur and when they will discontinue existing services.”); *cf.* Utilities Telecom Council July 29, 2015 *Ex Parte* Letter at 2 (noting that “in at least one instance a utility was unaware of the pending service discontinuance until the very last minute when it faced the imminent threat of the loss of critical communications services”). *But see* Verizon Comments at 26 (“If anything, the Commission should adopt a requirement on itself that it will both issue its public notice within a definite time period after an application is filed, such as within 30 days, and should adopt procedures and a timeline for how it will address applications it takes off of the automatic grant path.”).

advance notice of discontinuance before filing an application with the Commission,⁷²⁶ while the Competitive Carriers Association recommends a longer discontinuance process.⁷²⁷ AT&T alternatively argues that any expanded notice is not necessary because the Commission has the option to remove a section 214 application from streamlined processing.⁷²⁸

238. We find we need a more complete record on this issue before determining whether to adopt any additional modifications to section 63.71 of our rules. Accordingly, we seek further comment on whether we should update section 63.71, including the costs and benefits of any changes. Section 63.71(b) states that a carrier shall file its 214 application “on or after the date on which notice has been given to all affected customers.”⁷²⁹ Section 63.71(d) provides that applications shall be automatically granted on the 31st day after filing an application for non-dominant carriers and the 60th day for dominant carriers, unless the Commission notifies the applicant that the grant will not be automatically effective.⁷³⁰ Should we update the earliest date by which the Commission may grant approval, either for dominant or non-dominant carriers or for both? We emphasize we wish to maintain a streamlined process for carriers that satisfy our existing criteria for such treatment and the adequate substitutes proposal discussed above if adopted.⁷³¹ Should we require advance notice of discontinuance or are the existing procedures in section 63.71 sufficient? As noted above, parties recommend various revisions to the notice for discontinuance of TDM-based services used as wholesale inputs. While we seek comment on those proposals, we also seek comment on whether to align timing for notices of discontinuance with notices of copper retirement. In the Order, we extend the notice of copper retirement to interconnecting carriers and non-residential retail customers to at least 180 days and the notice period to residential retail customers to at least 90 days based upon our conclusion that these time periods strike the right balance between the planning needs of competitive carriers and customers and the need for incumbent LECs to be able to move forward in a timely fashion with their business plans.⁷³² We seek comment on whether this same rationale applies for discontinuances of TDM-based service to carrier-customers that may need to modify their end-user contracts to accommodate the discontinuance. We also seek comment on whether modification of section 63.71 to extend notice would conflict with any other Commission rules and procedures.

239. We also seek comment on whether we should revise our rules to explicitly allow email-based notice or other forms of electronic or other notice of discontinuance to customers. We recognize that email may be the preferred method of notice for both the carriers seeking discontinuance and consumers. We seek comment as to whether there are efficiencies of electronic distribution such that we should make a rule change to include it as a method of delivery. Would email or other electronic forms of notice harm or disadvantage any end users? Should alternative forms of notice be permissible only with

⁷²⁶ See XO Comments at 27; Birch et al. Reply at 9 (“For example, if the Commission adopts the Joint Commenters’ proposal to require incumbent LECs to provide at least 12 months of notice before filing a discontinuance application, incumbent LECs could submit with such notices a document memorializing the rates, terms, and conditions governing their packet-based replacement offerings. And if those rates, terms, and conditions fully comply with the Equivalent Wholesale Access requirement, the applications could be automatically granted after 60 days unless the Commission notifies the incumbent LECs otherwise.”).

⁷²⁷ See CCA Comments at 13 (“Even assuming that a competitive carrier relying on wholesale access to an ILEC’s network received actual notice 31 or 60 days prior to a discontinuance of service, such notice would be inadequate in many cases for a competitive LEC to make appropriate network changes or alternative service arrangements, and thus could result in lapses of service (or degraded service) to the carrier’s customers.”).

⁷²⁸ See AT&T Reply at 33 (citing 47 C.F.R. § 63.71(d)).

⁷²⁹ 47 C.F.R. § 63.71(b).

⁷³⁰ 47 C.F.R. § 63.71(d).

⁷³¹ See *supra* paras. 127, 208, 210.

⁷³² See *supra* paras. 29, 62; see also *infra* Appendix A, Final Rules, new section 51.332(e).

customer consent, and if so what should be permissible methods to obtain consent? Are there factors the Commission should take into consideration for certain groups of customers, such as accessible formats? Are there any other issues we should consider to ensure all affected consumers receive adequate notice? For example, how should notice be provided when consumers lack access to broadband?

C. Section 214(a) Discontinuance Notice to Tribal Governments

240. In the Order above, we extend notice of copper retirements to include notice to the public utility commission and the governor of the state in which the retirement will occur and to the Secretary of Defense, consistent with our current section 214 discontinuance rules.⁷³³ We also extend notice of copper retirements to affected Tribal governments so they may prepare for network changes affecting their communities. Here, we tentatively conclude that the same justification applies in the section 214 context of a discontinuance, reduction or impairment of a service. Tribal governments should be in a position to prepare and address any concerns from consumers in their Tribal communities.⁷³⁴ We also tentatively conclude that it is appropriate to make the notice requirements for section 214 discontinuance applications and copper retirement network changes consistent, as both involve changes to the Nation's communications networks and affect different groups of consumers. We therefore seek comment on including notice to Tribal governments as part of our section 214 discontinuance application process. Specifically, we seek comment on our tentative conclusion that we should revise rule 63.71(a) to include notice to Tribal governments in order to make our copper retirement and service discontinuance notice requirements consistent.⁷³⁵ Rule 63.71 requires that applications to discontinue, reduce or impair service to a community provide notice to the "Governor of the State in which the discontinuance, reduction, or impairment of service is proposed, and also to the Secretary of Defense."⁷³⁶ We tentatively conclude that we should include any Tribal Nations in the state in which discontinuance, reduction, or impairment of service is proposed regardless of the reason for the discontinuance.⁷³⁷ We seek comment on this proposal, including its costs and benefits. We seek comment on whether a different or limited scope of notice to Tribal governments would be appropriate. We seek comment on our proposal and if there are any legal, regulatory or procedural impairments to our extension of notice to Tribal governments. Are there any other issues of notice, such as form or content that are unique to Tribal governments the Commission should consider?

D. Copper Retirement Process – Good Faith Communication Requirement

241. In the Order above, we eliminate the objection procedures previously available to interconnecting carriers upon receipt of a copper retirement notice and instead adopt a requirement that incumbent LECs work with interconnecting entities in good faith to ensure that those entities have the information needed to allow them to accommodate the transition with no disruption of service to their end user customers.⁷³⁸ Should we provide specific objective criteria by which to evaluate this good faith requirement to ensure that all parties are aware of their respective rights and obligations? And what recourse should be available to an interconnecting entity who believes that an incumbent LEC is not acting in good faith? If the Commission finds an incumbent LEC has failed to fulfill the good faith communication requirement, should the retirement be postponed by an additional 90 days (beyond the

⁷³³ See *supra* para. 70.

⁷³⁴ See generally Patricia Steel Comments at 1-5 (addressing lack of broadband availability to "rural, native, and low-income communities"); Rural Broadband Policy Group Comments at 2 (same).

⁷³⁵ See 47 C.F.R. § 63.71(a); see also *infra* Appendix A, revised section 51.333.

⁷³⁶ 47 C.F.R. § 63.71(a).

⁷³⁷ To be clear, the proposed notice requirement would be permanent (barring future Commission action) and would not terminate with the reasonably comparable wholesale access condition at the conclusion of the Commission's special access proceeding.

⁷³⁸ See *supra* paras. 31-32.

180-day mark)? Are there limitations on how much and what types of information an incumbent LEC should be required to provide to an interconnecting entity?

E. Termination of Interim Reasonably Comparable Wholesale Access Condition

242. As discussed above, to support the current technology transitions, we seek to avoid delays due to diminished competition by imposing light-handed regulation through the interim reasonably comparable wholesale access condition.⁷³⁹ The Commission will have adopted and implemented the rules and policies that end the reasonably comparable wholesale access interim rule when: (1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective.⁷⁴⁰ We recognize, however, that the special access proceeding will not address the status of commercial wholesale platform services such as AT&T's Local Service Complete and Verizon's Wholesale Advantage that include incumbent LEC loops, transport and local circuit switching.⁷⁴¹

243. We accordingly seek comment on how to facilitate continuation of commercial wholesale platform services, which we believe serve an important business need for enterprises that seek, among other things, "the ability to obtain service from a single supplier at their disparate retail locations nationwide."⁷⁴² Granite explains that it and other similarly-situated competitive carriers "serve multi-location business customers that have modest demands for voice services at each location by combining value-added services with underlying TDM-based telephone services purchased at wholesale from incumbent LECs."⁷⁴³ Granite recently submitted a study prepared by Charles River Associates that finds, based on Granite's own estimate of the per-line added value that its service provides to customers, that loss of wholesale access to incumbents' voice services would result in customer harm of between \$4.443 and 10.168 billion per year.⁷⁴⁴ We note that this study is additionally premised on the expectation that absent regulatory action by the Commission, wholesale arrangements between companies like Granite and incumbent providers will not occur. We seek comment on that underlying assumption and on the incentives of incumbents to enter into, or not enter into, IP-based wholesale arrangements for voice service. We recognize that incumbents are currently offering such commercial arrangements in TDM on a voluntary basis and we encourage such arrangements and hope they continue to be standard wholesale offerings, including in IP.⁷⁴⁵ Verizon, for example, points out that "[c]ommercial UNE-P replacement products are market-based responses to competitive pressures, and in the six wire centers that Verizon migrated to all-fiber facilities, Verizon provided Wholesale Advantage – [Verizon's] UNE-P commercial replacement product – onto the new fiber facilities with no change in rates, terms, or conditions."⁷⁴⁶ We further recognize the benefits of agreements reached through market negotiations.

244. However, to the extent that the Commission finds that wholesale arrangements for voice service are unlikely to occur in the future on a marketplace basis, would it be appropriate for the Commission to require reasonably comparable wholesale access for commercial wholesale platform

⁷³⁹ See *supra* para. 131.

⁷⁴⁰ See *supra* para. 132.

⁷⁴¹ See *supra* para. 152.

⁷⁴² Granite Comments at 3.

⁷⁴³ Letter from Thomas Jones, Counsel to Granite, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., at 1 (filed May 29, 2015); see also generally Granite June 23, 2015 *Ex Parte* Letter.

⁷⁴⁴ See Letter from Michael B. Galvin, General Counsel, Granite, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5 et al., Attach. Letter from Charles River Associates at 5-6 (filed June 12, 2015).

⁷⁴⁵ See Verizon Reply at 9; see also Verizon June 12, 2015 *Ex Parte* Letter at 3-4.

⁷⁴⁶ Verizon June 12, 2015 *Ex Parte* Letter at 3-4.

services for a further interim period beyond completion of the special access proceeding? If the Commission does extend this requirement, for how long should it be extended and should its substance be revised? Should the timeframe be connected to any pending Commission proceeding?

V. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

245. This proceeding shall continue to be treated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.⁷⁴⁷ Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s *ex parte* rules.

B. Filing Instructions

246. Pursuant to sections 1.415 and 1.419 of the Commission’s rules,⁷⁴⁸ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed by paper or by using the Commission’s Electronic Comment Filing System (ECFS).⁷⁴⁹

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Because more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission’s Secretary, Office of the Secretary, Federal Communications Commission.
 - All hand-delivered or messenger-delivered paper filings for the Commission’s Secretary must be delivered to FCC Headquarters at 445 12th St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.

⁷⁴⁷ 47 C.F.R. § 1.1200 *et seq.*

⁷⁴⁸ 47 C.F.R. §§ 1.415, 1.419.

⁷⁴⁹ See *Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

C. Paperwork Reduction Act Analysis

247. The Report and Order contains new and modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It will be submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we previously sought specific comment on how the Commission might further reduce the information collection burden for small business concerns with fewer than 25 employees.⁷⁵⁰ In this present document, we require incumbent LECs to: (1) include in their copper retirement notices to interconnecting carriers the information currently required by section 51.327(a) and a description of any changes in prices, terms, or conditions that will accompany the planned changes; (2) provide direct notice of planned copper retirements to interconnecting entities within the affected service area at least 180 days prior to the planned implementation date, except when the facilities to be retired are no longer being used to serve customers in the affected service area, in which case notice must be provided at least 90 days prior to the planned implementation date;⁷⁵¹ (3) provide notice of planned copper retirements to the public utility commission and to the governor of the state in which the network change is proposed, to the Tribal entity with authority over the Tribal lands in which the network change is proposed, and to the Secretary of Defense, with such notice to be provided at least 180 days prior to the planned implementation date, but only 90 days prior to the planned implementation date when the facilities to be retired are no longer being used to serve customers in the affected service area; (4) work in good faith with interconnecting entities to provide information necessary to assist them in accommodating planned copper retirements without disruption of service to their customers; (5) provide clear and conspicuous direct notice via electronic mail or postal mail to retail customers of planned copper retirements where the retail customer is within the service area of the retired copper and only where the retirement will result in the involuntary retirement of copper loops, with such notice to be provided at least 180 days prior to the planned implementation date for non-residential retail customers and at least 90 days prior to the planned implementation date for residential retail customers; (6) include in notice to retail customers information to enable the retail customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes, including (i) the information required by section 51.327(a) other than 51.327(a)(5), (ii) a statement that the customer will still be able to purchase the existing service with the same functionalities and features, except that if the statement would be untrue, then the incumbent LEC must include a statement identifying any changes to the service(s) and the functionality and features thereof, and (iii) a neutral statement of the various service options that the incumbent LEC makes available to retail customers affected by the planned copper retirement; and (7) file a certificate of service within 90 days before a retirement certifying their compliance with the requirements imposed by our network change disclosure rules pertaining to copper retirement. We have

⁷⁵⁰ *See Notice*, 29 FCC Rcd at 15019, para. 122.

⁷⁵¹ After the Commission receives notice of the planned copper retirement from the incumbent LEC, it will issue a public notice of the retirement. It is at that point that the 180-day period begins to run.

assessed the effects of these requirements and find that any burden on small businesses will be minimal because: (1) the rules remain notice-based; (2) incumbent LECs already must provide direct notice of planned copper retirements to many interconnecting entities; (3) the method of transmission of the notice required by the rules matches previously existing requirements for notice to interconnecting telephone exchange service providers; (4) the expanded content requirement for notices to interconnecting entities is a narrow and targeted extension of the existing requirement to provide notice of the “reasonably foreseeable impact of the planned changes” already required by section 51.327(a) of the Commission’s rules; (5) incumbent LEC commenters, including small, rural LECs, assert that they already engage in significant outreach to their retail customers when implementing copper retirements; (6) the rules require incumbent LECs to include in their direct notices to retail customers one neutral statement of the various service options that the incumbent LEC makes available to retail customers affected by the planned copper retirement, with no other consumer education or outreach requirements; (7) limit the requirement of direct notice to retail customers within the service area of the retired copper and only where the retirement will result in the involuntary retirement of copper loops; and (8) the rules do not require direct notice to retail customers when the copper facilities being retired are no longer in use in the affected service area.

248. The Order on Reconsideration does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. Therefore, it does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4).

249. The Further Notice of Proposed Rulemaking contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. § 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

D. Congressional Review Act

250. The Commission will send a copy of this Report & Order and Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act.⁷⁵²

E. Final Regulatory Flexibility Analysis

251. As required by the Regulatory Flexibility Act of 1980 (RFA),⁷⁵³ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice*.⁷⁵⁴ The Commission sought written public comment on the possible significant economic impact on small entities regarding the proposals addressed in the *Notice*, including comments on the IRFA. Pursuant to the RFA, a Final Regulatory Flexibility Analysis is set forth in Appendix E.

F. Initial Regulatory Flexibility Analysis

252. As required by the RFA,⁷⁵⁵ the Commission has prepared an IRFA of the possible significant economic impact on small entities of the policies and rules proposed in the Further Notice

⁷⁵² *See* 5 U.S.C. § 801(a)(1)(A).

⁷⁵³ *See* 5 U.S.C. § 603.

⁷⁵⁴ *Notice*, 29 FCC Rcd at 15026, Appx. B.

⁷⁵⁵ *See* 5 U.S.C. § 603.

contained herein. The analysis is found in Appendix F. We request written public comment on the analysis. Comments must be filed in accordance with the same deadlines as comments filed in response to the Further Notice and must have a separate and distinct heading designating them as responses to the IRFA. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of this Further Notice, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.

VI. ORDERING CLAUSES

253. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201, 214, 251, and 303(r), of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 214, 251, 303(r), this Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking ARE ADOPTED.

254. IT IS FURTHER ORDERED that parts 51 and 63 of the Commission's rules ARE AMENDED as set forth in Appendix A, and that any such rule amendments that contain new or modified information collection requirements that require approval by the Office of Management and Budget under the Paperwork Reduction Act SHALL BE EFFECTIVE after announcement in the Federal Register of Office of Management and Budget approval of the rules, and on the effective date announced therein.

255. IT IS FURTHER ORDERED that this Report and Order and Order on Reconsideration SHALL BE effective 30 days after publication in the Federal Register, except for 47 CFR 51.325(a)(4) and (e), 51.332, and 51.333(b) and (c), which contain information collection requirements that have not been approved by OMB. Additionally, the removal of 47 CFR 51.331(c) and 51.333(f), resulting in the removal of information collection requirements previously approved by OMB, has not been approved by OMB. The Federal Communications Commission will publish a document in the Federal Register announcing the effective date.

256. IT IS FURTHER ORDERED that the Petition for Reconsideration filed by the United States Telecom Association IS DENIED.

257. IT IS FURTHER ORDERED that the Motion of the California Public Utilities Commission for Acceptance of Late-Filed Comments IS GRANTED.

258. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Order on Reconsideration to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

259. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order and Further Notice of Proposed Rulemaking, including the Final and Initial Regulatory Flexibility Analyses, and this Order on Reconsideration to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Rules

For the reasons set forth above, Parts 51 and 63 of Title 47 of the Code of Federal Regulations are amended as follows:

PART 51 – INTERCONNECTION

1. The authority for part 51 continues to read as follows:

Authority: Sections 1-5, 7, 201-05, 207-09, 218, 220, 225-27, 251-54, 256, 271, 303(r), 332, 706 of the Telecommunication Act of 1996, 48 Stat. 1070, as amended, 1077; 47 U.S.C. 151-55, 157, 201-05, 207-09, 218, 220, 225-27, 251-54, 256, 271, 303(r), 332, 1302, 47 U.S.C. 157 note, unless otherwise noted.

2. Section 51.325 is amended by revising paragraph (a)(4) and adding new paragraph (e), to read as follows:

§ 51.325 Notice of network changes: Public notice requirement.

(a) * * * * *

(4) Will result in the retirement of copper, as defined in §51.332.

* * * * *

(e) Notices of network changes involving the retirement of copper, as defined in §51.332, are subject only to the requirements set forth in this section and §§51.329(c), 51.332, and 51.335.

3. Section 51.331 is amended by deleting paragraph (c).

§ 51.331 [Amended].

4. New section 51.332 is added to read as follows:

§ 51.332 Notice of network changes: Copper retirement.

(a) Definition. For purposes of this section, the retirement of copper is defined as: (i) removal or disabling of copper loops, subloops, or the feeder portion of such loops or subloops, (ii) the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops, as those terms are defined in §51.319(a)(3), or (iii) the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling.

(b) Methods for Providing Public Notice. In providing the required notice to the public of network changes under this section, an incumbent LEC must comply with the following requirements:

(1) The incumbent LEC must file a notice with the Commission.

(2) The incumbent LEC must provide each entity within the affected service area that directly interconnects with the incumbent LEC's network with a copy of the notice filed with the Commission pursuant to paragraph (b)(1) of this section.

(3) If the copper retirement will result in the retirement of copper loops to the premises, the incumbent LEC must directly provide notice through electronic mail or postal mail to all retail customers within the affected service area who have not consented to the retirement; except that the incumbent LEC is not required to provide notice of the copper retirement to retail customers

where (i) the copper facilities being retired under the terms of paragraph (a) of this section are no longer in use in the affected service area, or (ii) the retirement of facilities pursuant to paragraph (a)(iii) of this section is undertaken to resolve a service quality concern raised by the customer to the incumbent LEC.

(i) The contents of any such notice must comply with the requirements of paragraph (c)(2) of this section.

(ii) Notice to each retail customer to whom notice is required shall be in writing unless the Commission authorizes in advance, for good cause shown, another form of notice. If an incumbent LEC uses e-mail to provide notice to retail customers, it must comply with the following requirements in addition to the requirements generally applicable to the notice:

(A) The incumbent LEC must have previously obtained express, verifiable, prior approval from retail customers to send notices via e-mail regarding their service in general, or planned network changes in particular;

(B) E-mail notices that are returned to the carrier as undeliverable must be sent to the retail customer in another form before carriers may consider the retail customer to have received notice; and

(C) An incumbent LEC must ensure that the subject line of the message clearly and accurately identifies the subject matter of the e-mail.

(4) The incumbent LEC shall notify and submit a copy of its notice pursuant to paragraph (b)(1) of this section to the public utility commission and to the Governor of the State in which the network change is proposed, to the Tribal entity with authority over the Tribal lands in which the network change is proposed, and to the Secretary of Defense, Attn. Special Assistant for Telecommunications, Pentagon, Washington, DC 20301.

(c) Content of Notice.

(1) Non-Retail. The notices required by paragraphs (b)(1), (b)(2), and (b)(4) of this section must set forth the information required by §51.327. In addition, the notices required by paragraphs (b)(1), (b)(2), and (b)(4) of this section must include a description of any changes in prices, terms, or conditions that will accompany the planned changes.

(2) Retail.

(i) The notice to retail customers required by paragraph (b)(3) of this section must provide sufficient information to enable the retail customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes, including but not limited to the following provided in a manner that is clear and conspicuous to the average consumer:

(A) The information required by §51.327(a)(1)-(4) and §51.327(a)(6);

(B) A statement that the retail customer will still be able to purchase the existing service(s) to which he or she subscribes with the same functionalities and features as the service he or she currently purchases from the incumbent LEC, except that if this statement would be inaccurate, the incumbent LEC must include a statement identifying any changes to the service(s) and the functionality and features thereof; and

(C) A neutral statement of the services available to the retail customers from the incumbent LEC, which shall include a toll-free number for a customer service help line, a URL for a related web page on the provider's website with relevant information, contact information for the Federal Communications Commission including the URL for the Federal Communications Commission's consumer complaint portal, and contact information for the relevant state public utility commission.

(ii) If any portion of a notice is translated into another language, then all portions of the notice must be translated into that language.

(iii) An incumbent LEC may not include in the notice required by paragraph (b)(3) of this section any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes.

(iv) For purposes of this section, a statement is "clear and conspicuous" if it is disclosed in such size, color, contrast, and/or location that it is readily noticeable, readable, and understandable. In addition:

(B) The statement may not contradict or be inconsistent with any other information with which it is presented.

(C) If a statement materially modifies, explains or clarifies other information with which it is presented, then the statement must be presented in proximity to the information it modifies, explains or clarifies, in a manner that is readily noticeable, readable, and understandable, and not obscured in any manner.

(D) Hyperlinks included as part of the message must be clearly labeled or described.

(d) Certification. No later than ninety (90) days after the Commission's release of the public notice identified in paragraph (f) of this section, an incumbent LEC must file with the Commission a certification that is executed by an officer or other authorized representative of the applicant and meets the requirements of §1.16 of this chapter. This certification shall include:

- (1) A statement that identifies the proposed changes;
- (2) A statement that notice has been given in compliance with paragraph (b)(1) of this section;
- (3) A statement that the incumbent LEC timely served a copy of its notice filed pursuant to paragraph (b)(1) of this section upon each entity within the affected service area that directly interconnects with the incumbent LEC's network;
- (4) The name and address of each entity referred to in paragraph (d)(3) of this section upon which written notice was served;
- (5) A statement that the incumbent LEC timely notified and submitted a copy of its public notice to the public utility commission and to the Governor of the State in which the network change is proposed, to any federally recognized Tribal Nations with authority over the Tribal lands in which the network change is proposed, and to the Secretary of Defense in compliance with paragraph (b)(4) of this section;
- (6) If customer notice is required by paragraph (b)(3) of this section, a statement that the incumbent LEC timely served the customer notice required by paragraph (b)(3) of this section upon all retail customers to whom notice is required;

- (7) If a customer notice is required by paragraph (b)(3) of this section, a copy of the written notice provided to retail customers;
- (8) A statement that the incumbent LEC has complied with the notification requirements of §68.110(b) of this chapter or that the notification requirements of §68.110(b) do not apply;
- (9) A statement that the incumbent LEC has complied with the good faith communication requirements of paragraph (g) of this section and that it will continue to do so until implementation of the planned copper retirement is complete; and
- (10) The docket number and NCD number assigned by the Commission to the incumbent LEC's notice provided pursuant to paragraph (b)(1) of this section.

(e) Timing of Notice.

- (1) Except pursuant to paragraph (e)(2) of this section, an incumbent LEC must provide the notices required by paragraphs (b)(2) and (b)(4) of this section no later than the same date on which it files the notice required by paragraph (b)(1) of this section.
- (2) Where the copper facilities being retired under the terms of paragraph (a) of this section are no longer being used to serve any customers, whether wholesale or retail, in the affected service area, an incumbent LEC must provide the notices required by paragraphs (b)(2) and (b)(4) of this section no later than ninety (90) days after the Commission's release of the public notice identified in paragraph (f) of this section.
- (3) An incumbent LEC must provide any notice required by paragraph (b)(3) of this section to all non-residential customers to whom notice must be provided no later than the same date on which it files the notice required by paragraph (b)(1) of this section.
- (4) An incumbent LEC must provide any notice required by paragraph (b)(3) of this section to all residential customers to whom notice must be provided no later than ninety (90) days after the Commission's release of the public notice identified in paragraph (f) of this section.

(f) Implementation Date. The Commission will release a public notice of filings of the notice of copper retirement pursuant to paragraph (b)(1) of this section. The public notice will set forth the docket number and NCD number assigned by the Commission to the incumbent LEC's notice. The notices of copper retirement required by paragraph (b) of this section shall be deemed approved on the 180th day after the release of the Commission's public notice of the filing.

(g) Good Faith Requirement. An entity within the affected service area that directly interconnects with the incumbent LEC's network may request that the incumbent LEC provide additional information to allow the interconnecting entity where necessary to accommodate the incumbent LEC's changes with no disruption of service to the interconnecting entity's end user customers. Incumbent LECs must work with such requesting interconnecting entities in good faith to provide such additional information.

5. Section 51.333 is amended by revising the heading and paragraphs (b)-(c) to read as follows and deleting paragraph (f):

§ 51.333 Notice of network changes: Short term notice, objections thereto.

* * * * *

(b) Implementation date. The Commission will release a public notice of filings of such short term notices. The public notice will set forth the docket number assigned by the Commission to the incumbent LEC's notice. The effective date of the network changes referenced in those filings shall be deemed final

on the tenth business day after the release of the Commission's public notice, unless an objection is filed pursuant to paragraph (c) of this section.

(c) Objection procedures for short term notice. An objection to an incumbent LEC's short term notice may be filed by an information service provider or telecommunications service provider that directly interconnects with the incumbent LEC's network. Such objections must be filed with the Commission, and served on the incumbent LEC, no later than the ninth business day following the release of the Commission's public notice. All objections filed under this section must:

- (1) State specific reasons why the objector cannot accommodate the incumbent LEC's changes by the date stated in the incumbent LEC's public notice and must indicate any specific technical information or other assistance required that would enable the objector to accommodate those changes;
- (2) List steps the objector is taking to accommodate the incumbent LEC's changes on an expedited basis;
- (3) State the earliest possible date (not to exceed six months from the date the incumbent LEC gave its original public notice under this section) by which the objector anticipates that it can accommodate the incumbent LEC's changes, assuming it receives the technical information or other assistance requested under paragraph (c)(1) of this section;
- (4) Provide any other information relevant to the objection; and
- (5) Provide the following affidavit, executed by the objector's president, chief executive officer, or other corporate officer or official, who has appropriate authority to bind the corporation, and knowledge of the details of the objector's inability to adjust its network on a timely basis:

"I, (name and title), under oath and subject to penalty for perjury, certify that I have read this objection, that the statements contained in it are true, that there is good ground to support the objection, and that it is not interposed for purposes of delay. I have appropriate authority to make this certification on behalf of (objector) and I agree to provide any information the Commission may request to allow the Commission to evaluate the truthfulness and validity of the statements contained in this objection."

* * * * *

PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. Amend § 63.71 by redesignating paragraphs (c), (d), and (e) as (d), (e), and (f), and adding new paragraph (c), to read as follows:

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

* * * * *

(c)(1) If an incumbent LEC, as that term is defined in §51.5 of this chapter, obtains authority to discontinue, reduce, or impair a time-division multiplexing (TDM) service listed in paragraph (c)(1) and if the incumbent LEC offers an Internet Protocol (IP) service in the same geographic market(s) as the TDM service following the discontinuance, reduction, or impairment of such TDM service, then as a condition on such authority, the incumbent LEC shall provide any requesting telecommunications carrier wholesale access reasonably comparable to the level of wholesale access it previously provided on

reasonably comparable rates, terms, and conditions. This condition shall expire when all of the following have occurred: (i) the Commission identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (ii) the Commission provides notice such rules are effective in the Federal Register; and (iii) such rules and/or policies become effective.

(2) The requirements of this paragraph apply to (i) a special access service that is used as a wholesale input by one or more telecommunications carriers and (ii) a service that is that is used as a wholesale input by one or more telecommunications carriers to provide end users with voice service and that includes last-mile service, local circuit switching, and shared transport.

* * * * *

APPENDIX B

Proposed Rules

For the reasons set forth above, the Federal Communications Commission proposes to amend 47 CFR part 63 as follows:

PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS

1. Amend § 63.71 by revising paragraphs (a) and (d), to read as follows:

§ 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. Notice shall include the following:

* * * * *

(d) The application to discontinue, reduce, or impair service, if filed by a domestic, non-dominant carrier, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant unless **either (1) the Commission has notified the applicant that the grant will not be automatically effective, or (2) the applicant is subject to §63.602 of this chapter and does not include with its application the certification specified in §63.602(a) of this chapter**. 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 **either (1) the Commission has notified the applicant that the grant will not be automatically effective, or (2) the applicant is subject to §63.602 of this chapter and does not include with its application the certification specified in §63.602(a) of this chapter**. For purposes of this section, an application will be deemed filed on the date the Commission releases public notice of the filing.

* * * * *

2. Add new § 63.602 to read as follows:

§63.602 Additional contents of applications to discontinue, reduce, or impair an existing retail service in favor of a retail service based on a newer technology.

(a) In order to remain eligible for automatic grant, any domestic carrier that seeks to discontinue, reduce, or impair an existing retail service in favor of a retail service based on a newer technology shall include with its application, in addition to any other information required, a certification that there is an adequate substitute service available for the service to be discontinued, reduced, or impaired and that the substitute service provides adequate:

- (1) Network capacity and reliability;
- (2) Service quality;
- (3) Device and service interoperability, including interoperability with vital third-party services and devices;
- (4) Service for individuals with disabilities, including compatibility with assistive technologies;
- (5) PSAP and 9-1-1 service;
- (6) Cybersecurity;
- (7) Service functionality; and
- (8) Coverage.

(b) Any domestic carrier that seeks to discontinue, reduce, or impair an existing retail service in favor of a retail service based on a newer technology that does not file the certification described in paragraph (a) of this section shall include with its application, in addition to any other information required, supporting evidence regarding the degree to which there is an adequate substitute or substitutes available for the service to be discontinued, reduced, or impaired, and supporting evidence regarding the degree to which the substitute service(s) provide adequate:

- (1) Network capacity and reliability;
- (2) Service quality;
- (3) Device and service interoperability, including interoperability with vital third-party services and devices;
- (4) Service for individuals with disabilities, including compatibility with assistive technologies;
- (5) PSAP and 9-1-1 service;
- (6) Cybersecurity;
- (7) Service functionality; and
- (8) Coverage.

(c) A certification pursuant to paragraph (a) of this section must: (1) set forth a detailed statement explaining the basis for such certification; (2) be executed by an officer or other authorized representative of the applicant; and (3) meet the requirements of §1.16 of this chapter.

APPENDIX C

**List of *Emerging Wireline Networks and Services NPRM*
Commenters and Reply Commenters**

<u>Commenter</u>	<u>Abbreviation</u>
AARP	AARP
Access Point Inc.; Birch Communications Inc.; BullsEye Telecom, Inc.; Matrix Telecom, Inc.; New Horizon Communications Corp.; Sage Telecom Communications, LLC; Telscape Communications, Inc.; and Xchange Telecom	Wholesale DS-0 Coalition
Ad Hoc Telecommunications Users Committee	Ad Hoc
ADT LLC d/b/a ADT Security Services	ADT
ADTRAN	ADTRAN
American Cable Association	ACA
Appalachian Regional Commission	Appalachian Comm'n
Appalshop, Inc.	Appalshop
AT&T Services, Inc.	AT&T
Birch, Integra & Level 3	Birch et al.
California Association of Competitive Telecommunications Companies	CALTEL
California Public Utilities Commission	Cal. PUC
CenturyLink, Inc.	CenturyLink
Cincinnati Bell Telephone Company LLC	Cincinnati Bell
City of New York/DoITT	City of New York
Communications Workers of America	CWA
Competitive Carriers Association	CCA
COMPTEL	COMPTEL
Corning Incorporated	Corning
Edison Electric Institute	Edison Electric Inst.
Electronic Security Association	Electronic Security Ass'n
Fiber to the Home Council Americas	FTTH Council
Full Service Network LP and TruConnect	Full Service Network et al.
Garland Connect, LLC	Garland
Granite Telecommunications, LLC	Granite
GVNW Consulting, Inc.	GVNW
ITTA - The Voice of Mid-Size Communications Companies	ITTA
Louis T. Fiore, Chairman of AICC	AICC
Michigan Public Service Commission	Mich. PSC
National Association of State Utility Consumer Advocates	NASUCA
National Association of Regulatory Utility Commissioners	NARUC
National Association of State 911 Administrators	NASNA
National Cable & Telecommunications Association	NCTA
National Association of Telecommunications Officers and Advisers and the National League of Cities	NATOA
Neustar, Inc.	Neustar
New York State Public Service Commission	NY PSC
NTCA-The Rural Broadband Association	NTCA
Office of the People's Counsel for the District of Columbia	OPC
Pennsylvania Public Utility Commission	Pa. PUC
Public Knowledge	Public Knowledge

Public Knowledge, Appalshop, Benton Foundation, Benton Foundation, Center for Media Justice, Center for Rural Strategies, Common Cause, The Greenlining Institute, Media Action Center, Media Literacy Project, National Consumer Law Center, On behalf of its low-income clients, New American Foundation Open Technology Institute, Rural Broadband Policy Group, and TURN	Public Knowledge et al.
Rural Broadband Policy Group	Rural Broadband Policy Group
Sprint Corporation	Sprint
TCA	TCA
Telecommunications Industry Association	TIA
Texas 9-1-1 Alliance, Texas Council on State Emergency Communications and Municipal Emergencies Communications Districts Association	Texas 9-1-1 Entities
United States Telecom Association	USTelecom
Utilities Telecom Council	Utilities Telecom Council
Verizon	Verizon
Vonage Holdings Corp.	Vonage
Windstream	Windstream
WorldNet Telecommunications, Inc.	WorldNet
XO Communications, LLC	XO

Reply Commenter

AARP
American Cable Association
AT&T Services, Inc.
Birch, Integra & Level 3
Bright House Networks, LLC
BT Americas
California Association of Competitive
Telecommunications Companies
CenturyLink
Charter Communications, Inc.; Cablevision Systems Corp.;
Cox Communications, LLC
Communications Workers of America
COMPTEL
Fiber to the Home Council Americas
Frontier Communications
Full Service Network LP and TruConnect
Hance Haney
Hawaiian Telcom, Inc.
Hughes Network Systems, LLC
Information Technology and Innovation Foundation
Louis T. Fiore, Chairman of AICC
Massachusetts Department of Telecommunications and Cable
National Association of State Utility Consumer Advocates
National Cable & Telecommunications Association
New America's Open Technology Institute, American Civil
Liberties Union, American Library Association, Benton
Foundation, Brennan Center for Justice, Center for
Democracy & Technology, Center for Digital Democracy,

Abbreviation

AARP
ACA
AT&T
Birch et al.
Bright House Networks
BT Americas
CALTEL

CenturyLink
Charter et al.

CWA
COMPTEL
FTTH Council
Frontier
Full Service Network et al.
Hance Haney
Hawaiian Telecom
Hughes
ITIF
AICC
MDTC
NASUCA
NCTA
Open Technology Inst. et al.

Consumer Action, Consumer Federation of California,
Consumer Watchdog, Defending Dissent
Foundation, Electronic Frontier Foundation, Privacy
Rights Clearinghouse, Public Knowledge, Sunlight Foundation,
and U.S. PIRG.

NTCA-The Rural Broadband Association
Pennsylvania Public Utility Commission
United States Telecom Association
U.S. TelePacific Corp.
Verizon
Windstream Services, LLC
WorldNet Telecommunications, Inc.
XO Communications, LLC

NTCA
Pa. PUC
USTelecom
TelePacific
Verizon
Windstream
WorldNet
XO

APPENDIX D

**List of Oppositions and Replies to *Petition for Reconsideration*
of the *United States Telecom Association*****Opposition**

COMPTEL
Granite Telecommunications, LLC
Public Knowledge
Rural Broadband Policy Group

Abbreviation

COMPTEL
Granite
Public Knowledge
Rural Broadband Policy Group

Replies

AT&T Services, Inc.
National Cable and Telecommunications Association
NTCA- The Rural Broadband Association
United States Telecom Association
Verizon

Abbreviation

AT&T
NCTA
NTCA
USTelecom
Verizon

APPENDIX E

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980 (RFA),¹ as amended, an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Emerging Wireline Networks Notice of Proposed Rulemaking and Declaratory Ruling (Notice)*.² The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The Commission did not receive any comments on the *Notice* IRFA. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.³

A. Need for, and Objectives of, the Final Rules

2. The fixed communications networks in this country are undergoing several technology transitions that are rapidly bringing innovative and improved services to consumers and the marketplace. As a nation, we are steadily moving from voice networks based on time-division multiplexed (TDM) services running on copper, to all-Internet Protocol (IP) multimedia networks running on a range of physical infrastructures. At the same time, the success of these technology transitions depends on the technologically-neutral preservation of longstanding principles embodied in the Communications Act, including those of competition and consumer protection.⁴ Towards that end, this Order adopts rules and policies to preserve our pro-consumer and pro-competition policies as communications facilities and services change. In addition to ensuring that interconnecting carriers and consumers are adequately informed when copper facilities are retired and that carriers comply with section 214(a) and obtain Commission approval prior to discontinuing service used by carrier-customers as a wholesale input if the carrier's actions will discontinue, reduce, or impair service to a community or part of a community, this Order revises the Commission's section 214 discontinuance rules to preserve competitive access to wholesale inputs during the pendency of our special access proceeding.⁵

3. *Copper Retirement.* The Order finds that the pace of copper retirement has accelerated over the last few years and that this rapid pace of retirements, combined with the deterioration of copper networks that have not been formally retired, has necessitated changes to ensure that our rules governing copper retirement promote competition, which will in turn serve the public interest. Thus, the foreseeable and increasing impact that copper retirement is exerting on competition and consumers warrants revisions to the Commission's network change disclosure rules to allow for greater transparency, opportunities for participation, and consumer protection.⁶ The Order revises these rules to require incumbent LECs planning copper retirements to provide direct notice to all entities within the affected service area that directly interconnect with their network and to include in their network change disclosures not only the information already required by section 51.327(a) of the Commission's rules, but also a description of any changes in prices, terms, or conditions that will accompany the planned changes.⁷ Additionally, incumbent LECs must provide the notice to interconnecting entities — or each entity that directly

¹ 5 U.S.C. § 603. The RFA, 5 U.S.C. §§ 601-612 has been amended by the Contract With America Advancement Act of 1996, Public Law No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968 (2014) (*Notice*).

³ See 5 U.S.C. § 604.

⁴ See *supra* para. 1.

⁵ See *supra* para. 6.

⁶ See *supra* paras. 5, 13.

⁷ See *supra* paras. 20, 24.

interconnects with the incumbent LEC's network — at least 180 days prior to the planned implementation date, except when the facilities to be retired are no longer being used to serve customers in the affected service area. In instances where facilities are no longer in use, the Order instead adopts the baseline 90-day period of the Commission's prior rules as the applicable notice period. After the Commission receives notice of the planned copper retirement from the incumbent LEC, it will issue a public notice of the retirement. It is at that point that the 180-day period begins to run. We find that receipt of the additional information and the extended notice period adopted in the Order will allow interconnecting entities to work more closely with their customers to ensure minimal disruption to service as a result of any planned copper retirements. These rules will also help ensure that competitive LECs are fully informed about the impact that copper retirements will have on their businesses. We further believe that by retaining a time-limited notice-based process, we can better ensure that our rules strike a sensible balance between meeting the needs of interconnecting carriers and allowing incumbent LECs to manage their networks.⁸

4. In light of the extended notice period adopted in the Order, we discard the objection procedures.⁹ However, we find that incumbent LECs should be required to act in good faith to provide additional information to interconnecting entities upon request when such information is necessary to accommodate the copper retirement without disruption of service to the interconnecting entity's customers. When an entity that directly interconnects with an incumbent LEC's network requests that the incumbent LEC provide additional information where necessary to allow the interconnecting entity to accommodate the incumbent LEC's changes with no disruption of service to the interconnecting entity's end user customers, we require incumbent LECs to work with such requesting interconnecting entities in good faith to provide such additional information. This good faith communication requirement will ensure that interconnecting entities still may obtain the information they need in order to accommodate the planned copper retirement without disruption of service to their customers that they would have been entitled to seek through the objection procedures. We further believe that this requirement strikes an appropriate balance between the needs of interconnecting carriers for sufficient information to allow for a seamless transition and the need to not impose overly burdensome notice requirements on incumbent LECs.¹⁰

5. The Order also revises section 51.331 of our rules by deleting paragraph (c), which provides that competing service providers may object to planned copper retirements by using the procedures set forth in section 51.333(c). The Order further revises section 51.333 to remove those provisions and phrases applicable to copper retirement. We find that consolidation of all notice requirements and rights of competing providers pertaining to copper retirements in one comprehensive rule provides clarity to industry and customers alike when seeking to inform themselves of their respective rights and obligations.¹¹

6. The Order modifies our network change disclosure rules to require direct notice to retail customers of planned copper retirements. Copper retirements often affect consumers, and consumers need to understand how they will be affected. We believe that the network change disclosure rules adopted in the Order will help to safeguard the most vulnerable populations of consumers against any confusion and will ensure that they are informed about how they will be impacted by any copper retirements. Thus, under the updated rules adopted in the Order, incumbent LECs will be required to provide direct notice of planned copper retirements to all of their retail customers within the affected service area(s), but only where the copper to the customer's premises is to be removed (e.g., where a customer is required to receive service via fiber-to-the-premises). We believe limiting the notice

⁸ See *supra* para. 17.

⁹ See *supra* para. 31.

¹⁰ See *supra* para. 32.

¹¹ See *supra* para. 34.

requirement to retirements involving involuntary replacement of copper to the customer's premises limits notice to circumstances in which customers are most likely to be affected, thereby avoiding confusion and minimizing the costs of compliance.¹² We find that modifying the proposed class of recipients in this way will make it easier for incumbent LECs to comply with their notice obligations by removing the need for them to make an independent determination regarding whether particular customers will require new or modified CPE or whether particular customers will be negatively impacted by the planned network change. We believe that the adopted rule will provide customers with sufficient clarity and will ensure that none are inadvertently excluded from the pool of recipients.¹³ The modified rule extends copper retirement notice requirements not just to consumers, but also to non-residential end users such as businesses and anchor institutions.

7. The *Notice* proposed requiring that copper retirement notices to retail customers provide sufficient information to enable the customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes, including the information required by section 51.327(a), as well as statements notifying customers that they can still purchase existing services and that they have a right to comment, and advising them regarding timing and the Commission's process. In this Order, we modify the proposal in the *Notice* in four ways. First, we adopt the additional requirement that the mandatory statements in the notice must be made in a clear and conspicuous manner. As stated above, the record reflects that a number of consumers are confused when copper retirements occur, so clear and conspicuous provision of information will help to remedy that issue.¹⁴ To provide additional guidance, we clarify that a statement is "clear and conspicuous" if it is disclosed in such size, color, contrast, and/or location that it is readily noticeable, readable, and understandable. In addition, the statement may not contradict or be inconsistent with any other information with which it is presented; if a statement materially modifies, explains or clarifies other information with which it is presented, then the statement must be presented in proximity to the information it modifies, explains or clarifies, in a manner that is readily noticeable, readable, and understandable, and not obscured in any manner; and hyperlinks included as part of the message must be clearly labeled or described. We adopt this detailed definition of "clear and conspicuous" to provide guidance to help ensure that customers will understand the required notice and to provide certainty to industry about our requirements.¹⁵ And to streamline the filing and reduce the burden on incumbent LECs, we decline to require that the notice include: (1) information required by section 51.327(a)(5), because that primarily requires provision of technical specifications that are unlikely to be of use to most retail customers; (2) a statement regarding the customer's right to comment on the planned network change, because, as discussed below, we decline to include in the updated rule we adopt today a provision regarding the opportunity to comment on planned network changes; and (3) a statement that "[t]his notice of planned network change will become effective" a certain number of days after the Federal Communications Commission (FCC) releases a public notice of the planned change on its website" because this statement is likely to be unnecessarily confusing and because 47 C.F.R. § 51.327(a)(3), which we incorporate as to customer copper retirement notices, already requires disclosure of the implementation date of the planned changes.¹⁶

¹² See *supra* para. 44.

¹³ See *supra* para. 45.

¹⁴ See, e.g., City of New York Comments at 2; NATOA Comments at 4; NASUCA Comments at 19; Public Knowledge Comments at 33.

¹⁵ See generally Federal Trade Commission, .com Disclosures: How to Make Effective Disclosures in Digital Advertising (Mar. 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

¹⁶ See *supra* para. 48.

8. The Order further requires LECs to include in copper retirement notices to retail customers a neutral statement of the various service options that the LEC makes available to retail customers affected by the planned copper retirement and that incumbent LECs are not subject to any additional obligations. There is a risk that without a clear, neutral message explaining what copper retirement does and does not mean, some consumers will easily fall prey to marketing that relies on confusion about the ability to keep existing services. The Order also requires that the notice be free of any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes. However, this last prohibition applies only to copper retirement notices provided pursuant to the Commission's network change disclosure rules and not to any other communication. This neutral statement requirement and limited prohibition will better enable retail consumers to make informed choices regarding their services and will give them the necessary tools to determine what services to purchase without swaying them towards new or different offerings.¹⁷

9. The rules adopted in the Order allow incumbent LECs to use written or electronic notice such as postal mail or e-mail to provide notice to retail customers of a planned copper retirement. This requirement should be sufficient to ensure that retail customers receive notice, without imposing unnecessary additional burdens on carriers.¹⁸ The rules adopted in the Order also require that incumbent LECs provide notice to non-residential retail customers at least 180 days prior to the planned implementation date.¹⁹ This should allow non-residential retail customers sufficient time to evaluate the impact of the planned network change on the service they would continue to receive and whether they need to seek out alternatives. Moreover, the rules require that incumbent LECs provide residential retail customers at least ninety-days' notice of planned copper retirements.²⁰ We conclude that this notice period is appropriate for residential retail customers, to whom earlier notice may be confusing and potentially forgotten over a long period of time.

10. The Order requires carriers to send notice of proposed copper retirements to state authorities (the governor and the state PUC), federally recognized Tribal nations within their Tribal lands, and the Secretary of the Department of Defense, and that this notice occur contemporaneously with notice to interconnecting entities. This rule will help ensure that states and Tribal governments are fully informed of copper retirements occurring within their respective borders. Given the increased cybersecurity risks posed by IP-based networks, the Department of Defense should also be kept informed of copper retirements.²¹

11. The Order further requires that no later than ninety (90) days before the date that the notices of copper retirement are deemed approved, incumbent LECs must file a certification identifying the proposed changes, the name and address of each entity upon which written notification was served, and a copy of the written notice provided to affected retail customers, among other information.²² Monitoring compliance with the rules adopted in the Order would be difficult without incumbent LECs confirming that they have complied. Thus, requiring this information is necessary to ensure compliance with our rules and will assist greatly with enforcement.

12. Given the frequency and scope of copper network retirement, it is essential that industry participants and stakeholders alike have a clear understanding of what retirement entails so that the public

¹⁷ See *supra* para. 51.

¹⁸ See *supra* paras. 60-61.

¹⁹ See *supra* para. 62. After the Commission receives notice of the planned copper retirement from the incumbent LEC, it will issue a public notice of the retirement. It is at that point that the 180-day period begins to run.

²⁰ *Id.*

²¹ See *supra* para. 70.

²² See *supra* para. 73.

is properly informed of network changes. To the end, the Order expands the definition of copper retirement to encompass the “removal or disabling of copper loops, subloops, or the feeder portion of such loops or subloops, or the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops.” Copper retirement also includes *de facto* retirement, i.e., failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling.²³

13. *Service Discontinuance.* Section 214(a) of the Act mandates that the Commission ensure that the public is not adversely affected when carriers discontinue, reduce, or impair services on which communities rely. To that end, the Order clarifies that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to end users, including a carrier-customer’s retail end users. The Order also clarifies that a carrier should not discontinue a service used as a wholesale input until it is able to determine that there will be no discontinuance, reduction, or impairment of service to end users, including carrier-customers’ end users, or until it obtains Commission approval.²⁴ We find that this clarification is necessary to fortify the Commission’s ability to fulfill its critical statutory role in overseeing service discontinuances under Section 214 of the Act. This clarification is thus designed to protect retail customers from the adverse impacts associated with discontinuances of service, and to ensure that service to communities will not be discontinued without advance notice to affected customers and Commission authorization. The Order clarifies that carriers must assess the impact of their actions on end user customers to prevent the discontinuance of service to a community without adequate public interest safeguards, including notice to affected customers and Commission consideration of the effect on the public convenience and necessity. This clarification is necessary to ensure that carriers meet their section 214(a) obligations to obtain approval for a discontinuance. Absent such clarification, the Commission may not be informed prior to carriers’ actions that discontinue, reduce, or impair service to retail end users, actions that potentially adversely affect the present or future public convenience and necessity. Moreover, without such clarification, carrier-customers and retail end users might not receive adequate notice or opportunity to object when such actions will discontinue service to carrier-customers’ retail end users.

14. The Order also adopts an interim rule that incumbent LECs that seek section 214 authority prior to the resolution of the special access proceeding to discontinue, reduce, or impair a TDM-based service that is currently used as a wholesale input by competitive carriers must as a condition to obtaining discontinuance authority provide competitive carriers reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions. The interim condition to which incumbent LECs must commit to obtain discontinuance authority for a TDM-based service will remain in place only until the Commission will have adopted and implemented the rules and policies that end the reasonably comparable wholesale access interim rule when (1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective. The Commission will evaluate whether a carrier provides reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions based on the totality of the circumstances, and its evaluation includes specifically whether the carrier is complying with five specific questions articulated in the Order. The reasonably comparable wholesale access condition that we adopt applies to two categories of service: (1) special access services at DS1 speed and above and (2) commercial wholesale platform services such as AT&T’s Local Service Complete and Verizon’s Wholesale Advantage.

15. Establishing the reasonably comparable wholesale access requirement is necessary to protect the competition that exists today for the provision of telecommunications services to small- and

²³ See *supra* para. 90.

²⁴ See *supra* para. 102.

medium-sized businesses, schools, libraries, and other enterprise customers.²⁵ This requirement is carefully tailored to preserve incentives for investment for incumbent LECs while maintaining opportunities for competitive LECs to provide the services that customers demand on a limited-term basis until the Commission completes its evaluation of the special access market or markets for TDM and IP based services and adopts rules and policies to ensure services are available at just and reasonable rates, terms, and conditions. An interim rule that provides both providers and their wholesale customers with a balanced approach will facilitate transitions and preserve the benefits of competition during the pendency of the special access proceeding.²⁶

16. Service by competitive carriers that depend on wholesale inputs offers the benefits of additional competitive choice to an enormous number of small and medium-sized businesses, schools, government entities, healthcare facilities, libraries, and other enterprise customers. The Order takes these actions to preserve such competition and ensure that this competition continues to thrive as the ongoing technology transitions occur.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

17. There were no comments filed that specifically addressed the rules and policies proposed in the IRFA. To the extent we received comments raising general small business concerns during this proceeding, those comments are addressed throughout the Order.²⁷

C. Description and Estimate of the Number of Small Entities to Which the Rules Will Apply

18. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by adopted rules.²⁸ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁹ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.³⁰ A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.³¹

19. The majority of the rules and policies adopted in the Order will affect obligations on incumbent LECs and, in some cases, competitive LECs. Other entities, however, that choose to object to network change notifications for copper retirement under our new rules may be economically impacted by the regulations adopted in this Order.

²⁵ See *supra* paras. 131-132.

²⁶ See *supra* para. 131.

²⁷ See, e.g., *supra* paras. 6, 62, 101, 131, 133, 134, 162, and 247; see also TCA Comments.

²⁸ See 5 U.S.C. § 603(b)(3).

²⁹ 5 U.S.C. § 601(6).

³⁰ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

³¹ See 15 U.S.C. § 632.

1. Total Small Businesses

20. A small business is an independent business having less than 500 employees. Nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.³² Affected small entities as defined by industry are as follows.

2. Wireline Providers

21. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.³³ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.³⁴ Of this total, 3144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.³⁵ Thus, under this size standard, the majority of firms can be considered small.

22. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁶ According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.³⁷ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.³⁸ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by the rules adopted in the Order.

23. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁹ According to Commission data,⁴⁰ 1,307 carriers reported that they were incumbent local exchange service providers.⁴¹ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.⁴² Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Order.

³² See SBA, Office of Advocacy, *Frequently Asked Questions* (March 2014), http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

³³ 13 C.F.R. § 121.201, NAICS code 517110.

³⁴ U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 5, “Employment Size of Firms for the United States: 2007, NAICS Code 517110,” http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ1/naics-517110 (last visited July 16, 2015).

³⁵ See *id.*

³⁶ 13 C.F.R. § 121.201, NAICS code 517110.

³⁷ Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, tbl. 5.3 (Sept. 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf (*Trends in Telephone Service*).

³⁸ See *id.*

³⁹ 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁰ See *Trends in Telephone Service* at tbl. 5.3.

⁴¹ See *id.*

⁴² See *id.*

24. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”⁴³ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.⁴⁴ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁵ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁴⁶ Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁴⁷ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁴⁸ In addition, 72 carriers have reported that they are Other Local Service Providers.⁴⁹ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.⁵⁰ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and other local service providers are small entities that may be affected by rules adopted pursuant to the Order.

26. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵¹ According to Commission data,⁵² 359 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXC are small entities that may be affected by rules adopted pursuant to the Order.

27. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers

⁴³ 5 U.S.C. § 601(3).

⁴⁴ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (filed May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

⁴⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁴⁶ See *Trends in Telephone Service* at tbl.5.3.

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁵² *Trends in Telephone Service* at tbl. 5.3.

that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁵³ According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁵⁴ Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.⁵⁵ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by the rules and policies adopted pursuant to the Report and Order.

3. Wireless Providers

28. *Wireless Telecommunications Carriers (except Satellite)*. Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.⁵⁶ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁵⁷ For the category of Wireless Telecommunications Carriers (except Satellite), census data for 2007 show that there were 1,383 firms that operated for the entire year.⁵⁸ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁵⁹ Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

29. *Wireless Telephony*. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁶⁰ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁶¹ According to Commission data, 413 carriers reported that they were engaged in wireless telephony.⁶² Of these, an estimated 261 have 1,500 or fewer employees and 152 have more than 1,500 employees.⁶³ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

4. Cable Service Providers

30. *Cable and Other Program Distributors*. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is

⁵³ See 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁴ See *Trends in Telephone Service* at tbl. 5.3.

⁵⁵ See *id.*

⁵⁶ U.S. Census Bureau, 2012 NAICS Definitions, *517210 Wireless Telecommunications Categories (Except Satellite)*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2012%20NAICS%20Search> (last visited July 16, 2015).

⁵⁷ 13 C.F.R. § 121.201, NAICS code 517210 (2012 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁵⁸ U.S. Census Bureau, Subject Series: Information, Table 5, “Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210,” http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ5/naics-517210 (last visited July 16, 2015).

⁵⁹ See *id.*

⁶⁰ 13 C.F.R. § 121.201, NAICS code 517210.

⁶¹ *Id.*

⁶² *Trends in Telephone Service* at tbl. 5.3.

⁶³ *Id.*

defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”⁶⁴ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was all such firms having \$13.5 million or less in annual receipts.⁶⁵ According to Census Bureau data for 2007, there were a total of 3,188 firms in this category that operated for the entire year.⁶⁶ Of this total, 2,684 firms had annual receipts of under \$10 million, and 504 firms had receipts of \$10 million or more.⁶⁷ Thus, the majority of these firms can be considered small and may be affected by rules adopted pursuant to the Order.

31. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.⁶⁸ Industry data shows that there are 660 cable operators in the country.⁶⁹ Of this total, all but eleven cable operators nationwide are small under this size standard.⁷⁰ In addition, under the Commission’s rules, a “small system” is a cable system serving 15,000 or fewer subscribers.⁷¹ Current Commission records show 4,945 cable systems nationwide.⁷² Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records.⁷³ Thus, under this standard, we estimate that most cable systems are small entities.

⁶⁴ U.S. Census Bureau, 2012 NAICS Definitions, *517110 Wired Telecommunications Carriers*, (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012> (last visited July 16, 2015).

⁶⁵ 13 C.F.R. § 121.201, NAICS code 517110.

⁶⁶ U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 4, “Receipts Size of Firms for the United States: 2007, NAICS Code 517110,” http://factfinder.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ/naics-517110 (last visited July 16, 2015).

⁶⁷ *Id.*

⁶⁸ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, MM Docket Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995). The Commission also applied this size standard to MVPD operators in its implementation of the CALM Act. *See Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, para. 37 (2011) (*CALM Act Report and Order*).

⁶⁹ NCTA, *Industry Data, Number of Cable Operators and Systems*, <https://www.ncta.com/industry-data> (last visited July 16, 2015). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. *See Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013).

⁷⁰ These data are derived from R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857. *CALM Act Report and Order*, 26 FCC Rcd 17222, 17245-46, para. 37.

⁷¹ 47 C.F.R. § 76.901(c).

⁷² The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

⁷³ *See id.*

5. All Other Telecommunications

32. The Census Bureau defines this industry as including “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or Voice over Internet Protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”⁷⁴ The SBA has developed a small business size standard for this category; that size standard is \$32.5 million or less in average annual receipts.⁷⁵ According to Census Bureau data for 2007, there were 2,383 firms in this category that operated for the entire year.⁷⁶ Of these, 2,346 firms had annual receipts of under \$25 million and 37 firms had annual receipts of \$25 million or more.⁷⁷ Consequently, we estimate that the majority of these firms are small entities that may be affected by our action.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements for Small Entities

33. The Order proposes a number of rules and policies that will affect reporting, recordkeeping, and other compliance requirements.

34. *Copper Retirement.* The Order revises our network change rules to require incumbent LECS planning copper retirements to include in their network change disclosures not only the information already required by section 51.327(a) of the Commission’s rules, but also a description of any changes in prices, terms, or conditions that will accompany the planned changes. Additionally, these providers must provide direct notice to interconnecting entities within the affected service area at least 180 days prior to the planned implementation date, except when the facilities to be retired are no longer being used to serve customers in the affected service area. In instances where facilities are no longer in use, the Order adopts a 90-day period as the applicable notice period.⁷⁸

35. The Order also requires that an entity that directly interconnects with an incumbent LEC’s network may request that the incumbent LEC provide additional information where necessary to allow the interconnecting entity to accommodate the incumbent LEC’s changes with no disruption of service to the interconnecting entity’s end user customers. Incumbent LECs are required to work with such requesting interconnecting entities in good faith to provide such additional information.⁷⁹

36. The Order further modifies our network change disclosure rules to require direct notice to retail customers of planned copper retirements. Under the updated rules adopted in the Order, incumbent LECs will be required to provide direct notice of planned copper retirements to all of their retail customers within the affected service area(s).⁸⁰ The modified rule extends copper retirement notice

⁷⁴ U.S. Census Bureau, 2012 NAICS Definitions, *517919 All Other Telecommunications*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012> (last visited July 16, 2015).

⁷⁵ See 13 C.F.R. § 121.201, NAICS code 517919.

⁷⁶ U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 4, “Receipts Size of Firms for the United States: 2007, NAICS Code 517919” (issued Nov. 2010), http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ4/naics-517919 (last visited July 16, 2015).

⁷⁷ See *id.*

⁷⁸ See *supra* para. 30.

⁷⁹ See *supra* para. 32.

⁸⁰ See *supra* para. 44.

requirements not just to consumers, but also to non-residential end users such as businesses and anchor institutions.⁸¹

37. The Order requires that copper retirement notices to retail customers provide sufficient information to enable the customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes, including the information required by section 51.327(a) – with the exception of the information required by section 51.327(a)(5) – as well as statements notifying customers that they can still purchase existing services.⁸²

38. The Order further requires LECs to include in copper retirement notices to retail customers a neutral statement of the various service options that the LEC makes available to retail customers affected by the planned copper retirement. The Order also requires that the notice be free of any statement attempting to encourage a customer to purchase a service other than the service to which the customer currently subscribes. However, this last prohibition applies only to copper retirement notices provided pursuant to the Commission’s network change disclosure rules and not to any other communication.⁸³ The rules adopted in the Order allow incumbent LECs to use written or electronic notice such as postal mail or e-mail to provide notice to retail customers of a planned copper retirement.⁸⁴

39. The Order also requires carriers to send notice of proposed copper retirements to state authorities (the state governor and PUC) and the Secretary of the Department of Defense, as well as affected Tribal entities.⁸⁵

40. In tandem with their public notice, incumbent LECs must file a certification identifying the proposed changes, the name and address of each entity upon which written notification was served, and a copy of the written notice provided to affected retail customers, among other information.⁸⁶

41. The Order also expands the definition of copper retirement to encompass the “removal or disabling of copper loops, subloops, or the feeder portion of such loops or subloops, or the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops.”⁸⁷ Copper retirement also includes de facto retirement, i.e., failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling.⁸⁸

42. *Service Discontinuance.* The Order clarifies that a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to end users, including a carrier-customer’s retail end users. The Order also clarifies that a carrier should not discontinue a service used as a wholesale input until it is able to determine that there will be no discontinuance, reduction, or impairment of service to end users, including carrier-customers’ end users, or until it obtains Commission approval.⁸⁹

43. The Order clarifies that carriers must assess the impact of their actions on end user customers to prevent the discontinuance of service to a community without adequate public interest safeguards, including notice to affected customers and Commission consideration of the effect on the

⁸¹ See *supra* para. 45.

⁸² See *supra* paras. 46-48.

⁸³ See *supra* para. 54.

⁸⁴ See *supra* para. 60.

⁸⁵ See *supra* para. 70.

⁸⁶ See *supra* para. 73.

⁸⁷ See *supra* para. 80.

⁸⁸ See *supra* para. 90.

⁸⁹ See *supra* para. 102.

public convenience and necessity. Specifically, carriers must undertake a meaningful evaluation of the impact of actions that will discontinue, reduce, or impair services used as wholesale inputs, using all information available, including information obtained from carrier-customers, and assess the impact of these actions on end user customers, including carrier-customers' end users. If their actions will discontinue service to any such end users, Commission approval is required.⁹⁰

44. The Order also adopts an interim rule that incumbent LECs that seek section 214 authority prior to the resolution of the special access proceeding to discontinue, reduce, or impair a TDM-based service that is currently used as a wholesale input by competitive carriers must as a condition to obtaining discontinuance authority provide competitive carriers reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions. The interim condition to which incumbent LECs must commit to obtain discontinuance authority for a TDM-based service will remain in place only until the Commission will have adopted and implemented the rules and policies that end the reasonably comparable wholesale access interim rule when: (1) it identifies a set of rules and/or policies that will ensure rates, terms, and conditions for special access services are just and reasonable; (2) it provides notice such rules are effective in the Federal Register; and (3) such rules and/or policies become effective. The Commission will evaluate whether a carrier provides reasonably comparable wholesale access on reasonably comparable rates, terms, and conditions based on the totality of the circumstances, and its evaluation includes specifically whether the carrier is complying with five specific questions articulated in the Order. The reasonably comparable wholesale access condition that we adopt applies to two categories of service: (1) special access services at DS1 speed and above and (2) commercial wholesale platform services such as AT&T's Local Service Complete and Verizon's Wholesale Advantage.⁹¹

E. Steps Taken to Minimize the Significant Economic Impact on Small Entities, and Significant Alternatives Considered

45. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rules for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.⁹²

46. The Commission is aware that some of the rules adopted in this Order will impact small entities by imposing costs and administrative burdens. For this reason, in reaching its final conclusions and taking action in this proceeding, the Commission has taken a number of measures to minimize or eliminate the costs and burdens generated by compliance with the adopted regulations.

47. Although the Order adopted new requirements for the copper retirement notice process, the Commission declined to require that the descriptions of the potential impact of the planning changes be specific to each interconnecting carrier to whom an incumbent LEC must give notice. Such a requirement would impose an unreasonable burden on incumbent LECs, as would the requirement that copper retirement notices include information regarding impacted circuits and wholesale alternatives, another alternative step that we considered before eventually discarding. The requirements in proposed new section 51.332 of our rules are sufficient protection to interconnecting carriers without the need for further regulation. The Commission also declined to adopt a particular required format for copper

⁹⁰ See *supra* para. 113.

⁹¹ See *supra* para. 132.

⁹² 5 U.S.C. § 603(c)(1)-(c)(4).

retirement notices, since such a specified format runs the risk of not covering all aspects of each provider's copper retirement plans.⁹³

48. In light of the extended notice period adopted in the Order, the Commission eliminated the objection procedures.⁹⁴ The Order also consolidates all notice requirements and rights of competing providers pertaining to copper retirements within one comprehensive rule in order to provide clarity to small entities when seeking to inform themselves of their rights and obligations.⁹⁵

49. Although we considered a proposal that, for a network change to qualify as a copper retirement as opposed to a service discontinuance, a carrier must present the same standardized interface to the end user as it did when it used copper, we ultimately concluded that this requirement was unnecessary. We find that this proposal would go far beyond the mandate of section 68.110(b) of the Commission's rules, which speaks to the effect of changes in facilities, equipment, operations, or procedures on customer's terminal equipment.⁹⁶

50. We similarly declined to require incumbent LECs to provide competitive providers with an annual forecast of copper retirements. This type of information can constitute some of an incumbent LEC's most competitively sensitive information, and such an advance disclosure requirement may risk putting them at a competitive disadvantage. Moreover, the information contained in a forecast can change over time as circumstances change, and we are thus skeptical of the value of such a requirement.⁹⁷ We also declined to adopt a requirement that incumbent LECs establish and maintain a publicly available and searchable database of all their copper plant. It is not clear based on the record that such a database would be feasible or cost-effective, and such a requirement could impose an expensive and potentially duplicative burden.⁹⁸

51. The Order also modified the notice to retail customers rules proposed in the Notice in order to minimize the burden they impose on incumbent LECs, primarily by eliminating a requirement that incumbent LECs undertake consumer education efforts in connection with planned copper retirements, among several other requirements proposed as part of the Notice.⁹⁹ Under the rules adopted by the Order, incumbent LECs are required to provide only one neutral statement to consumers and will not be subject to any additional obligations with regards to the notice to retail customers requirement.¹⁰⁰

52. While the *Notice* proposed requiring direct notice to all retail customers affected by the planned network change, the rules adopted in the *Order* require incumbent LECs to provide direct notice of planned copper retirements to all of their retail customers within the affected service area(s). We believe that modifying the proposed class of recipients in this way will make it easier for incumbent LECs to comply with their notice obligations by removing the need for them to make an independent determination regarding whether particular customers will require new or modified CPE or whether particular customers will be negatively impacted by the planned network change.¹⁰¹

⁹³ See *supra* para. 27.

⁹⁴ See *supra* para. 31.

⁹⁵ See *supra* para. 34.

⁹⁶ See *supra* para. 35.

⁹⁷ See *supra* para. 36.

⁹⁸ See *supra* para. 37.

⁹⁹ See *supra* para. 40; see also para. 63.

¹⁰⁰ See *supra* para. 40.

¹⁰¹ See *supra* para. 45.

53. While incumbent LECs are required to provide direct notice of planned copper retirements to all of their retail customers within the affected service area(s), this notice need not include the information required by section 51.327(a)(5) of our rules, nor a provision regarding the opportunity for customers to comment on planned network changes. Section 51.327(a)(5) requires provision of technical specifications that are unlikely to be of use to most retail customers.¹⁰² Aside from the neutral statement requirement, we decline to adopt any further content requirements with regards to the direct notice of planned copper retirements. We do not believe it is necessary or appropriate to require more than this in the context of a copper retirement that does not rise to the level of a discontinuance, reduction, or impairment of service for which a carrier would need to seek Commission authorization.¹⁰³

54. The Order allows incumbent LECs to use written or electronic notice such as postal mail or e-mail to provide notice to retail customers of a planned copper retirement. We find that this requirement should be sufficient to ensure that retail customers receive such notice without imposing unnecessary additional burdens on carriers. And because we retain the notice-based process for copper retirement network change disclosures, we find that there is little reason to require incumbent LECs to allow customers to reply directly to any e-mail notices.¹⁰⁴

55. We decline to adopt a rural exemption to the notice rule. While the rules necessarily impose some burden on carriers, that burden is not greater for rural LECs. We also decline to impose different notice requirements for network upgrades, network downgrades, and the complete abandonment of facilities. We do not believe such differentiation is necessary, and would impose a greater burden on incumbent LECs. We also refuse to require proof of notice to be acknowledged by individual customers before allowing changes. Such a requirement would unfairly penalize incumbent LECs for the failure of their customers to act.¹⁰⁵

56. We also decline to adopt a proposal to revise the network change disclosure rules to provide the public with the opportunity to comment on planned network changes. We find that avenues to communicate with the Commission are sufficient and formalizing a right to comment is not needed.¹⁰⁶ And while the Order requires notice of copper retirements to be given to state authorities and the Department of Defense, as well as Tribal entities with proposed copper retirements within their borders, it declines to adopt this same notice requirement for other network change notifications. There is a lack of sufficient support in the record to support such a requirement, which would place an increased regulatory burden on incumbent LECs and other small entities.¹⁰⁷

57. We decline to establish a process for situations where a network is damaged after a natural disaster and a carrier decides to permanently replace that network with a new technology. The discontinuance and network change notification requirements proposed in the Further Notice and adopted in the Order are responsive to this concern without the need for additional regulation. Additionally, such a process would require incumbent LEC submission of service metrics with the Commission that are beyond the scope of this proceeding.¹⁰⁸

58. The Order also reduces the regulatory burden on small entities by declining to mandate the sale of copper facilities that an incumbent LEC intends to retire and/or establish for ourselves a

¹⁰² See *supra* para. 48.

¹⁰³ See *supra* para. 55.

¹⁰⁴ See *supra* paras. 60-61.

¹⁰⁵ See *supra* paras. 65-67.

¹⁰⁶ See *supra* para. 68.

¹⁰⁷ See *supra* para. 69.

¹⁰⁸ See *supra* para. 97.

supervisory role in the sale process (although the sale of such facilities is encouraged). Commission oversight of sales could be intrusive, costly, and a potential barrier to technology transitions.¹⁰⁹

59. While the Order requires carriers to undertake a meaningful evaluation of the impact of actions that will discontinue, reduce, or impair services used as wholesale inputs and to obtain Commission approval if their actions will discontinue service to end users, Commission approval is not required for a planned discontinuance, reduction, or impairment of service (1) when the action will not discontinue, reduce, or impair service to a community or part of a community, or (2) 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.¹¹⁰

60. The Order declines to adopt requirements to ensure that carriers have properly rebutted the proposed presumption, including a requirement that the carrier submit documentation or a certification to the Commission identifying and providing the basis for its conclusion that the carrier has adequately rebutted the presumption, among other proposed obligations. The burdens of such an obligation would exceed the benefits. Thus, the adopted rules and policies will be less burdensome for carriers than the proposed rebuttable presumption, and we allow carriers to determine through their own internal processes whether Commission approval of their actions is necessary. We have also sought to minimize burdens and cost by not requiring carriers to submit information to the Commission when they determine that a section 214 application is not needed because their actions do not discontinue, reduce, or impair service to the community or part of the community.¹¹¹

61. We further decline to adopt an irrebuttable presumption that discontinuance of a wholesale service necessarily results in a discontinuance, reduction, or impairment to end users. Such an approach would be highly burdensome for carriers.¹¹² We also decline to adopt a presumption in favor of approving discontinuance of a retail service if at least one competitive alternative is available. We see no reason to deviate from our longstanding and clearly articulated criteria by which we evaluate section 214(a) applications, which already take into account whether alternatives are available.¹¹³

62. To ensure clarity and assist small entities with regulatory compliance, we codify the reasonably comparable wholesale access condition adopted in the Order in a new subsection to section 63.71 of our rules.¹¹⁴

63. Although we considered obligating carriers to provide “equivalent” wholesale access on “equivalent” rates, terms, and conditions, we ultimately found it preferable to impose a more flexible “reasonably comparable” standard. We also imposed a time limit on the requirement that we adopted. This flexible standard and time-limited approach minimizes the regulatory burden on incumbent LECs while advancing the Commission’s goal of preserving competition and promoting technology transitions.¹¹⁵ We also declined to adopt as mandatory requirements any of the six objective requirements for which we sought comment in the *Notice*.¹¹⁶ Rather, we adopt a flexible “totality of the circumstances”

¹⁰⁹ See *supra* para. 99.

¹¹⁰ See *supra* para. 114.

¹¹¹ See *supra* paras. 123-124.

¹¹² See *supra* para. 125.

¹¹³ See *supra* para. 128. The Order also notes that the attached Further Notice addresses this matter in greater detail.

¹¹⁴ See *supra* para. 132.

¹¹⁵ See *supra* paras. 138, 142.

¹¹⁶ See Notice, 29 FCC Rcd at 15013-14, para. 111.

approach that takes into account versions of five of these six factors as questions but does not prescribe hard rules.¹¹⁷ We adopt this balanced approach to provide parties necessary flexibility.

64. Although the Notice sought comment on whether, as a part of a wholesale access condition, to prohibit price hikes from being effectuated via significant changes to charges for network to network interface (NNI) or any other rate elements, lock-up provisions, early termination fees (ETFs), special construction charges, or any other measure, we decline to adopt such a prohibition in the Order. We find that the steps taken are sufficient without necessitating adoption of this further restriction.¹¹⁸ We also decline to adopt any rate publication requirement. We do not find sufficient evidence to impose publication obligations on incumbent LECs. Moreover, this requirement would go beyond merely preserving competition to create an obligation that does not presently exist for TDM services that are discontinued, and would therefore be contrary to the overall framework and purpose of our wholesale access obligation. The Order also declines to adopt additional requirements to the reasonably comparable wholesale access condition, specifically a certification requirement proposed by some commenters, since it is unclear the timing of such certification and requiring certification is inherently backward-looking, i.e., is best suited to confirming that an entity has already complied with a regulatory obligation. We find that the conditions we adopt to govern the discontinuance process is better suited to ensuring forward-looking, ongoing compliance on an interim basis. We see no need at this juncture to adopt additional methods to ensure compliance when doing so would impose costs on small entities without any attendant clear benefit. The Order declines to impose any audits or specific metric requirements on incumbent or competitive LECs for the same reasons.¹¹⁹

F. Report to Congress

65. The Commission will send a copy of the Order, including this FRFA, in a report to be sent to Congress and the Government Accountability Office pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996.¹²⁰ In addition, the Commission will send a copy of the Order, including the FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the Order and FRFA (or summaries thereof) will also be published in the Federal Register.¹²¹

¹¹⁷ See *supra* para. 159.

¹¹⁸ See *supra* para. 178.

¹¹⁹ See *supra* paras. 179-180.

¹²⁰ See 5 U.S.C. § 801(a)(1)(A).

¹²¹ See *id.* § 604(b).

APPENDIX F

Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),¹ the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Further Notice of Proposed Rule Making (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 243 of this Further Notice. The Commission will send a copy of this Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the Further Notice and IRFA (or summaries thereof) will be published in the Federal Register.³

A. Need for, and Objectives of, the Proposed Rules

2. Building on the record developed in response to the *Notice*,⁴ in the Further Notice the Commission proposes specific criteria for the Commission to use in evaluating the adequacy of substitute services in connection with applications to discontinue retail services pursuant to section 214 of the Communications Act of 1934, as amended.⁵ The Commission believes all stakeholders will benefit from an additional round of comments focused on its specific proposals. Adopting specific criteria will enable the Commission to ensure that it can carry out its statutorily-mandated responsibilities in a technology-neutral manner and provide clear up-front guidance that will minimize complications when carriers seek approval for large-scale discontinuances. The Commission also seeks further comment on what constitutes a sufficient notice period for affected customers in connection with a section 214 discontinuance application and whether it should revise its rules to explicitly allow email-based notice or other forms of electronic or other notice of discontinuance to customers.⁶ And the Commission seeks comment on including notice to Tribal governments as part of the section 214 discontinuance application process.⁷ The Commission also seeks comment on defining what constitutes “good faith” in connection with the requirement adopted in the Order that incumbent LECs act in good faith to provide interconnecting entities with information needed in order to accommodate planned copper retirements.⁸ Finally, the Commission seeks comment on how to facilitate continuation of commercial wholesale platform services after technology transitions.⁹

3. First, the Further Notice seeks additional comment on possible criteria against which to measure “what would constitute an adequate substitute for retail services that a carrier seeks to discontinue, reduce, or impair in connection with a technology transition (e.g., TDM to IP, wireline to

¹ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

² See 5 U.S.C. § 603(a).

³ See *id.*

⁴ *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 14969, para. 1 (2014) (*Notice*).

⁵ See *supra* Further Notice, Section IV.A; see also 47 U.S.C. § 214.

⁶ See *supra* Further Notice, Section IV.B.

⁷ See *supra* Further Notice, Section IV.C.

⁸ See *supra* Further Notice, Section IV.D.

⁹ See *supra* Further Notice, Section IV.E.

wireless)” in order “to ensure that we protect consumers, competition, and public safety.”¹⁰ The Commission continues to believe that establishing criteria for evaluating the adequacy of replacement services will benefit industry and consumers by providing certainty. Because the record as developed thus far does not provide sufficient clarity to allow the Commission to fully establish clear criteria, the Commission seeks additional comment on specific proposals so that it has the benefit of more targeted input in order to adopt rules that are carefully tailored to address the issues presented by the ongoing technology transitions process and that will stand the test of time.¹¹ The Further Notice also seeks comment on effective ways to ensure compliance with the criteria and tentatively proposes requiring an officer or other authorized public representative to certify the accuracy of the statements in the application regarding the criteria. The availability of adequate substitute services is one of five factors the Commission looks at in evaluating section 214 discontinuance applications under existing precedent, to be balanced against the other factors in determining whether the public convenience and necessity will be adversely affected by discontinuance of the service at issue.¹²

4. Second, the Further Notice seeks additional comment on whether and how the Commission should adopt modifications to Section 63.71 of our rules, including the costs and benefits of any changes.¹³ In the *Notice*, the Commission sought comment on whether it should revise section 63.71 of its rules, which establishes the procedures that carriers must follow to obtain section 214(a) approval for discontinuances, including notification to affected customers and the earliest dates by the Commission may grant approval of discontinuance applications.¹⁴ Although some entities filed comments, in the Further Notice the Commission determines that we need a more complete record on this issue.¹⁵ The Further Notice also seeks more general comment on whether it should revise its rules to explicitly allow email-based notice or other forms of electronic or other notice of discontinuance to customers¹⁶ and on whether there are factors the Commission should take into consideration for certain groups of customers, such as accessibility formats, or any other issues that the Commission should consider to ensure that all affected consumers receive adequate notice.¹⁷

5. Third, the Further Notice tentatively concludes that the Commission should extend the notice requirements for discontinuances, reductions, or impairments of service to affected Tribal governments and seeks comment on including notice to Tribal governments as part of our section 214 discontinuance application process.¹⁸ Specifically, the Further Notice seeks comment on the tentative conclusion that the Commission should revise section 63.71(a) of its rules to include notice to Tribal governments in order to make its copper retirement and service discontinuance notice requirements consistent.¹⁹ The Further Notice tentatively concludes that the Commission should include any Tribal Nations in the state in which discontinuance, reduction, or impairment of service is proposed regardless of the reason for the discontinuance, and seeks comment on this, including its costs and benefits. Finally, the Further Notice seeks comment on whether a different or limited scope of notice to Tribal governments

¹⁰ See Further Notice, Section IV.A; see also *Notice*, 29 FCC Rcd at 15006, paras. 92-93.

¹¹ See Further Notice, Section IV.A.

¹² *Id.*

¹³ See *supra* Further Notice, Section IV.B.

¹⁴ *Notice*, 29 FCC Rcd at 15014, para. 113; see also 47 C.F.R. §63.71.

¹⁵ See *supra* Further Notice, Section IV.B.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *supra* Further Notice, Section IV.C.

¹⁹ *Id.*

would be appropriate and whether there are any other issues of notice, such as form or content, unique to Tribal governments that the Commission should consider.

6. Fourth, the Further Notice notes that, in the attached Report and Order, the Commission eliminates the objection procedures previously available to interconnecting carriers upon receipt of a copper retirement notice and instead adopts a requirement that incumbent LECs work with interconnecting entities in good faith to ensure that those entities have the information needed to allow them to accommodate the transition with no disruption of service to their end user customers.²⁰ The Further Notice seeks comment on whether the Commission should provide specific objective criteria by which to evaluate this good faith requirement to ensure that all parties are aware of their respective rights and obligations.²¹ The Further Notice also seeks comment on what recourse should be available to an interconnecting entity who believes that an incumbent LEC is not acting in good faith and whether there are limitations on how much and what types of information an incumbent LEC should be required to provide to an interconnecting entity.

7. Finally, the Further Notice notes that to support the current technology transitions, we seek to avoid delays due to diminished competition by imposing light-handed regulation through the interim reasonably comparable wholesale access condition. The Further Notice seeks comment on how to facilitate continuation of commercial wholesale platform services, which the Commission believes serve an important business need for enterprises that seek, among other things, “the ability to obtain service from a single supplier at their disparate retail locations nationwide.”²² The Commission seeks comment on whether to the extent that the Commission finds that wholesale arrangements for voice service are unlikely to occur in the future on a marketplace basis, it would be appropriate for the Commission to require reasonably comparable wholesale access for commercial wholesale platform services for a further interim period beyond completion of the special access proceeding and, if so, for how long.²³

B. Legal Basis

8. The proposed action is authorized under Sections 1, 2, 4(i), 214, and 251 of the Communications Act of 1934, as amended; 47 U.S.C. Sections 151, 152, 154(i), 214, and 251.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

9. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.²⁴ The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”²⁵ In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.²⁶ A “small-business

²⁰ See *supra* Report and Order, paras. 31-32, 241.

²¹ *Supra* Further Notice, Section IV.D.

²² See *supra* Further Notice, para. 243 (quoting Granite Comments at 3).

²³ See *supra* Further Notice, Section IV.E.

²⁴ See 5 U.S.C. § 603(b)(3).

²⁵ 5 U.S.C. § 601(6).

²⁶ See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.²⁷

10. The majority of our proposals in the Further Notice will affect obligations on incumbent LECs. Other entities, however, that choose to object to network change notification for copper retirement under our new proposed rules may be economically impacted by the proposals in this Further Notice.

1. Total Small Businesses

11. A small business is an independent business having less than 500 employees. Nationwide, there are a total of approximately 28.2 million small businesses, according to the SBA.²⁸ Affected small entities as defined by industry are as follows.

2. Wireline Providers

12. *Wired Telecommunications Carriers.* The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.²⁹ According to Census Bureau data for 2007, there were 3,188 firms in this category, total, that operated for the entire year.³⁰ Of this total, 3,144 firms had employment of 999 or fewer employees, and 44 firms had employment of 1000 employees or more.³¹ Thus, under this size standard, the majority of firms can be considered small.

13. *Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³² According to Commission data, 1,307 carriers reported that they were incumbent local exchange service providers.³³ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.³⁴ Consequently, the Commission estimates that most providers of local exchange service are small entities that may be affected by rules adopted pursuant to the Further Notice.

14. *Incumbent Local Exchange Carriers (Incumbent LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.³⁵ According to Commission data,³⁶ 1,307 carriers reported that they were incumbent local exchange service

²⁷ See 15 U.S.C. § 632(l).

²⁸ See SBA, Office of Advocacy, *Frequently Asked Questions* (March 2014), http://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf.

²⁹ 13 C.F.R. § 121.201, NAICS code 517110.

³⁰ U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 5, “Employment Size of Firms for the United States: 2007, NAICS Code 517110,” http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ1/naics~517110 (last visited July 10, 2015).

³¹ See *id.*

³² 13 C.F.R. § 121.201, NAICS code 517110.

³³ Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, *Trends in Telephone Service*, tbl. 5.3 (Sept. 2010), https://apps.fcc.gov/edocs_public/attachmatch/DOC-301823A1.pdf (*Trends in Telephone Service*).

³⁴ See *id.*

³⁵ 13 C.F.R. § 121.201, NAICS code 517110.

³⁶ See *Trends in Telephone Service* at tbl. 5.3.

providers.³⁷ Of these 1,307 carriers, an estimated 1,006 have 1,500 or fewer employees and 301 have more than 1,500 employees.³⁸ Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by rules adopted pursuant to the Further Notice.

15. We have included small incumbent LECs in this present RFA analysis. As noted above, a “small business” under the RFA is one that, *inter alia*, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and “is not dominant in its field of operation.”³⁹ The SBA’s Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not “national” in scope.⁴⁰ We have therefore included small incumbent LECs in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

16. *Competitive Local Exchange Carriers (Competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴¹ According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.⁴² Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees and 186 have more than 1,500 employees.⁴³ In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.⁴⁴ In addition, 72 carriers have reported that they are Other Local Service Providers.⁴⁵ Of the 72, seventy have 1,500 or fewer employees and two have more than 1,500 employees.⁴⁶ Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and other local service providers are small entities that may be affected by rules adopted pursuant to the Further Notice.

17. *Interexchange Carriers.* Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁷ According to Commission data,⁴⁸ 359 carriers have

³⁷ See *id.*

³⁸ See *id.*

³⁹ 5 U.S.C. § 601(3).

⁴⁰ Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, Federal Communications Commission (filed May 27, 1999). The Small Business Act contains a definition of “small business concern,” which the RFA incorporates into its own definition of “small business.” 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret “small business concern” to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

⁴¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁴² See *Trends in Telephone Service* at tbl.5.3.

⁴³ See *id.*

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ 13 C.F.R. § 121.201, NAICS code 517110.

reported that they are engaged in the provision of interexchange service. Of these, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by rules adopted pursuant to the Further Notice.

18. *Other Toll Carriers.* Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.⁴⁹ According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.⁵⁰ Of these, an estimated 279 have 1,500 or fewer employees and five have more than 1,500 employees.⁵¹ Consequently, the Commission estimates that most Other Toll Carriers are small entities that may be affected by rules adopted pursuant to the Further Notice.

3. Wireless Providers

19. *Wireless Telecommunications Carriers (except Satellite).* Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category.⁵² Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees.⁵³ For the category of Wireless Telecommunications Carriers (except Satellite), census data for 2007 show that there were 1,383 firms that operated for the entire year.⁵⁴ Of this total, 1,368 firms had employment of 999 or fewer employees and 15 had employment of 1000 employees or more.⁵⁵ Since all firms with fewer than 1,500 employees are considered small, given the total employment in the sector, we estimate that the vast majority of wireless firms are small.

20. *Wireless Telephony.* Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. The SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite).⁵⁶ Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees.⁵⁷ According to Commission data, 413 carriers reported that they were engaged in wireless telephony.⁵⁸ Of these, an estimated 261 have

(Continued from previous page) _____

⁴⁸ *Trends in Telephone Service* at tbl. 5.3.

⁴⁹ See 13 C.F.R. § 121.201, NAICS code 517110.

⁵⁰ See *Trends in Telephone Service* at tbl. 5.3.

⁵¹ See *id.*

⁵² U.S. Census Bureau, 2012 NAICS Definitions, *517210 Wireless Telecommunications Categories (Except Satellite)*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517210&search=2012%20NAICS%20Search> (last visited July 16, 2015).

⁵³ 13 C.F.R. § 121.201, NAICS code 517210 (2012 NAICS). The now-superseded, pre-2007 C.F.R. citations were 13 C.F.R. § 121.201, NAICS codes 517211 and 517212 (referring to the 2002 NAICS).

⁵⁴ U.S. Census Bureau, Subject Series: Information, Table 5, "Establishment and Firm Size: Employment Size of Firms for the United States: 2007 NAICS Code 517210," http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ5/naics-517210 (last visited July 16, 2015).

⁵⁵ See *id.*

⁵⁶ 13 C.F.R. § 121.201, NAICS code 517210.

⁵⁷ *Id.*

⁵⁸ *Trends in Telephone Service* at tbl. 5.3.

1,500 or fewer employees and 152 have more than 1,500 employees.⁵⁹ Consequently, the Commission estimates that approximately half or more of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

4. Cable Service Providers

21. *Cable and Other Program Distributors.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.”⁶⁰ The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was all such firms having \$13.5 million or less in annual receipts.⁶¹ According to Census Bureau data for 2007, there were a total of 3,188 firms in this category that operated for the entire year.⁶² Of this total, 2,694 firms had annual receipts of under \$10 million, and 504 firms had receipts of \$10 million or more.⁶³ Thus, the majority of these firms can be considered small and may be affected by rules adopted pursuant to the Further Notice.

22. *Cable Companies and Systems.* The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers, nationwide.⁶⁴ Industry data shows that there are 660 cable operators in the country.⁶⁵ Of this total, all but eleven cable operators nationwide are small under this size standard.⁶⁶ In addition, under the Commission’s rules, a “small system” is a cable system

⁵⁹ *Id.*

⁶⁰ U.S. Census Bureau, 2012 NAICS Definitions, *517110 Wired Telecommunications Carriers*, (partial definition), <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517110&search=2012> (last visited July 16, 2015).

⁶¹ 13 C.F.R. § 121.201, NAICS code 517110.

⁶² U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 4, “Receipts Size of Firms for the United States: 2007, NAICS Code 517110” (issued Nov. 2010), http://factfinder.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ5//naics~517110 (last visited July 16, 2015).

⁶³ *Id.*

⁶⁴ 47 C.F.R. § 76.901(e). The Commission determined that this size standard equates approximately to a size standard of \$100 million or less in annual revenues. *Implementation of Sections of the 1992 Cable Act: Rate Regulation*, MM Docket Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408, para. 28 (1995).

⁶⁵ NCTA, *Industry Data, Number of Cable Operators and Systems*, <https://www.ncta.com/industry-data> (last visited July 16, 2015). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013).

⁶⁶ These data are derived from R.R. Bowker, *Broadcasting & Cable Yearbook 2006*, “Top 25 Cable/Satellite Operators,” pages A-8 & C-2 (data current as of June 30, 2005); Warren Communications News, *Television & Cable Factbook 2006*, “Ownership of Cable Systems in the United States,” pages D-1805 to D-1857. The Commission applied this size standard to MVPD operators in its implementation of the CALM Act. See *Implementation of the Commercial Advertisement Loudness Mitigation (CALM) Act*, MB Docket No. 11-93, Report and Order, 26 FCC Rcd 17222, 17245-46, para. 37 (2011) (defining a smaller MVPD operator as one serving 400,000 or fewer subscribers nationwide, as of December 31, 2011).

serving 15,000 or fewer subscribers.⁶⁷ Current Commission records show 4,945 cable systems nationwide.⁶⁸ Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 or more subscribers, based on the same records.⁶⁹ Thus, under this standard, we estimate that most cable systems are small entities.

5. All Other Telecommunications

23. The Census Bureau defines this industry as including “establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or Voice over Internet Protocol (VoIP) services via client-supplied telecommunications connections are also included in this industry.”⁷⁰ The SBA has developed a small business size standard for this category; that size standard is \$32.5 million or less in average annual receipts.⁷¹ According to Census Bureau data for 2007, there were 2,383 firms in this category that operated for the entire year.⁷² Of these, 2,346 firms had annual receipts of under \$25 million and 37 firms had annual receipts of \$25 million or more.⁷³ Consequently, we estimate that the majority of these firms are small entities that may be affected by rules adopted pursuant to the Further Notice.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

24. The Further Notice proposes a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. Each of these changes is described below.

25. The Further Notice seeks comment on specific criteria for the Commission to use in evaluating the adequacy of substitute services in connection with applications to discontinue service pursuant to section 214, specifically seeking comment on possible criteria for evaluating the adequacy of replacement services. The Further Notice also seeks comment on effective ways to ensure compliance with the criteria and tentatively proposes requiring an officer or other authorized public representative to certify the accuracy of the statements in the application regarding the criteria. The Further Notice also seeks comment on whether and how the Commission should adopt modifications to Section 63.71 of our rules, including notification to affected customers, and tentatively concludes that the Commission should extend the notice requirements for discontinuances, reductions, or impairments of service to affected Tribal entities. Further, the Further Notice seeks general comment on whether it should revise its rules to allow email-based notice or other forms of electronic or other notice of discontinuance to customers and on whether there are factors the Commission should take into consideration for certain groups of customers, such as accessibility formats, or any other issues that the Commission should consider to

⁶⁷ 47 C.F.R. § 76.901(c).

⁶⁸ The number of active, registered cable systems comes from the Commission’s Cable Operations and Licensing System (COALS) database on Aug. 28, 2013. A cable system is a physical system integrated to a principal headend.

⁶⁹ *See id.*

⁷⁰ U.S. Census Bureau, 2012 NAICS Definitions, *517919 All Other Telecommunications*, <http://www.census.gov/cgi-bin/sssd/naics/naicsrch?code=517919&search=2012> (last visited July 16, 2015).

⁷¹ *See* 13 C.F.R. § 121.201, NAICS code 517919.

⁷² U.S. Census Bureau, 2007 Economic Census, Information: Subject Series – Establishment and Firm Size: Table 4, “Receipts Size of Firms for the United States: 2007, NAICS Code 517919,” http://factfinder2.census.gov/bkmk/table/1.0/en/ECN/2007_US/51SSSZ4/naics-517919 (last visited July 16, 2015).

⁷³ *See id.*

ensure that all affected consumers receive adequate notice. Additionally, the Further Notice eliminates the objection procedures previously available to interconnecting carriers upon receipt of a copper retirement notice and instead adopts a requirement that incumbent LECs work with interconnecting entities in good faith to ensure that those entities have the information needed to allow them to accommodate the transition with no disruption of service to their end user customers. The Further Notice seeks comment on what recourse should be available to an interconnecting entity who believes that an incumbent LEC is not acting in good faith and whether there are limitations on how much and what types of information an incumbent LEC should be required to provide to an interconnecting entity. Finally, the Commission seeks comment on how to facilitate continuation of commercial wholesale platform services after technology transitions.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

26. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.⁷⁴

27. The Further Notice seeks comment on each of its proposed approaches and specifically seeks additional proposals of possible criteria for evaluating the adequacy of replacement services, input on effective ways to ensure compliance with proposed criteria, and comment on whether and how the Commission should adopt modifications to Section 63.71 of our rules, including notification to affected customers. The Further Notice also seeks general comment on whether: (1) it should revise its rules to allow email-based notice or other forms of electronic or other notice of discontinuance to customers; (2) there are factors the Commission should take into consideration for certain groups of customers, such as accessibility formats; and (3) there are any other issues that the Commission should consider to ensure that all affected consumers receive adequate notice. And the Further Notice seeks comment on whether it should include Tribal governments in its notice requirements for section 214(a) discontinuance applications. The Further Notice also seeks comment on what recourse should be available to an interconnecting entity who believes that an incumbent LEC that is retiring copper is not acting in good faith to ensure that interconnecting carriers have the information they need, and whether there are limitations on how much and what types of information an incumbent LEC should be required to provide to an interconnecting entity. Finally, the Commission seeks comment on how to facilitate continuation of commercial wholesale platform services after technology transitions.

F. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rule

28. None.

⁷⁴ See 5 U.S.C. § 603(c).

**STATEMENT OF
CHAIRMAN TOM WHEELER**

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

The Commission is committed to promoting the opportunities of the technology transitions and unleashing new waves of innovation and consumer benefits. Today, we adopt a Report and Order, Order on Reconsideration and Further Notice of Proposed Rulemaking that establish clear rules of the road to give providers the certainty they need to invest, while protecting consumers, competition and public safety in this time of change. Today's updates to our copper retirement process and Section 214 discontinuance process will accelerate and facilitate the transition from copper-based, analog services to more efficient fiber- and IP-based networks and services. It is a move from legacy services, to the innovative services of the future.

In order to encourage these technology transitions, consumers must know they are protected in a manner similar to what they knew in the analog era. Thus, if a carrier intends to cease maintaining its copper and provide legacy voice and data services using only fiber facilities, our rules require that they inform their customers about what they are doing and why they are doing it. Customers should understand the options available to them before the copper network is removed.

Moreover, carriers may not let their legacy networks silently "die on the vine." To avoid any issues related to so-called "*de facto* retirement," it simply is necessary for the carrier to provide appropriate notice to customers, interconnected carriers, and others when it does not intend to continue maintaining its copper network.

The point is not to hamper copper retirement. To the contrary, we want to facilitate the transition to fiber- and IP-based networks, which is why, consistent with longstanding policy, our new rules would NOT require FCC approval before carriers retire copper networks, as long as no service is discontinued, reduced or impaired.

Today's action also preserves competitive choices as the technology transitions move forward. Access to legacy voice and data services purchased at wholesale from incumbent telcos has been a mainstay of competitive services provided to schools, health-care facilities, businesses, and other small- and medium-sized institutions across the nation. Competitive providers rely on these inputs to serve hundreds of thousands of businesses and other enterprise customers at competitive rates, often offering customized services not offered by incumbents. Consumers win when these businesses and organizations have choice for communications services because these entities are able to provide more, better services and products at lower cost. Competitive carriers and the customers that depend on them should not lose access to such connectivity because of a change in technology.

To address this, we will require that—if legacy services are discontinued—replacement services be offered at rates, terms and conditions that are reasonably comparable to those of the legacy networks. This would be an interim solution pending the completion of a broader wholesale access proceeding. FCC staff is working hard to complete that proceeding, and parties from across industry are motivated to participate in this effort.

Moreover, Congress has mandated in section 214 of the Communications Act that a carrier may not discontinue service until the FCC determines that doing so will not adversely affect the public

interest. Just as we want to arm consumers with information, we believe in providing greater clarity for providers, and the fact is that the Commission has not codified the criteria used to evaluate and compare replacement and legacy services. Today's Further Notice of Proposed Rulemaking sets us on a path to fix this problem by proposing standards we would use as part of our review, and we seek more focused comment on the specific criteria to be used.

The Commission is committed to helping consumers and providers alike reap the benefits of technology transitions. These clear rules of the road will give providers the certainty they need to invest, while protecting consumers, competition and public safety in this time of rapid change.

Collectively, today's actions will ease the transition to modern networks and facilitate the introduction of new and innovative services to consumers and businesses, while preserving our core values of competition and consumer protection, which have long defined the relationship between Americans and the networks we use to communicate.

**STATEMENT OF
COMMISSIONER MIGNON CLYBURN**

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

It is sometimes difficult for me to come to terms with the fact that when I joined the FCC back in 2009, the latest gadget was the iPhone 3GS and the first android device had just been introduced. In six short years, these devices have become technology dinosaurs... replaced with glitzy, more advanced versions that, for those of us fortunate enough to afford them, are completely integrated into our daily lives.

I reference the gadgets of yesteryear to highlight the fact that, while the pace of change and innovation is nothing short of amazing, the FCC's role - to ensure a proper balance that promotes these transitions, consistent with the statutory goals of consumer protection, competition, universal service and public safety - will never be obsolete.

Today's item focuses on the wireline network evolution from copper to fiber. In ex-parte meetings on this item, there were comparisons to the DTV migration of broadcasters from analog to digital, and how, in both situations, positive technological changes should lead to improvements in quality and service for consumers.

But, what was striking to me is the difference between these two transitions when it comes to ensuring that consumers understand, and are prepared for, the technology transition. With the DTV transition, the government invested billions of dollars for consumer education campaigns, which included radio, television and newspaper notices, as well as staff outreach and a subsidy for converter boxes. Even in-home assistance and walk-in centers were available. You almost had to live under a rock not to know that the DTV transition was coming, and all this work was done for an estimated 16-19 million households that did not subscribe to paid TV, because the number one goal was for no one to be left behind.

Unlike the DTV transition, there is no outreach budget from Congress ... no mandate to ensure that consumers understand and get prepared for change in telephone service, which is arguably far more critical than television - with all due respect to broadcasters - because it could mean life or death if you cannot dial 911. And the number of consumers affected is also larger. According to the most recently released FCC data, approximately 50% of residential telephone connections, or 37 million residential lines, remain on legacy wireline technology. Many of these consumers are harder to reach, elderly, and lack broadband at home.

And while I sincerely appreciate the Chairman adding clarifications and encouraging providers to do more to ensure that consumers are informed and understand the impact of any change, I still fear the hardest-to-reach consumers, that remain on legacy technologies, may be unaware or ill-prepared for this transition, especially if carriers are only required to notify them through "one neutral statement." This is why I am pleased that the Order encourages providers to work collaboratively with their communities and states, to educate and inform impacted consumers. We all benefit if consumers understand and are ready for change.

When it comes to promoting competition, I believe the updates to our copper retirement rules, to provide additional notice, and reforms to our section 214 discontinuance process, to ensure reasonably

comparable service remains available to wholesale providers, strike the appropriate balance to ensure that transitions do not eliminate competitive alternatives. The section 214 discontinuance rules are interim, until resolution of the special access proceeding – which I hope to see “put to bed” before my term is up.

I am also pleased to see additional questions in the Further Notice, that identify specific criteria to use in future section 214 discontinuance proceedings, including a focus on consumer education and outreach.

In sum, this item takes some important steps when it comes to updating our regulatory policies. I applaud the Chairman for enacting new consumer protections rules, and supplying clarity to providers regarding the copper retirement and service discontinuance process. I would also like to thank the dedicated staff of the Wireline Competition Bureau for crafting a series of steps to that end.

**STATEMENT OF
COMMISSIONER JESSICA ROSENWORCEL**

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

Our networks are changing—and the numbers don't lie. In fact, they tell a story.

At the turn of the millennium, there were nearly 200 million local phone lines in this country. Interconnected VoIP was not in the running, not in the market, and not counted anywhere in our data. The new technology was wireless service, which was making waves with 80 million subscriber lines.

Fast forward to the here and now. Today there are only 85 million traditional local phone lines. That is less than half the number we had a decade and a half earlier. On top of that, we have nearly 50 million interconnected VoIP lines—a category that didn't even exist fifteen years ago. Plus, wireless service has exploded and we now have more wireless lines than people in this country.

This shift is dramatic. Our networks are changing. The choices consumers are making to call and connect are changing, too. With all this change, however, we need to be mindful of the values that have always informed our communications policy. We care about public safety; we care about universal access; we care about competition; and we care about consumer protection.

Furthermore, we need to find a way to give meaning to these values—while also inspiring the deployment of new network infrastructure. Balancing these equities is no easy task. But I think today's decision does an admirable job—and for that reason, I support it. On the one hand, it provides important safeguards to support competition as older network infrastructure is put to rest. On the other hand, it provides clear rules of the road so that providers will have certainty when they seek to turn off older infrastructure in order to deploy services that will bring us further and faster into the future.

Though we can't know where the numbers will take us next, I think we know more change is coming. So in time we may need to revisit these policies. But I believe what we have before us now is good for consumers and consistent with the fundamental values that inform our law.

**DISSENTING STATEMENT OF
COMMISSIONER AJIT PAI**

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

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

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

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

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

I respectfully dissent for several reasons.

First, by dragging out the copper retirement process, the FCC is adopting "regulations that deter rather than promote fiber deployment."¹ The *Order* tacks three months of delay onto the copper retirement process,² slowing down the speed of fiber deployment. And the *Order* tells companies to spend more capital maintaining the legacy copper plant,³ even when fiber can cure any failures of that fading infrastructure. It's an iron law of economics that you can't spend a dollar twice, so diverting

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

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

³ *Order* at para. 90.

scarce capital from new networks to old will only slow next-generation deployment and deepen the digital divide.

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

But not anymore. The Commission now requires carriers to seek permission before discontinuing almost “every [network] feature no matter how little-used or old-fashioned.”⁷ That means the FCC gets to micromanage each and every change that a carrier makes to its network. The Commission now says carriers must get permission before discontinuing “wholesale voice inputs” even if the carrier continues to serve that same community with the same service.⁸ That means the FCC gets to flyspeck each and every change a carrier makes to its business model—all in the name of enhancing competition in the already competitive *voice* market. And the Commission now leverages its discontinuance authority to get a

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

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

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

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

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

foothold in the Ethernet market,⁹ exporting its legacy economic regulations into an all-IP world. That means the FCC will intervene in the enterprise broadband services market even though our staff still have not analyzed the extensive data we just finished collecting about whether that market needs regulation at all.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Putting it all together, this results in an inflexible regime where providers' decisions will be questioned at every turn. Moreover, it starts to resemble a scheme to insulate backdoor rate regulation from litigation, rather than a benign effort to preserve the status quo. I cannot agree to that. Supporters point out that these requirements only kick in if a provider files to discontinue service. But the order seems designed to force carriers to file in order to subject them to the problematic pricing regime. Specifically, carriers will have to engage in a “meaningful evaluation of the impact of actions that will

discontinue, reduce, or impair services used as wholesale inputs and ... obtain Commission approval if their actions will discontinue service to end users.” That has since expanded to include a requirement to consult with wholesale carriers—as if they have any incentive to ever agree. All of this puts carriers between a rock and a hard place. Either they defer their discontinuances, forcing them to maintain legacy services, or they file for discontinuances and are subject to the new conditions.

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

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

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

Another source of concern is the dubious “de facto retirement” section. To the extent this is actually a problem, the item does not explain why our current rules are insufficient to address it. As one commenter explained: “It just makes sense that when a superior network is available, which provides more and better services to consumers and also requires less maintenance, that the provider would not devote scarce resources to maintaining the current legacy network. When that network no longer is able to provide reliable service, it is appropriate for it to be retired.”¹ At that point, providers would presumably follow the Commission’s retirement rules. There is no evidence in the record of systematic neglect or non-compliance with the rules, so it is unclear why additional requirements are necessary.² To the contrary, there is evidence that providers are meeting applicable standards for network upkeep, which acknowledge that no network is perfect.³ But now, a single complaint could subject a provider to an enforcement action, further diverting resources away from fiber investment.

I also disagree with the restrictions on how providers market new services that will be available when copper is retired. Based on the section 706 proceeding, I was under the impression that we wanted consumers to adopt broadband, to the tune of 25/3 Mbps, which currently means fiber. Yet here in this

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

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

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

proceeding, the message from the Commission seems to be “Warning: Fiber Ahead. Sorry for the Convenience.” Incredibly, the Commission found a way to be for and against fiber at the same time.

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

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