Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**	
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Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment	**)**	**WC Docket No. 17-84**
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COMMENTS OF ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

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ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to the Federal Communications Commission's Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment proposing to remove regulatory barriers to broadband infrastructure investment and suggesting changes to speed the transition from legacy to next-generation networks and services.[1]

I. INTRODUCTION AND SUMMARY

ITTA members have been at the forefront of the TDM-to-IP transition, drawing on private capital, intercarrier compensation, public-private partnerships with federal and state regulators, and universal service support to deploy broadband networks and innovative IP-based services in the predominantly rural, high-cost areas they serve. Therefore, ITTA members have a strong interest in seeing the Commission pursue and restore regulatory policies that will promote and sustain the evolution from legacy platforms to IP-enabled networks and services. To best achieve these results, it is important for the Commission to reduce or eliminate misguided

[1] *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3266 (2017) (*NPRM*, *NOI*, or *Request for Comment*).

regulations that hinder investment in IP-based infrastructure, as well as to foster a level competitive playing field pertaining to access to pole attachments.

One of the most important principles that should guide the Commission in its reevaluation of the policies and rules that will remove barriers to broadband infrastructure investment and facilitate the TDM-to-IP transition is ensuring regulatory parity for all classes of providers in this new "all-IP world." Under the Commission's regulatory framework prior to 2015, incumbent LECs (ILECs) were already placed at a competitive disadvantage vis-à-vis their cable and wireless competitors, because ILECs had to comply with legacy obligations tied to their former dominant position in the TDM-based world while their competitors were free to transition to IP-enabled platforms without such burdensome regulatory constraints.

Unfortunately, several measures adopted by the Commission in 2015 and 2016 in its Technology Transition docket,[2] such as those relating to additional notice of planned copper retirements, perpetuated and even exacerbated this inequitable treatment. These measures increased burdens and added unnecessary complexity for ILECs on top of the onerous legacy regulatory obligations they already faced, and contravened the reality that "[t]here has been an indisputable 'societal and technological shift' away from switched telephone service as a fixture of American life. Consumers are increasingly able and willing to abandon their landlines in favor of communications technologies that do not rely on local telephone switches."[3] In fact,

[2] *See Technology Transitions et al.*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 (2015) (*2015 Technology Transitions Order*); *Technology Transitions et al.*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283 (2016) (*2016 Technology Transitions Order*).

[3] *2016 Technology Transitions Order*, 31 FCC Rcd at 8290, para. 17. The Commission finally recognized this reality in the *2016 Technology Transitions Order*, where it declared that ILECs are no longer dominant providers in the interstate switched access services marketplace. *Id.* at 8289-90, paras. 16-18 (interstate switched access "continues to plummet as subscribership to

(continued…)

these measures seemed designed to address hypothetical harms that there was no record evidence to support.

Rather than promoting broadband deployment and the transition to next-generation networks and technologies, several regulations imposed by the Commission in the *2015 and 2016 Technology Transitions Orders* targeted ILECs exclusively and ignored the fundamental marketplace shifts that have taken and continue to take place. Similar ills have resulted from changes adopted by the Commission in 2015 and 2016 pertaining to Commission approval of service discontinuances pursuant to Section 214 of the Communications Act of 1934, as amended (Act).[4] ILECs, as the entities most likely to be adopting new technologies as they transition from legacy networks to next-generation services, are disproportionately impacted by changes to the Section 214 discontinuance process. Such changes, by effect if not by design, unfairly targeted ILECs, exacerbating competitive disparities that are out of touch with the realities of today's marketplace. Given that ILEC-provided services are one of many communications service options available to today's consumers, saddling ILECs with regulations that place them at a competitive disadvantage in relation to their competitors, as the Commission did in the *2015 and 2016 Technology Transitions Orders*, was inequitable.

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traditional voice phone service reaches new lows"). Statistics recently released by the Industry Analysis and Technology Division of the Commission's Wireline Competition Bureau clearly buttress these findings. From June 2013 through June 2016 (the most recent data reported upon), mobile voice subscriptions increased by 32 million (337.8 million total), interconnected VoIP subscriptions increased by 15 million (60.3 million total), and retail switched access lines decreased by 27.5 million (62.3 million total). FCC, Voice Telephone Services: Status as of June 30, 2016 at 2 (WCB 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-344500A1.pdf. Assuming these trends continue in their current trajectory, the next Voice Telephone Services report will reveal that interconnected VoIP subscriptions have overtaken retail switched access lines.

[4] 47 U.S.C. § 214.

It was also bad policy. These regulations inhibited ILECs' ability to compete, stifled investment in the networks and technologies the Commission seeks to encourage, and served as a disincentive to fiber deployment by incumbent wireline carriers, with the paradoxical result of impeding the migration to IP-enabled networks and services.[5] The epitome of misguided action was the Commission's adoption of the "adequate replacement test," which would burden ILECs with, among myriad other showings, potentially having to demonstrate the adequacy of alternative services from sources other than the carrier seeking discontinuance authority, despite carriers not being in a position to know or determine whether the detailed criteria adopted by the Commission are met by other carriers' service offerings. Moreover, such "streamlined treatment"[6] was a complete misnomer, as it requires so much information from carriers that otherwise would choose to pursue it that, instead, it is a significant deterrent. When ILECs must comply with unnecessary or burdensome regulatory requirements, it diverts valuable resources away from broadband investment and delays the transition to next-generation services.

The Commission's IP transition policies should be focused on facilitating the implementation by ILECs of new technologies, rather than hamstringing them with unnecessary regulatory obligations. ITTA is encouraged that the *NPRM* seeks comment on, if not proposes, numerous measures to truly expedite copper retirement and network change notification processes, and streamline the Section 214 discontinuance process. ITTA urges the Commission to adopt them as recommended below.

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[5] The Commission long has recognized that "requiring an incumbent to maintain two networks . . . reduces the incentive for incumbents to deploy" next-generation facilities, "siphon[s] investments away from new networks and services," and results in significant "stranded" investment in outdated facilities and technologies that are not sustainable." FCC, Connecting America: The National Broadband Plan at 49, 59 (Mar. 17, 2010), https://www.fcc.gov/general/national-broadband-plan.

[6] *See, e.g., 2016 Technology Transitions Order*, 31 FCC Rcd at 8305, para. 64.

Specifically, the Commission should roll back most of the changes adopted to the copper retirement process in the *2015 Technology Transitions Order*.[7] The Commission should restore the previously applicable and wholly adequate 90-day deemed approved timeframe. It should redefine the scope of copper retirement subject to Section 51.332 to exclude action relative to the feeder portion of loops or subloops, as well as *de facto* retirement. It should also restore the recipients of direct notice to "each telephone exchange service provider" directly interconnecting with the ILEC's network, provide ILECs flexibility in the content of copper retirement notices to affected customers, and remove undue and inefficient restrictions on ILECs' interaction with their customers regarding the services available for purchase as a result of the transition to upgraded facilities. However, in order to prevent undue obstructionism by competitive LECs (CLECs) to ILEC transitions to next-generation networks, the Commission should retain the change adopted in the *2015 Technology Transitions Order* eliminating the process by which CLECs can object to and endeavor to delay an ILEC's planned copper retirement.

With respect to network change notifications, the Commission should eliminate Sections 51.325(c) and 68.110(b) of its rules.[8] Section 51.325(c) unnecessarily hinders the network change process, and Section 68.110(b) has far outlived its usefulness, imposing burdensome and hard-to-meet notification processes that significantly outweigh any purported benefits.

In order to promote transitions to next-generation networks, the Commission also should provide relief from the heavily encumbered Section 214 discontinuance processes that it imposed in the *2015 and 2016 Technology Transitions Orders*. The Commission should achieve this through holistic streamlining of the discontinuance process for technology transitions and

[7] 47 CFR § 51.332.

[8] 47 CFR §§ 51.325(c), 68.110(b).

elimination of the adequate replacement test and overly prescriptive consumer education and outreach mandates. In the unfortunate event the Commission does not holistically streamline the discontinuance processes for technology transitions, at a minimum it should streamline processes through expanding the scope of services deemed "grandfathered" under its technology transitions discontinuance rules. And, in any event, it should adopt its proposal to streamline discontinuances where no customers would be affected, and reverse the "functional test" standard for when Section 214 discontinuance authorization is required.

The *NPRM* also seeks comment on numerous potential reforms to its policies and rules pertaining to pole attachments. ITTA members include companies that are pole owners and those that are primarily "attachers." ITTA agrees that pole attachments are a key input for many broadband deployment projects. Equitable solutions to address access to poles and pole attachment rates will facilitate greater deployment of broadband and achievement of the Commission's goals in this proceeding.

Among reforms the Commission should adopt are rules allowing new attachers to use utility-approved contractors to perform "routine" make-ready work, and also to perform "complex" make-ready work where the existing attacher fails to do so in a timely manner. However, the Commission should stipulate that this rule only applies to make-ready work that does not involve moving the equipment of existing attachers, and where the pole owner already maintains a list of pre-approved contractors. The Commission should also eliminate disparities in the pole attachment rate structure that frustrate ILEC broadband deployment. Furthermore, while the Commission does not possess authority under Section 224 of the Act[9] to reform pole attachment rates, terms and conditions imposed by municipalities, electric cooperatives, and

[9] 47 U.S.C. § 224.

railroads, it should continue to advocate for a statutory solution to this harmful gulf in its authority.

The Commission should refrain, however, from adopting rules to expedite make-ready timelines, which are already pragmatically difficult enough to meet under current timelines. The Commission also should not implement an overly-prescriptive, inflexible "one-touch, make-ready" pole attachment regime. Furthermore, the burdens of requiring pole owners to make more information publicly available regarding poles would far outstrip the benefits, and the Commission should decline to do so. Finally, while the Commission possesses authority under Section 253 of the Act[10] to preempt state and local laws inhibiting broadband deployment, the Commission should refrain from exercising this authority at the present time.

II. THE COMMISSION SHOULD ELIMINATE OR MODIFY RULES THAT UNNECESSARILY BURDEN COPPER RETIREMENT AND NETWORK CHANGE PROCESSES

A. The Commission Should Eliminate Most of the Changes to the Copper Retirement Process Adopted in the *2015 Technology Transitions Order*

As the *NPRM* recounts, in the *2015 Technology Transitions Order*, the Commission adopted new copper retirement rules, memorialized in Section 51.332 of the Commission's rules, doubling the time period during which an ILEC must wait to implement a planned copper retirement, requiring direct notice to retail customers, states, Tribal entities, and the Secretary of Defense, and expanding the types of information that must be disclosed.[11] The *NPRM* seeks comment on eliminating some or all of these changes.[12] ITTA urges the Commission to

[10] 47 U.S.C. § 253.

[11] *See NPRM*, 32 FCC Rcd at 3283-84, para. 57.

[12] *See id.* at 3283, para. 57.

eliminate most of them. In the Appendix, ITTA specifically sets forth its suggested changes to Section 51.332. Some of the particular suggested changes are addressed below.

1. Timeframe and Objections

ITTA supports the Commission's aims of preventing unnecessary delay in the copper retirement process and capital expenditures on legacy TDM technology while protecting consumers.[13] Two critical measures towards preventing unnecessary delay while protecting consumers are to restore the 90-day "deemed approved" timeframe while retaining the change adopted in 2015 eliminating the process by which CLECs can object to and seek to delay an ILEC's planned copper retirement.[14] Taken together, these two measures strike the appropriate balance between preventing undue obstacles to ILEC transitions to next-generation networks – which delays the benefits of those transitions for consumers – and CLECs' need for sufficient notice to evaluate whether they must move their customers to other facilities and, if so, to achieve that.

2. Scope of Copper Retirement Definition

The *NPRM* recognizes that the *2015 Technology Transitions Order* adopted an expanded definition of copper retirement that added the feeder portion of copper loops and subloops, as well as *de facto* retirement.[15] Retaining this expanded definition would be overkill, and contravene the Commission's avowed goals in this proceeding of preventing unnecessary capital expenditures on legacy TDM technology and promoting investment in next-generation networks.

[13] *See id.* at 3284, para. 58.

[14] *See id.* at para. 59.

[15] *See id.* at para. 60; *see also* 47 CFR § 51.332(a)(1), (3).

Effectively requiring ILECs to preserve copper networks for CLECs who do not want to invest in fiber facilities and a small minority of consumers who do not welcome advanced services will reduce the competitive options available overall to consumers. The fiber networks that incumbent carriers are deploying give consumers competitive alternatives not just for phone and Internet, but also for video services. CLECs' efforts to preserve old copper networks do not advance the interests of end users, particularly residential consumers. Forcing ILECs to preserve their copper networks or delay copper retirement via frivolous notice periods is a disincentive, hence a barrier, to ILEC investment in the fiber networks that will bring competitive options for the advanced services that consumers want and that Section 706 of the Telecommunications Act of 1996 (1996 Act) encourages.[16]

3. Institutional Recipients of Copper Retirement Notices

The *NPRM* acknowledges that the *2015 Technology Transitions Order* broadened the recipients of direct notice of copper retirements from "each telephone exchange service provider" directly interconnecting with the ILEC's network to "each entity within the affected service area" directly interconnecting with the ILEC's network.[17] ITTA urges the Commission to restore the language to the status quo ante.

Direct notice to every interconnecting entity of every retirement notice is not necessary. For example, an ILEC may have scores of interconnection agreements with CLECs, many of which never became active or have only limited interconnection activity. Many CLECs have been subject to various mergers and acquisitions but have failed to maintain current contact information. Requiring an ILEC to certify that it has directly contacted each of these parties is, in

[16] *See* 47 U.S.C. § 1302.

[17] *See NPRM*, 32 FCC Rcd at 3284, para. 61.

many cases, a virtually impossible burden to meet. Further, even if an interconnected entity is actively connected to an ILEC network, if it does not currently have a service that rides a copper cable planned for retirement, there is no reason to notify that carrier of the retirement. A carrier interested in expanding its service into new areas can obtain enough information about the ILEC network through current processes for the interconnector to determine if the impending retirement may impact future deployment plans and would be incented to contact the ILEC with questions. To maintain an affirmative duty on the ILEC to contact every interconnector is unduly burdensome.[18]

4. Customer Recipients of Copper Retirement Notices

The *NPRM* seeks comment on eliminating the requirement that ILECs provide direct notice of planned copper retirements to retail customers in the event the Commission modifies Section 51.332. It also asks, however, if there are "alternative ways in which the Commission can streamline these retail customer notice rules to make the process more flexible and less burdensome on carriers retiring their copper, while still ensuring customers are protected."[19]

If the Commission maintains a requirement to provide notice to retail customers, it should significantly streamline them. Such streamlining would adequately protect consumers while reducing the undue burdens associated with the current requirements. To the extent that the

[18] The rule as currently written is intended to "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" are contacted by the ILEC. *2015 Technology Transitions Order*, 30 FCC Rcd at 9385, para. 20. This is clearly overbroad, and the Commission's summary dismissal of claims that it would not be unduly burdensome because the predecessor rules already required ILECs "to provide notice to large numbers of interconnecting carriers," *id.* at 9386, para. 21, ignores the magnitude of the additional and unnecessary obligations the rule imposed on ILECs.

[19] *NPRM*, 32 FCC Rcd at 3286, para. 64.

stated purpose of adding the current requirements was to reduce consumer confusion,[20] ITTA's suggested modifications would retain the requirement that customer notifications include a "description of the reasonably foreseeable impact of the planned changes."[21] The key principle is that ILECs should have maximum flexibility with respect to providing customer notices relating to copper retirement.

To be clear, ITTA agrees that consumers and other retail customers need to understand how copper retirements may affect them. Customers should have clarity regarding the services available to them and understand the practical consequences of copper retirements. There are certain circumstances where notice to retail customers is beneficial, such as when copper retirement requires the provider to replace or install CPE on a customer's premises or eliminate line power. However, the Commission, in Section 51.332, overplayed its hand, imposing a panoply of retail customer notification requirements, including detailed specifications of the content of notices, whose burdens far outweighed their benefits. In the hopes of retaining customers through good customer relations practices, ILECs have every incentive to provide their customers with clear and timely notice about planned copper retirements. If the Commission maintains a retail customer notification requirement for planned copper retirements, ITTA recommends that they be general rather than maintaining the heavy-handed retail customer notification requirements currently found in Section 51.332.

[20] *See 2015 Technology Transitions Order*, 30 FCC Rcd at 9395-96, para. 39.

[21] *See infra* Appendix (revised Section 51.332(c)(2), providing that the notification must set forth the information required by, *inter alia*, 47 CFR § 51.327(a)(6)).

5. Undue Restrictions on ILEC Interaction with Customers Regarding Replacement Services

Among the retail customer notification requirements the *NPRM* seeks comment on eliminating is Section 51.332(c)(2). As ITTA maintains above, the Commission should retain a significantly streamlined version of that rule in order to balance consumer protections with reduction of undue burdens on ILECs. However, included in the provisions the Commission should dispense with altogether are restrictions on ILECs with respect to how they interact with customers regarding the services available for purchase as a result of the transition to upgraded facilities.

Carriers are transforming their networks from copper-based TDM systems to fiber-based IP networks in order to provide consumers with the advanced services they are demanding and that the Commission has declared are critical for consumers to have. Carriers are not going to invest billions of dollars to install fiber-only facilities just to offer consumers the same services they have today. The requirement found in Section 51.332(c) that the retail customer notice must be "neutral" negatively impacts both consumers and carriers. The majority of consumers are anxious to take advantage of the new services that FTTH deployments make possible. Hampering the ability of ILECs to tell their customers about the new services that are available over the upgraded network significantly increases costs, and delays adoption of broadband.

First, the requirement that the statement be "neutral" undermines the Commission's goals of promoting the adoption of broadband and migration of consumers to next-generation networks by inhibiting carriers from telling customers, during a key contact point, about the advantages of the upgraded network, thereby perpetuating a state of angst among consumers who are negatively predisposed towards network changes. Second, it also may confuse customers insofar as any attempt by the carrier to promote new features and functionalities enabled by network

upgrades must be rendered by separate messaging. Third, not only do these by-products of the rule harm, rather than protect, consumers, they also raise carriers' costs through necessitating multiple messages instead of what easily could have been achieved in one. Moreover, such costs are passed on to customers.

In sum, instead of protecting consumers, this rule burdens them, raises their costs, delays their opportunity to receive new, advanced services, and diminishes their ability to make product choices. Consumer welfare is increased when consumers have more (not less) information and more (not fewer) product choices so that they have a better opportunity to make intelligent decisions about the services they purchase. The Commission should eliminate it.

B. Section 51.325(c) Impedes Implementation of Network Changes and Should be Eliminated

The *NPRM* proposes to eliminate Section 51.325(c) of the Commission's rules, which prohibits ILECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.[22] ITTA supports this proposal, for the reasons espoused in the *NPRM*. Specifically, the *NPRM* observes that this prohibition "appears to unnecessarily constrain the free flow of useful information that such entities may find particularly helpful in planning their own business operations."[23] The Commission also "anticipate[s] that providing incumbent LECs greater flexibility to disclose information and discuss contemplated changes before cementing definitive plans would benefit these carriers, interconnecting carriers, and any other interested entities to which disclosure may be useful by providing all such entities greater time to consider or respond to possible network changes."[24]

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[22] *See NPRM*, 32 FCC Rcd at 3286-87, paras. 67-68.

[23] *Id.* at 3286, para. 67.

[24] *Id.* at 3287, para. 68.

Insofar as the Commission should retain the change adopted in 2015 removing the process by which CLECs can object to an ILEC's planned copper retirement,[25] eliminating Section 51.325(c) will also facilitate smoother copper retirement processes by enabling ILECs and interconnectors to communicate earlier. Thus, elimination of Section 51.325(c) would benefit ILECs and competitors alike.

The *NPRM* also asks whether the Commission should specify any particular timeframe within which public notice must follow, if it permits disclosure to affiliated or unaffiliated entities prior to public notice.[26] ITTA responds in the negative. Pursuant to Section 51.331 of the Commission's rules,[27] the timeframe to implement network changes is at least six months following public notice. The ILEC that is the proponent of the change has every incentive to implement it as rapidly as possible. Moreover, while the required public notice periods are already generous, imposing a "shot clock" between disclosure to other entities and the time of public notice would serve as nothing more than an artificial stressor on the process, and could largely undermine the purpose of eliminating Section 51.325(c) to begin with, which is to give other entities meaningful time to consider or respond to possible network changes and ensure the public notice period is, indeed, sufficient.

C. Section 68.110(b) is an Anachronism and Should be Eliminated

The *NPRM* seeks comment on eliminating or modifying Section 68.110(b) of the Commission's rules, which requires that if changes to a wireline telecommunications provider's communications facilities, equipment, operations or procedures "can be reasonably expected to

[25] *See supra* Section II.A.1.

[26] *See id.* at 3287, para. 67.

[27] 47 CFR § 51.331.

render any customer's terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service." It also seeks comment on the benefits and costs of the rule, and whether the benefits outweigh the costs.[28]

Section 68.110(b) hearkens back to 1975, when Part 68 of the Commission's rules was first adopted.[29] At that time, AT&T controlled the customer premises equipment (CPE) market as well as the public switched telephone network (PSTN) itself. The Commission was actively seeking to facilitate a competitive market for CPE, and the fundamental obligation that Part 68 imposed was on LECs – that they had to allow Part 68-compliant CPE to be connected freely to their networks. Due to AT&T's near monopoly on technical expertise in the 1970s, few other entities had extensive knowledge about the interaction of CPE and the PSTN.[30]

Fast-forward more than four decades, battles over facilitating a competitive market for CPE, and concerns over a monopoly provider hampering such competition via technical changes to the PSTN, are anachronistic. Aside from the practical difficulties of ascertaining whether "any customer's" – and, if so, whose – CPE "can be reasonably expected" to be affected by a network change,[31] the benefits of providing the required notifications long have been eclipsed by

[28] *See NPRM*, 32 FCC Rcd at 3287, para. 70.

[29] *See* Federal Communications Commission, Part 68 – Connection of Terminal Equipment to the Telephone Network, 40 Fed. Reg. 53013 (Nov. 14, 1975).

[30] *See 2000 Biennial Regulatory Review of Part 68 of the Commission's Rules and Regulations*, Report and Order, 15 FCC Rcd 24944, 24947, paras. 7-8 (2000).

[31] *See NPRM*, 32 FCC Rcd at 3287, para. 70 (asking how a carrier would be able to know whether "any" CPE would be affected).

the costs. In fact, given that the Commission's *Carterfone*[32] line of decisions, which spawned Part 68, "fostered unforeseen advances in technology and network applications . . . and contributed to technical and conceptual development that set the stage for the Internet,"[33] it is ironic that resources must still be devoted to complying with the notification requirements associated with the PSTN, when they would be put to much better use in service of broadband deployment and the transition to next-generation, IP-based networks.[34] Accordingly, ITTA urges that the Commission now eliminate Section 68.110(b).

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[32] *Use of the Carterfone Device in Message Toll Telephone Service; Thomas F. Carter and Carter Electronics Corp., Dallas, Tex. (Complainants), v. American Telephone and Telegraph Co., Associated Bell System Companies, Southwestern Bell Telephone Co., and General Telephone Co. of the Southwest (Defendants)*, Decision, 13 FCC 2d 420 (1968), *recon. denied*, 14 FCC 2d 571 (1968) (*Carterfone*).

[33] *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, 24 FCC Rcd 13064, 13072, para. 25 (2009).

[34] The *NPRM* also seeks comment on to what extent individuals with disabilities still rely on TTYs and Section 68.110(b) notifications. *See NPRM*, 32 FCC Rcd at 3287, para. 70. ITTA notes that, recently, in an proceeding captioned "Transition from TTY to Real-Time Text Technology," the Commission amended its rules to allow Real-Time Text Technology (RTT) to replace TTY technology over IP-based networks, and took numerous actions allowing providers to support RTT in lieu of supporting TTY technology. *See Transition from TTY to Real-Time Text Technology; Petition for Rulemaking to Update the Commission's Rules for Access to Support the Transition from TTY to Real-Time Text Technology, and Petition for Waiver of Rules Requiring Support of TTY Technology*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 13568, 13571-76, paras. 4-10 (2016). The Commission also sought comment on when wireline providers should be relieved of their obligations to provide and support TTY-based Telecommunications Relay Services. *See id.* at 13609, para. 84. Notably, the Commission observed that "[c]hanges to communications networks, particularly ongoing technology transitions from circuit switched to IP-based networks and from copper to wireless and fiber infrastructure, have affected the quality and utility of TTY technology, prompting discussions on transitioning to an alternative advanced communications technology for text communications." *Id.* at 13570, para. 3. And in the *2016 Technology Transitions Order*, the Commission encouraged carriers to supplant TTY technology with replacement IP-based services "that have the potential to provide new accessibility features and functionalities," and to make newly achievable features and functionalities available to their customers with disabilities. *2016 Technology Transitions Order*, 31 FCC Rcd at 8339, para. 150. Thus, the scarce remaining TTY users should not pose an impediment to the Commission's elimination of a rule that is

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III. THE COMMISSION SHOULD RELIEVE THE EXCESSIVE BURDENS ASSOCIATED WITH THE SECTION 214(a) DISCONTINUANCE PROCESS

Section 214(a) of the Act requires carriers to secure authorization from the Commission prior to discontinuing service to a community or part thereof.[35] While ITTA addresses several of the *NPRM*'s specific proposals below, as a threshold matter, ITTA welcomes the numerous measures on which the *NPRM* seeks comment to shorten timeframes and eliminate "unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue."[36] As the Commission expresses, such measures "will facilitate carriers' ability to retire legacy network infrastructure and will accelerate the transition to next generation IP-based networks."[37] Carriers and customers alike will benefit from such relief. Not only do the proposed measures maintain adequate customer protections, they are a win insofar as they will more rapidly bring to consumers the advanced features and functionalities of next generation, IP-based networks.

A. The Commission Should Holistically Streamline the Section 214(a) Discontinuance Process for Technology Transitions

After considering various targeted measures to streamline the current Section 214(a) discontinuance process, the *NPRM* seeks comment on methods to streamline the process more generally.[38] For discontinuances associated with technology transitions, ITTA supports the idea that the Commission should require carriers to file only a notice of discontinuance accompanied by proof that fiber, IP-based, or wireless alternatives are available to the affected community, in

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antithetical to the transition to IP-based networks and the new accessibility features and functionalities they provide.

[35] Section 214(a) also provides, however, that an authorization is not 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."

[36] *NPRM*, 32 FCC Rcd at 3288, para. 71.

[37] *Id.* at para. 72.

[38] *See id.* at 3295, para. 95.

lieu of a full application for approval.[39] Thus, ITTA agrees that it would be appropriate for the Commission to conclude that Section 214(a) discontinuances will not affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community.[40] Furthermore, the availability of alternative services either offered by third parties or by the discontinuing carrier should suffice.[41]

In 2017, the adequacy of alternative services as acceptable substitutes for legacy services should no longer be in question. Just last month, for the first time, it was reported that "cord-cutters" outnumber consumers relying on wireline services.[42] In addition, there are IP-based alternatives for virtually every legacy service, usually offering advanced features and functionalities beyond the legacy service's capabilities. And the exponentially greater capacity of fiber as compared to copper-based, legacy technologies is manifest. At most, there may be minimal customer disruptions associated with a discontinuance.[43]

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[39] *See id.* at para. 96.

[40] *See id.* at para. 95.

[41] *See id.*

[42] Division of Health Interview Statistics, National Center for Health Statistics, Centers for Disease Control and Prevention, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July-December 2016 at 1 (2017), https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201705.pdf ("The second 6 months of 2016 was the first time that a majority of American homes has only wireless telephones. Preliminary results from the July-December 2016 National Health Interview Survey . . . indicate that 50.8% of American homes did not have a landline telephone but did have at least one wireless telephone . . . .").

[43] While discontinuing carriers obviously have every incentive to avoid any customer disruptions, the Commission should tolerate minimal disruptions as the natural by-product of widespread and ultimately beneficial technology transitions.

1. Implementation of Streamlining

As for implementation of this streamlining, the following provisions of Sections 63.71 and 63.602 of the Commission's rules[44] should apply:

- The notification requirements of Section 63.71(a)(1)-(4) and (6)-(7);[45]
- The notification requirements of Section 63.71(c)(1)-(3);[46]
- Section 63.71(e), with the words "applications" and "application" being replaced respectively by "notifications" and "notification";
- Section 63.71(f), which, as it applies to technology transition-related discontinuances, should be amended by striking all text except for the last sentence and, in the last sentence, replacing "an application" with "a notice of discontinuance," and deleting all text after "section". In addition, it should be amended to provide that the discontinuance may not occur until the 31st day after release of the public notice;[47]

[44] 47 CFR §§ 63.71, 63.602 (2016). Though not all of the rules adopted in the *2016 Technology Transitions Order* have become effective, this discussion is keyed to the rule provisions as they appear in the October 1, 2016 edition of the CFR.

[45] Pursuant to a streamlined process where the carrier is filing with the Commission a *notice* of discontinuance, Section 63.71(a)(5) would no longer be necessary. The surviving provisions of Section 63.71(a) should be deemed satisfied if the carrier complies with Section 63.71(b).

[46] Because these processes would apply to non-dominant and dominant carriers alike, Section 63.71(c)(4) would be superfluous. In addition, to prevent the exception from swallowing the rule, Section 63.71(c)(5) should not apply. Section 63.71(c)(1) should be amended to read for technology transition-related discontinuances: "(1) Caption – 'Section 63.71 Notice of Discontinuance'".

[47] A 31-day notice period for customers is consistent with the period currently applicable to non-dominant carriers in Section 63.71(e) and for technology transition applications satisfying the adequate replacement test pursuant to Section 63.71(f). It is also sufficient in other contexts where customers are encountering service changes. *See, e.g.*, 47 CFR § 64.1120(e)(3) (minimum 30-day period for carrier change notification to customers).

- The first sentence of Section 63.71(h);[48]
- A certification by an officer or other authorized representative of the filer attesting to the availability of fiber, IP-based, and/or wireless alternatives to the affected company, and otherwise attesting to the truth and accuracy of the notice of discontinuance.[49]

Limiting the process to these requirements will ensure that the process is truly streamlined, while adequately protecting customers by providing them the information they need and adequate time to make any adjustments necessary in light of the impending discontinuance.

2. Elimination of the Adequate Replacement Test

As part and parcel of this streamlined notice of discontinuance process, the Commission would also eliminate the adequate replacement test. Maintaining the adequate replacement test, which piled on extensive additional requirements under the cloak of "streamlined treatment," would subvert the implementation of *actual* streamlining. Moreover, there was no record evidence that the process in place prior to the Commission's adoption of the adequate replacement test was not working. Adopting such criteria turned a straightforward element of the Section 214 evaluation – whether alternative communications services will be available to a particular community following discontinuance – into a complicated examination of the specific features and functions of replacement or alternative services, as well as the uses to which those services may be put and the equipment with which they may be used. Simply put, the burden of

[48] For the reasons discussed below, the second sentence of Section 63.71(h), pertaining to the adequate replacement test, should be eliminated.

[49] Such a certification should suffice as proof that fiber, IP-based, or wireless alternatives are available to the affected community. *See NPRM*, 32 FCC Rcd at 3295, para. 96 (asking what proof would suffice to support a notice of discontinuance). ITTA notes that even the moribund adequate replacement test is adequately supported by such a certification. *See* 47 CFR § 63.602(a)(4), (b).

conducting a time-consuming evaluation of the criteria far outweighs any purported public interest benefit.

3. Elimination of Consumer Education and Outreach Mandates

Similarly, in conjunction with adopting a streamlined notice of discontinuance process, the Commission should eliminate the unduly burdensome and prescriptive consumer education and outreach dictates adopted in the *2016 Technology Transitions Order*.[50] There is no need for such dictates because the discontinuance notice process would already entail provision of notice to affected customers and other stakeholders with adequate information of what is to occur and what steps they may need to take.[51] There was no evidence in the record that this decades-old process had been in any way insufficient in ensuring that customers are aware that a carrier is discontinuing service and what it means for them.

Furthermore, even if the Commission's rules did not contain notice requirements, carriers would continue to have incentives due to marketplace forces to communicate with customers in connection with technology transitions when customers are impacted by such changes. In light of these considerations, there was no need for the Commission to adopt any additional requirements relating to customer education and outreach in connection with the Section 214 discontinuance process. The Commission should vacate the customer education and outreach requirements adopted a year ago.[52]

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[50] *See 2016 Technology Transitions Order*, 31 FCC Rcd at 8348-52, paras. 179-86.

[51] *See* 47 CFR § 63.71(a)(1)-(4), (6)-(7).

[52] The Commission should, however, retain the amendment to Section 63.71(a) adopted in the *2016 Technology Transitions Order* that notice by email constitutes notice in writing. This brings modern sensibilities and efficiencies to the notice rule and averts unnecessary but substantial costs. It is also consistent with permissive email notification of copper retirements, *see* 47 CFR § 51.332(b)(3), and reform proposals that the Commission will consider in a similar context, for cable providers, next week. *See* Press Release, FCC, FCC Announces Tentative Agenda for June Open Meeting (June 1, 2017),

(continued…)

4. Holistic Streamlining of the Discontinuance Process Complies with the Act

The streamlined notice of discontinuance process also complies with the Act. Section 214(a) provides that "nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided." By their very nature, the technology transition-related discontinuances at issue ensure adequate alternatives are available to customers. Thus, the process does not require an actual authorization by the Commission, insofar as the customer will have available to it a "replacement . . . which will not impair the adequacy or quality of service provided" to him/her.[53]

B. In the Absence of Adopting a Notice of Discontinuance Process, the Commission Should Expand the Scope of Services Deemed Grandfathered

The *NPRM* proposes to streamline the public comment and auto-grant periods associated with applications that seek authorization to "grandfather" low-speed, legacy services for existing customers.[54] It further proposes, at a minimum, to apply this streamlined discontinuance process

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http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0601/DOC-345166A1.pdf (The Commission will consider a Declaratory Ruling in MB Docket No. 16-126, which would clarify that the "written information" that cable operators must provide to their subscribers via annual notices pursuant to Section 76.1602(b) of the Commission's rules may be provided via e-mail). ITTA also supports maintaining the amendment to Section 63.71(a) that notice be provided to any federally-recognized Tribal Nations with authority over the Tribal lands in which the discontinuance, reduction, or impairment of service is planned. *See NPRM*, 32 FCC Rcd at 3296, para. 99 (seeking comment on whether to retain the provisions adopted in the *2016 Technology Transitions Order* related to email notice, as well as related to providing notice of discontinuance filings to applicable Tribal Nations).

[53] If, nevertheless, the Commission decides that an actual instrument of authorization is warranted, the public notice of filing that it releases can be couched as an authorization.

[54] *See NPRM*, 32 FCC Rcd at 3288-89, paras. 73-78.

to grandfathered low-speed, TDM services at lower than DS1 speeds, i.e., below 1.544 Mbps, but seeks comment whether higher-speed grandfathered services should also qualify for this more streamlined processing.[55] If the Commission does not adopt the notice of discontinuance process advocated above, ITTA urges it to expand the scope of grandfathered services subject to proposed streamlined processing.

ILECs who accepted Connect America Phase II funding must provide service with speeds of at least 10 Mbps downstream.[56] At this point, anything below a minimum of 10 Mbps is realistically viewed by the Commission as "low-speed." Accordingly, 10 Mbps – if not the "advanced telecommunications capability" threshold of 25 Mbps – should be encompassed within the grandfathered TDM services subject to streamlining in the absence of the Commission adopting the notice of discontinuance process for all technology transition-related discontinuances.[57]

C. The Commission Should Adopt Its Proposal to Streamline Discontinuances Where There are No Customers

The *NPRM* proposes to maintain but further streamline treatment of Section 214 discontinuance applications for all services that have not had customers for a certain period prior

[55] *See id.* at 3290, para. 79.

[56] *See, e.g., Connect America Fund et al.*, Report and Order, 29 FCC Rcd 15644, 15649, para. 15 (2014). In addition, the Commission has defined "advanced telecommunications capability" as speeds of at least 25 Mbps downstream. *See, e.g., 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*, 2016 Broadband Progress Report, 31 FCC Rcd 699, 701, para. 3 (2016).

[57] *NPRM*, 32 FCC Rcd at 3290, para. 79 (seeking comment on "whether higher-speed grandfathered services—e.g., any legacy copper-based or other TDM services below 10 Mbps or 25 Mbps or even higher—should also qualify for this more streamlined processing").

to submission of the application.[58] Under the current rule, adopted in the *2016 Technology Transitions Order*,[59] carriers may certify to the Commission that the service to be discontinued is "a service for which the requesting carrier has had no customers or reasonable requests for service during the 180-day period immediately preceding submission of the application," and the application will be granted automatically on the 31st day after filing, unless the Commission has notified the applicant that the grant will not be automatically effective. The *NPRM* proposes to shorten the timeframe during which a carrier must demonstrate that it has had no customers for a given service from 180 days to 60 days.[60]

For the reasons suggested by the *NPRM*, ITTA supports the proposals. As the Commission states, because this rule applies only to services without customers, consumer harm from further streamlining these kinds of discontinuance applications is unlikely. Moreover, with 60 days being ample time for service to lie fallow before concluding it will only continue to do so, narrowing the timeframe for demonstrating a lack of customers will expedite a subject carrier's ability to divert precious resources from a service going unused to investing in broadband deployment or IP-based applications.[61]

D. The Commission Should Reverse the Functional Test Standard for When Section 214(a) Discontinuance Authorization is Required

In a November 2014 *sua sponte* Declaratory Ruling, the Commission adopted the "functional test," interpreting Section 214(a) to obligate the Commission to look beyond the

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[58] *See id.* at 3295-96, para. 97.

[59] *2016 Technology Transitions Order*, 31 FCC Rcd at 8364, Appx. A (adopting Section 63.71(g)).

[60] *See NPRM*, 32 FCC Rcd at 3295, para. 97.

[61] This provision of the rules should be "an effective tool for reducing barriers to next generation infrastructure deployment." *Id.*

terms of a carrier's tariff and instead consider the totality of the circumstances from the perspective of the relevant community when analyzing whether a service is discontinued under Section 214.[62] ITTA urges the Commission to abandon the functional test.

Instead, the Commission should issue a declaratory ruling[63] determining that a carrier's description in its tariff – or customer service agreement in the absence of a tariff – should be dispositive as to what comprises the "service" within the meaning of the Section 214(a) discontinuance requirement.[64] By allowing all parties to determine clearly when a discontinuance subject to Section 214 processes occurs based on objective criteria,[65] this approach will avert needless disputes that force carriers to divert time and resources that would otherwise be devoted to investment in next-generation services.[66] The costs of frivolous disputes, injecting uncertainty into an already-encumbered discontinuance process, far outweigh any benefits to consumer welfare purportedly advanced by the functional test. Furthermore, the revised approach is fully consistent with Section 214(a), as the carrier will do the calculus of whether Section 214(a) would require a discontinuance filing prior to inserting in its tariff or customer service agreement the description of the subject "service."[67]

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[62] *See id.* at 3302, para. 115 (citing *Technology Transitions et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15018, para. 117 (2014) (*2014 Technology Transitions Declaratory Ruling*)).

[63] *See id.* at 3304, para. 122. If it hasn't already, the Commission might also consider withdrawing any opposition to the pending appeal of the *2014 Technology Transitions Declaratory Ruling* and its progeny. *See id.* at 3302, para. 115 n.168 (noting the pending appeal).

[64] *See id.* at 3302, para. 116.

[65] *See id.*

[66] *See id.* at 3304, para. 119.

[67] *See id.* at 3303, para. 117 (positing that the language of Section 214(a) puts the burden on the discontinuing carrier to evaluate the broader impact of the discontinuance). ITTA also notes that

(continued…)

IV. IN EVALUATING FURTHER MODIFICATIONS TO ITS POLE ATTACHMENT RULES, THE COMMISSION SHOULD EMPHASIZE PRAGMATISM AND REGULATORY PARITY

A. The Accelerated Pole Attachment Timeframes Contemplated by the Commission, While Worthwhile in Theory, are Fraught with Pragmatic Difficulties

The *NPRM* seeks comment on a number of measures to accelerate the timeframes for processing pole attachment requests.[68] ITTA agrees that pole attachments are a key input for many broadband deployment projects, and that expediting access to utility poles will help realize the goals of this proceeding by removing barriers to broadband infrastructure deployment.[69] ITTA's rate-of-return members who did not receive full funding projected as necessary by the Alternative Connect America Cost Model (A-CAM)[70] or who are subject to a "haircut" of their legacy high-cost funding[71] are especially likely to utilize aerial deployment instead of buried deployment in order to deploy broadband cost effectively.

While the goal of accelerating the pole attachment process is a worthy one, ITTA has several practical concerns, particularly associated with expediting make-ready timelines. The existing timelines, which the *NPRM* seeks comment on curtailing by 30 days, are already quite challenging. This may be pronounced where the existing attachment is a power line. One ITTA member reports a situation where the make-ready work associated with a power line attachment

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customers receiving service via a customer service agreement actually do have the opportunity to negotiate over the description of the subject service.

[68] *See id.* at 3268-70, paras. 6-12.

[69] *See id.* at 3267, para. 3.

[70] *See Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 31 FCC Rcd 13775, 13780-81, para. 19 (2016).

[71] *See, e.g., Wireline Competition Bureau Announces Availability of Budget Control Mechanism Calculations for Rate-of-Return Carriers for the Period from January 1, 2017 Through June 30, 2017*, Public Notice, 31 FCC Rcd 11838 (WCB 2016).

has been backlogged for six *years*. Another ITTA members asserts that, notwithstanding the Commission's attempt to address unauthorized attachments via more substantial penalties,[72] unauthorized attachments persist as a common problem, which certainly hinders timely completion of make-ready work. Yet a further obstacle is the paucity of qualified contractors to perform the make-ready work in some areas.[73] Given the current challenges, as well as the specter of a greater volume of pole attachment activity going forward with increased broadband deployment as well as with the rollout of 5G wireless service, timeframes for make-ready work realistically are bound to only increase.[74]

B. Any "Alternative" Processes to Expedite Pole Attachments Should be Flexible and Facilitate Broadband Deployment in Rural Areas

1. List of Contractors Pre-Approved by Pole Owner

The *NPRM* also seeks comment on a variety of "alternative" pole attachment processes. One line of inquiry is whether the Commission should adopt rules allowing new attachers to use utility-approved contractors to perform "routine" make-ready work, and also to perform

[72] *See Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240, 5290-92, paras. 113-18 (2011) (*2011 Pole Attachment Order*).

[73] While ITTA notes that adoption of the course described in the next Section of utilizing a list of pole owner "pre-approved" contractors will help to solve existing attacher recalcitrance, it does not solve the problem of a scarcity of qualified contractors in some areas.

[74] These challenges are not alleviated by extended timeframes for "larger" wireless attachment orders. *See NPRM*, 32 FCC Rcd at 3269, para. 9 (seeking comment on whether the extended timelines for larger pole attachment orders might help utilities process the large volume of requests the Commission anticipates will be associated with the 5G buildouts); 47 CFR § 1.1420(e)(2)(ii) (135 days, rather than 90, for completion of make-ready in the case of larger orders). This extended timeline does not sufficiently account for the orders of magnitude difference between a standard order and a larger one. *See* 47 CFR § 1.1420(g)(1)-(4).

"complex" make-ready work where the existing attacher fails to do so in a timely manner.[75] ITTA recognizes the benefits of this course, and supports it subject to several caveats.

Where pole owners use contractors, the Commission should capitalize on the model of a pre-approved list of contractors that pole owners might compile, and from which an attaching entity may select. Doing so enables pole owners to confirm that they are properly trained and appropriately certified consistent with all current standards and codes. In this manner, the rights and quality-of-work expectations of pole owners will be safeguarded.[76] Some ITTA members that are pole owners do, indeed, maintain such a list.

ITTA cautions, however, that this process is not a panacea. For one thing, at least one member reports that not all of the pre-approved contractors on its list are qualified to do work on power line attachments. Another member laments that not all existing attachers accept the list as a source of contractors they approve, and that allowing contractors engaged by new attachers to move existing attachers' equipment without permission can lead to liability questions if something goes wrong, due to the lack of a contract between the new and existing attachers. Yet another member reports that it generally uses its own employees for make-ready work, and that labor contracts protect the rights of such employees to perform such work. Therefore, if the Commission adopts a rule removing make-ready logjams via reliance on a pole owner's pre-approved list of contractors, it should be subject to two stipulations: first, that the rule only applies to make-ready work that does not involve moving the equipment of an existing attacher;

[75] *See NPRM*, 32 FCC Rcd at 3270-72, paras. 13-19.

[76] *See, e.g., id.* at 3270, para.13 (seeking comment on balancing the benefits of alternative processes against "the safety and property concerns that are paramount to the pole attachment process").

and second, that the rule only applies where the pole owner maintains such a list, and is not a substantive requirement that the pole owner do so.[77]

2. One-Touch, Make-Ready

The *NPRM* also seeks comment on the benefits and detriments of a "one-touch, make-ready" (OTMR) pole attachment regime.[78] ITTA does not support implementation of such an approach. Each version of OTMR on which the Commission seeks comment is infused with overly prescriptive, inflexible timelines that, at best, may provide some benefit in more urban areas where there are already numerous attachers on a pole. However, to the extent the avowed goal of the pole attachment reforms on which the Commission seeks comment is to "remove significant barriers to broadband infrastructure deployment,"[79] OTMR fails to advance this goal in the rural areas that are most in need of seeing this goal realized, where there likely are fewer existing attachers. Instead, it hamstrings pole owners and would-be attachers alike. As such, OTMR stands as a solution to a problem different from the one it is proposed to remedy. If the Commission is going to adopt further pole attachment reforms, it must ensure that they will help in rural areas, not merely benefit 5G wireless deployment by urban broadband overbuilders.

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[77] ITTA is cognizant that Section 1.1422(a) of the Commission's rules, 47 CFR § 1.1422(a), already requires a pole owner to make available and keep up-to-date a "reasonably sufficient" list of contractors it authorizes. However, in adopting this rule, the Commission allowed that "'it is reasonable to require the utilities . . . to have an adequate number of their own workers available to do the requested work'" or have contractors perform it. *2011 Pole Attachment Order*, 26 FCC Rcd at 5265, para. 50; *see also id.* at 5267, para. 54 (providing alternative if a utility does not list approved contractors). Thus, the Commission contemplated exceptions to Section 1.422(a), and these exceptions should remain in place and be applied to any new rule the Commission adopts relative to utilization of a pre-approved list of contractors, as discussed above.

[78] *See NPRM*, 32 FCC Rcd at 3273-74, paras. 21-24.

[79] *Id.* at 3267, para. 3.

C. The Burdens of Imposing Requirements to Make Pole Attachment Information Publicly Available Would Far Outweigh Any Benefits

The *NPRM* seeks comment on whether making more information publicly available regarding poles also could lead to faster pole attachment timelines and, if so, what information pole owners should make available and how the Commission should facilitate access to it.[80] ITTA submits that the collection of pole data would be an inefficient and costly exercise of questionable, if any, value.

Pole and conduit ownership and rights-of-way information can often be obtained from public records. Information that is not available in the public domain is confidential and proprietary network information that is not ordinarily made available to third parties in the normal course of business, and should similarly be unavailable for these purposes. The proposed mandate to collect detailed information regarding actual attachments would yield no beneficial value. In the first instance, a vast database of pole-related information would create a gargantuan administrative burden for owners required to load and update the data. Second, the perpetually changing nature of pole attachments, including attaching entities and type of attachments used, would result in a Sisyphean exercise yielding results of little benefit, because the information would become outdated almost immediately.

Further, the continued widespread presence of unauthorized attachments[81] throws into question the reliability of any database that, by definition, can rely only upon known data. Finally, many companies do not even have all of the information delineated in the *NPRM*, or do not have it aggregated on a company-wide basis. Therefore, they would incur an enormous expense to build their own database just for the purpose of providing the data to a centralized

[80] *See id.* at 3275, para. 27.

[81] *See supra* Section IV.A.

clearinghouse. In all of these ways, the specter of pole owners making available all of the information suggested could not possibly survive a cost-benefit analysis.[82]

D. The Commission Should Continue to Press for a Statutory Solution for Poles Owned by Entities Not Subject to Section 224

The *NPRM* seeks comment on actions that the Commission could undertake to speed deployment of next generation networks by facilitating access to infrastructure owned by entities not subject to Section 224 of the Act, such as municipalities, electric cooperatives, and railroads.[83] It is no secret that would-be attachers frequently encounter difficulties in access to poles owned by such entities, for instance, through being subject to predatory pricing and timelines being ignored.[84] The *NPRM* further queries whether increased transparency regarding pole attachment rates and costs for Commission-regulated pole owners would benefit potential attachers to non-Commission regulated poles by providing data that would be useful in contractual negotiations.[85] Aside from ITTA's general opposition to required public furnishing of such information,[86] ITTA is skeptical whether it would help potential attachers to any meaningful degree, given that there is still no legal mechanism under the Act to compel any particular result.

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[82] *See 2011 Pole Attachment Order*, 26 FCC Rcd at 5280-81, para. 89 (for largely the same reasons, declining to adopt a similar proposal, and finding that the burdens associated with an information collection requirement likely outweigh the benefits). The reasons cited by the Commission for declining to impose an information collection requirement leading towards a centralized poles information database apply as forcefully now as they did in 2011 (if not more so). If the Commission nevertheless does not heed the myriad reasons why an information collection is unwise, at most it should require pole owners to make available rates and poles availability information.

[83] *See NPRM*, 32 FCC Rcd at 3276, para. 30.

[84] *See, e.g., id.* & n.45.

[85] *See id.*

[86] *See supra* Section IV.C.

ITTA believes that the most effective action the Commission can take is to continue to press Congress for a legislative change to bring municipalities, electric cooperatives, and railroads within the ambit of Section 224. Chairman Pai, for instance, has demonstrated a willingness to do so:

> Congress should also expand the Commission's authority over pole attachments. Right now, we don't have jurisdiction over poles owned by government authorities, whether federal state, or local, nor poles owned by railroads. Unsurprisingly, I have heard from ISPs that many pole-attachment disputes arise from these particular pole owners, who may have little interest in negotiating just and reasonable rates for private actors to access their rights of way. This is a gap that Congress could easily fix.[87]

The importance of a statutory change in this regard would be heightened even further if, in any infrastructure legislation that is enacted, insufficient or no funds are provided for broadband deployment. In this case, more creative methods would need to be found to bolster the business case for increased broadband deployment in unserved or underserved areas. One such method could be legislative action to help decrease rates for attaching to poles owned by municipalities, electric cooperatives, and railroads.

E. The Commission Should Eliminate Disparities in the Pole Attachment Rate Structure that Frustrate ILEC Broadband Deployment

In the *2011 Pole Attachment Order*, the Commission concluded that reducing the telecom rate to be lower and more uniform with the cable rate better enables providers to compete on a level playing field, eliminates competitive distortions between different providers of the same services, and fosters broadband deployment by ensuring that provider behavior is driven more by

[87] Remarks of FCC Commissioner Ajit Pai at the Brandery, A Digital Empowerment Agenda (Sept. 13, 2016), https://apps.fcc.gov/edocs_public/attachmatch/DOC-341210A1.pdf, at 7-8.

underlying economic costs than arbitrary price differentials.[88] For the same reasons, the Commission should adopt its proposal that the "just and reasonable rate" under Section 224(b) for ILEC attachers should presumptively be the same rate by other telecommunications attachers, i.e., a rate calculated using the most recent telecommunications rate formula.[89]

When cable companies or other competitive telecommunications providers pay pole attachment fees at a rate that is generally lower than for ILECs, this discrepancy frustrates broadband deployment by enabling utility pole owners to levy much higher rates on ILECs than their direct competitors. Consistency in rate regulation is needed to increase regulatory parity, diminish disruptive market signals, and preempt inappropriate regulatory advantages. By removing regulatory mechanisms that impose upon providers varying obligations that are not substantially related to actual costs, the Commission is able to promote the pro-competitive and deregulatory goals of the 1996 Act that led to significant amendments to Section 224.[90] The Commission's current pole attachments regulatory regime, which enables different rate formulae for identical attachments, is no longer appropriate as intermodal and intramodal competition flourish. Accordingly, the Commission should, once and for all, pursue a uniform rate structure that is unrelated to the classification of the attaching entity.

The Commission previously found that revising its pole attachment formula to create regulatory parity between the telecommunications rate and the cable rate "will substantially

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[88] *2011 Pole Attachment Order*, 26 FCC Rcd at 5303, para. 147; *see also id.* at 5320, para. 181 ("largely eliminating the difference in prices charged to cable operators and telecommunications carriers will significantly reduce the extent to which investment and deployment choices by such providers, and competition more generally, are distorted based on regulatory classifications").

[89] *See NPRM*, 32 FCC Rcd at 3280, para. 45.

[90] *See* 1996 Act § 703 (amending Section 224 of the Act).

reduce the incentives for costly disputes by substantially reducing the potential gains that a party can claim by arguing for a favorable attachment definition."[91] The same principle applies here. As the *NPRM* recounts, in the *2011 Pole Attachment Order*, the Commission declined to adopt a pole attachment rate formula for ILECs, opting instead to evaluate ILEC complaints on a case-by-case basis to determine whether the rates, terms, and conditions imposed on ILEC pole attachments are consistent with Section 224(b) of the Act. The Commission held that the just and reasonable rate for ILECs is achieved when an ILEC is obtaining pole attachments on terms and conditions that leave ILECs "comparably situated" to telecommunications carriers or cable operators. However, in the ensuing years, this formulation led to repeated disputes between ILECs and utilities over appropriate pole attachment rates.[92] To rectify this situation, the Commission now proposes that the ILEC would no longer be required to demonstrate that it is "comparably situated" to a telecommunications provider or cable operator; instead, the ILEC would receive the telecommunications rate unless the utility owner can demonstrate with clear and convincing evidence that the benefits to the ILEC far outstrip the benefits accorded to other pole attachers.[93] Shifting the burden to the pole owner to demonstrate that the ILEC should not enjoy the telecommunications rate, and requiring the pole owner to support its showing with clear and convincing evidence, similarly should reduce costly disputes and regulatory gamesmanship.

[91] *2011 Pole Attachment Order*, 26 FCC Rcd at 5321, para. 181.

[92] *See NPRM*, 32 FCC Rcd at 3279-80, para. 44 (citing *2011 Pole Attachment Order*, 26 FCC Rcd at 5238, 5334, 5336-37, paras. 203, 214, 217-18).

[93] *See id.* at 3280, para. 45.

V. THE COMMISSION POSSESSES AUTHORITY UNDER SECTION 253 TO PREEMPT STATE AND LOCAL LAWS INHIBITING BROADBAND DEPLOYMENT BUT SHOULD REFRAIN FROM WIELDING IT AT THE PRESENT TIME

The *NOI* seeks comment on whether the Commission should adopt rules, pursuant to its authority under Section 253 of the Act, to promote broadband infrastructure deployment by preempting state and local laws that inhibit such deployment.[94] Section 253(a) provides that no state or local legal requirements "may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service," and Section 253(d) empowers the Commission, after notice and an opportunity for public comment, to preempt the enforcement of any such legal requirement "to the extent necessary to correct" a violation of Section 253(a).

As a threshold matter, ITTA believes that the Commission possesses authority under Section 253 to preempt state and local laws that thwart broadband infrastructure deployment. ITTA concurs with the Commission's "preliminary view," as expressed in the *NOI*, that "restrictions on broadband deployment may effectively prohibit the provision of telecommunications service."[95] This is so even if the Commission ultimately reinstates the information service classification of BIAS.[96]

For instance, the *Restoring Internet Freedom NPRM* invokes providers that voluntarily offer broadband transmission on a common carrier basis.[97] In 2005, the Commission eliminated previously existing obligations to offer the transmission component of wireline BIAS on a stand-

[94] *See id.* at 3296, para. 100.

[95] *Id.* at 3297, para. 101.

[96] *See Restoring Internet Freedom*, Notice of Proposed Rulemaking, FCC 17-60, at 8, para. 25 (May 23, 2017) (*Restoring Internet Freedom NPRM*).

[97] *See id.* at 23, para. 65.

alone basis, and held that facilities-based wireline BIAS providers could choose to offer the transmission component of wireline BIAS on a non-common carrier basis or a common carrier basis.[98] The Commission stated:

> Our primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband. We find that we can best further this goal by providing all wireline broadband providers the flexibility to offer these services in the manner that makes the most sense as a business matter and best enables them to respond to the needs of consumers in their respective service areas.[99]

Citing a 2005 *ex parte* letter from ITTA and other associations with rural ILEC members, the Commission found that some carriers may choose to offer the transmission component of BIAS as a common carrier service.[100] Here, too, the Commission's goal is to facilitate broadband deployment by removing barriers to broadband infrastructure investment,[101] which is especially critical in rural areas given that "millions of rural Americans remain unserved."[102] Rural ILECs may choose to continue to offer BIAS transmission on a common carrier basis. Assuming some do, restrictions on their broadband deployment will have the effect of prohibiting their ability to provide common carrier telecommunications service, thus subjecting these effective prohibitions to the Commission's authority under Section 253.

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[98] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities et al.*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14899, para. 86 (2005).

[99] *Id.* at 14901, para. 89.

[100] *See id.* at 14900-01, para. 89 & n.269; *see also Restoring Internet Freedom NPRM* at 10, para. 28 & n.73.

[101] Moreover, the title of Section 253 is "Removal of Barriers to Entry."

[102] *Connect America Fund et al.*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC Rcd 3087, 3089, para. 2 (2016).

Notwithstanding the Commission's authority to take action pursuant to Section 253, ITTA recommends that the Commission not do so at this juncture. As the *NOI* observes, the Commission's Broadband Deployment Advisory Committee (BDAC) has been charged with working to develop model codes for municipalities and states, and to consider additional steps that can be taken to remove state and local regulatory barriers to broadband infrastructure deployment.[103] The *NOI* also suggests that barriers may be removed through collaborative efforts with states and localities.[104] For example, the Commission could leverage its Intergovernmental Advisory Committee (IAC) to collaborate on best practices. If efforts of the BDAC and collaboration via the IAC fail to yield sufficient and uniform relief from state or municipal barriers to broadband infrastructure investment, then the Commission may consider employing its preemption authority under Section 253.[105]

VI. CONCLUSION

In sum, the Commission should retract or modify regulations adopted in the *2015 and 2016 Technology Transition Orders* that unfairly burden ILECs and hamper their ability to compete against their cable and wireless rivals. The Commission also should revise its pole attachment rules to promote access to poles on a level playing field, including as to rates. By taking these actions, the Commission can minimize marketplace distortions, create incentives for broader investment in next-

[103] *See NOI*, 32 FCC Rcd at 3301, para. 111.

[104] *See id.* at para. 112.

[105] *Cf.* Remarks of Michael O'Rielly, FCC Commissioner, Before the 2017 Wireless Infrastructure Show (May 23, 2017), http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0523/DOC-345021A1.pdf, at 4 (citing Section 253(d), stating that if obstructions to wireless broadband infrastructure investment are "not resolved quickly and satisfactorily, the Commission must be willing to use its preemption authority").

generation networks and services, promote efficient allocation of valuable investment dollars, and better promote broadband deployment and the transition to all-IP networks.

Respectfully submitted,

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APPENDIX

Proposed Revisions to Section 51.332

§51.332 Notice of network changes: Copper retirement.

(a) *Definition.* For purposes of this section, the retirement of copper is defined as:

(1) Removal or disabling of copper loops or~~,~~ subloops~~, or the feeder portion of such loops or subloops;~~; or

(2) 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~~

~~(3) The failure to maintain copper loops or, 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~~ telephone exchange service provider 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)~~ ~~T~~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)~~ ~~T~~the retirement of facilities ~~pursuant to paragraph (a)(3) of this section~~ is undertaken to resolve a service quality concern raised by the customer to the incumbent LEC.

~~(iii) The contents of any such notice must comply with the requirements of paragraph (c)(2) of this section.~~

~~(iv)~~ 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 email to provide notice to retail customers, it must comply with the following requirements in addition to the requirements generally applicable to the notice:

(i~~A~~) The incumbent LEC must have previously obtained express, verifiable, prior approval from retail customers to send notices via email regarding their service in general, or planned network changes in particular;

(ii~~B~~) Email 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

(iii~~C~~) An incumbent LEC must ensure that the subject line of the message clearly and accurately identifies the subject matter of the email.

(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), (2), and (4) of this section must set forth the information required by §51.327. ~~In addition, the notices required by paragraphs (b)(1), (2), and (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 set forth the information required by §51.327(a)(1) through (4) and (a)(6).~~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) through (4) and (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 Web site 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:~~

~~(A) The statement may not contradict or be inconsistent with any other information with which it is presented.~~

~~(B) 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.~~

~~(C) Hyperlinks included as part of the message must be clearly labeled or described.~~

(d) *Certification.* When an ~~i~~incumbent LEC files the ~~No later than ninety (90) days after the Commission's release of the public~~ notice required under paragraph (b)(1) ~~notice identified in paragraph (f)~~ of this section, ~~an~~ the 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:~~that it has complied with the requirements of this section and ~~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;~~

(2~~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 telephone exchange service provider ~~entity~~ within the affected service area that directly interconnects with the incumbent LEC's network;

(3~~4~~) The name and address of each entity referred to in paragraph (d)(2~~3~~) of this section upon which written notice was served;

(4~~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;

(5~~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, a~~An incumbent LEC must provide the notices required by paragraphs (b)(2), (3) and (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 (4) of this section no later than ninety (90)60 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.~~

(1) Except pursuant to paragraph (f)(2) of this section, ~~T~~the notices of copper retirement required by paragraph (b) of this section shall be deemed approved on the ~~180~~90th day after the release of the Commission's public notice of the filing.

(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, the notices of copper retirement required by paragraph (b) of this section shall be deemed approved on the 30th day after the release of the Commission's public notice of the filing.

(g) *Good faith requirement.* ~~An entity within the affected service area~~ telephone exchange service provider that directly interconnects with the incumbent LEC's network may request that the incumbent LEC provide additional information to allow the interconnecting ~~entity~~telephone exchange service provider, where necessary, to accommodate the incumbent LEC's changes with no disruption of service to the interconnecting ~~entity~~telephone exchange service provider's end user customers. Incumbent LECs must work with such requesting interconnecting ~~entities~~telephone exchange service providers in good faith to provide such additional information.