Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
2016 Biennial Review of	)	
Telecommunications Regulation	)	
	)	
Wireline Competition Bureau	)	WC Docket No. 16-132
Wireless Telecommunications Bureau	)	WT Docket No. 16-138
Public Safety and Homeland Security Bureau	)	PS Docket No. 16-128
Office of Engineering and Technology	)	ET Docket No. 16-127

REPLY COMMENTS OF PUBLIC KNOWLEDGE

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I. Introduction and Summary

Public Knowledge, Common Cause, and New America's Open Technology Institute take this opportunity to respond to comments pursuant to the Commission's Public Notice[1] regarding the commencement of the 2016 Biennial Review of Regulations.

II. The Commission's Biennial Review Should Not Be a Tool to Undermine Important Commission Oversight or Broad-Spectrum Forbearance and Deregulation.

A. The Commission Should Reject Incumbent Industry Attempts to Manipulate the Biennial Review Process in an Effort to Undermine Important Commission Authority to Promote Competition and Protect Consumers.

The Biennial Review process requires the Federal Communications Commission ("Commission" or "FCC") to review, in even-numbered years, its regulations which apply to providers of telecommunications services, and eliminate those which are no longer in the public interest as a result of "meaningful economic competition between providers of such service" in the marketplace.[2] Eliminating a regulation may only be justified if the rule no longer serves the public interest, as a direct result of the existence of meaningful competition in the marketplace, such that the removal of the regulation in question would not compromise the public interest.[3] The Biennial Review provides the opportunity for the Commission to tidy up outdated regulations, streamline its procedures, and harmonize regulations which govern similar services. It does not, as some commenters appear to believe, represent open season for dominant industries to attack Title 47 of the Code of Federal Regulations

Based on the record, it appears that large telecom providers and their trade associations view this proceeding as a vehicle to circumvent the Commission's regular rulemaking process in

[1] Commission Seeks Public Comment in 2016 Biennial Review of Telecommunications
[2] 47 USC § 161.
[3] *Id.*

order to subvert the Commission's core mission of protecting consumers, promoting competition, and ensuring universal service.[4] In recent years, dominant companies with substantial market power in increasingly concentrated industries have become hysterical nearly any time the Commission has used its Congressionally-mandated authority to serve the public interest. The Commission should be vigilant in rejecting requests for corporate giveaways and unwarranted deregulation proposed in these dockets by these dominant industry players, and instead keep its focus on its mission to protect consumers, promote competition, and serve the public interest.

B. The Biennial Review is Not an Opportunity for Dominant Industry Players to submit Untimely Requests for Reconsideration or Procedurally Defective Petitions for Forbearance.

The Biennial Review should serve as an administrative scalpel to ensure ongoing reexamination of whether certain rules are stale, or no longer serve the public interest. The Biennial Review has never been an opportunity for dominant phone, wireless, and broadband companies to undermine the Commission's mission and its most immediately recent rules. It is also not intended to provide opportunity for Verizon, CenturyLink, or any industry trade association to line-edit the FCC's rules just to strip out the bits they find inconvenient.

While examples of manipulation and overreach abound in this record, there are some illustrative instances where the process is used as intended, and which the Commission should use as a guidepath. For example, CTIA's request to remove 47 CFR § 20.20, which sunset in 2002, is precisely the purpose for which this process exists.[5] Clearing the underbrush of rules that are actually no longer operable is the central purpose of the Biennial Review. Contrast this

[4] 47 USC § 151.
[5] Comments of CTIA at 10.

with CTIA's request in the same filing to remove the FCC's privacy rules.[6] This request is little more than an improper Petition for Reconsideration, as those rules have only recently been published in the Federal Register.[7] As discussed previously, the purpose of the Biennial Review is to remove outdated rules; it hardly seems reasonable that the privacy rules, among the FCC's newest, meet the requirements of the statute.

In recent years, the Commission has implemented a number of important consumer protection and competition-promoting policies that were both high-profile and hotly contested. These policies cover a range of issues, from the Open Internet Order of 2015 to the more recent measure to improve consumer privacy to a variety of critical, if less visible, spectrum proceedings. Industry incumbents poured endless resources into opposing these efforts, amidst rancor from customers and competitors that the Commission step in to protect consumers and promote a level playing field. Fortunately, the Commission did not fall for industry misdirection, and followed its statutory directives, taking those measures to improve internet access, affordability, and openness in the digital marketplace. The Biennial Review is not the appropriate venue for parties to re-air their unhappiness with the Commission's most recent proceedings; parties can avail themselves of Petitions for Reconsideration and the courts. The Commission should reject efforts to distort the Biennial Review process to cast aside these important policies in a blatant attempt to subvert well-reasoned public policy and circumvent the Commission's routine rulemaking processes and procedures.

Leaving aside these most recent matters, there remains a long list of less recent but nonetheless important rules that remain relevant in a 21st century where every industry has a

[6] Comments of CTIA at 9.

vested interest in the way communications policy operates. To that end, the FCC should use the Biennial Review as intended: with precision trims where necessary to streamline the business of the Commission and tidy up its rules, rather than a slash-and-burn deregulation sought by trade associations like USTelecom.[8] The initial comments in this proceeding appear designed to transform the Biennial Review into an opportunity for broad deregulation and the complete upending of competitive industries to favor dominant firms and incumbent industries, at the expense of consumers, competition, and innovation. Critical consumer protections will be bulldozed in the process if many of the industry wishlists are granted, obliterating decades of carefully deliberated policies in one fell swoop.

As has always been the case in the past, however, APA standards apply. Full Notices of Proposed Rulemaking and discrete dockets would be required before the Commission could act on any of the submitted industry wishlists, or upend the competitive apple-cart with broad sweeping deregulation. This also includes an opportunity for the public to comment on each proposal in detail, before any of the long and varied industry wishlists can be become a reality.

If the Commission moves forward with any of the items on these industry wishlists, it should be sure to examine the full breadth of regulations that affect relevant industries. This includes reexamining the Commission's outstanding grants of broad forbearance, to ensure that the vast swaths of Federal law and Commission rules not currently applied to telecommunications companies are still inappropriate to apply. Just as the Commission may

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[7] *See* Protecting the Privacy of Customers of Broadband and Other Telecommunications Services, 81 Fed. Reg. 87274 (Dec. 2, 2016).

[8] Comments of the United States Telecom Association to the Wireline Competition Bureau 8-9 (asking that any regulation which applies exclusively to LECs or BOCs on the basis of their status as such, be removed purely for that reason).

reexamine whether its applied regulations serve the public interest, it should also look to whether or not its forbearance continues to do the same.

For these reasons, we urge the FCC to reject industry efforts to use the Biennial Review as a sledgehammer to remake the FCC's full body of rules in a new, anti-competitive image.

III. Several Commenters Attempt to Leverage the Biennial Review as an Improper Procedural Vehicle to Reverse Recent Pro-Consumer, Pro-Competition Initiatives.

Several industry commenters ask that the Commission reverse or eliminate major rulemakings conducted in recent years. In particular, aspects of the Tech Transitions orders, the Open Internet Order, the Privacy Order, and the Mobile Spectrum Holdings Order, among others, are targeted for substantial revision or wholesale elimination. These requests are little more than untimely Petitions for Reconsideration masquerading as proper requests in the Biennial Review process.

The Biennial Review is meant to facilitate tidying up of FCC regulations to ensure they do not become cluttered and conflicting over time, and to provide periodic revisitation of the Commission's oldest regulations to determine whether or not they continue to serve the public interest. It is not, as industry interests hope, a vehicle to facilitate wholesale reversals of FCC proceedings in light of shifting political winds, or to suit the interests of industry players with dominant market power. CTIA, for example, complains in their filing that the FCC "reversed course" from information service classification five years after the 2010 rules, yet now pushes for the FCC to do exactly the same thing only two years later.[9] Apparently, regulatory uncertainty is only a threat to industry when those regulations are inconvenient. This demand for reversal would result in the FCC granting a corporate giveaway at the expense of consumers. The

[9] Comments of CTIA at 7-8.

FCC should reject these efforts to play on shifting political winds to achieve anticompetitive and anti-consumer goals..

In some instances, commenters request the Commission to appropriately exercise its Biennial Review authority. For example, Verizon, requests that the Commission modify its rules to shift from paper to electronic filing of spectrum subleases, harmonizing this process to match the filing requirements for full leases.[10] This is precisely the sort of common-sense housekeeping that the Biennial Review is intended to facilitate. The Biennial Review process should not be distorted to suit industry's interest in thwarting competition through wholesale deregulation or reversals of recent policies with which those industries happen to disagree.

IV. Responses to Specific Requests for Review or Revision of Rules and Regulations.

The vast majority of industry requests extend far beyond the scope of the Biennial Review, and are more appropriately viewed as procedurally defective Petitions for Forbearance or Rulemaking, or untimely Petitions for Reconsideration. Furthermore, the requests are rarely accompanied by any further substantive justification than an unsubstantiated assertion that the rules no longer serve the public interest simply because they impose some requirement upon the commenter's business. To the extent any commenter has a substantive case to make for forbearance or reconsideration, the Commission should reject their requests in this proceeding and invite them to submit a properly-formed and fully substantiated Petition, as is appropriate under the Commission's rules.[11]

A. Rules Overseen by the Wireless Bureau

[10] Comments of Verizon at 8.
[11] *See, e.g.* 47 CFR §§ 1.401, 1.429

Pre-Closing Approval for *Pro Forma* Spectrum License Transfers Verizon requests that the Commission vacate this rule, and instead require only post-closing notification of *pro forma* transfers.[12] However, there is often a question as to whether transfers of this type are really *pro forma*, or if they in fact raise significant concerns. While an applicant may genuinely believe that a transfer is *pro forma*, that is not for the applicant to decide - it is for the Commission. The *pro forma* process is a means of streamlining the FCC's requirements under 47 USC § 310(d) that it review and approve all license transfers.[13] Notification alone would not satisfy this requirement. Furthermore, one of the FCC's main objectives is to maintain awareness of how and to what end the public airwaves are being used. It is important for stakeholders, the public, and researchers, to be able to trace the chain of ownership, particularly for merger reviews and application of the spectrum screen.

FCC Oversight over Spectrum Leases CTIA and Verizon ask the FCC to "condense and reform" rules relating to spectrum leasing, abolishing any review process and requiring only prior notification of spectrum leases.[14] The recent XO transaction, however, as well as additional potential transactions among legacy providers, clearly illustrate the ever-increasing importance of this rule. While it may be useful for the Commission to to have a proceeding on spectrum leasing, particularly with an eye toward encouraging real-time spectrum leasing, it is certainly not the case that the Commission should simply eliminate this rule. This rule is now even more critical to ensuring that spectrum concentration does not reach unhealthy levels, that the market remains suitably transparent, and that the FCC continues to be able to satisfy its 47 USC § 310(d) transfer obligations.

[12] Comments of Verizon at 9.
[13] *See* 47 USC § 310(d).

With regard to Verizon's further request that spectrum subleases be permitted to be filed electronically, rather than requiring a paper submission, however, we have no objection.[15] This is precisely the kind of modernization and harmonization with other Commission policies for which the Biennial Review process was designed.

Roaming Access Mobile Future asks the FCC to eliminate the requirement that carriers provide roaming access in any geographic area where a competitor owns licenses, in order to incentivize buildout.[16] Commission reversed this very policy in 2011 in the Data Roaming order.[17] There is no evidence presented that the policy is any less needed today; notably, Mobile Future offers none. To the contrary, the Commission's own experience in the data roaming proceeding demonstrates the continued need to preserve roaming obligations in voice as well as data markets.

Mid-Term Buildout Requirements Verizon asks the FCC to repeal its penalties for failing to meet interim buildout requirements.[18] The Commission should not take this action, as it would only incentivize entities to warehouse spectrum for speculation purposes, effectively disincentivizing buildout in rural areas - those where buildout is most necessary.

47 CFR §§ 22.301, 22.305 CTIA requests that these rules be modified in light of the universal reliance on electronic licenses.[19] Provided certain needs are addressed, this is similarly the kind of modernization contemplated by the Biennial Review. Specifically, licensees should

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[14] Comments of Verizon at 7; Comments of CTIA at 10.
[15] Comments of Verizon at 8.
[16] Comments of Mobile Future at 6-7.
[17] *See generally* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, *Second Report and Order*, WT Docket No. 05-265 (rel. Apr. 7, 2011).
[18] Comments of Verizon at 5.
[19] Comments of CTIA at 10.

still be required to have electronic copies easily accessible to personnel and FCC inspectors. Furthermore, licensees must acknowledge that they remain liable for ensuring that employees are actually aware of and familiar with the requirements of the licenses, so that ignorance of a license condition does not become an excuse for failure to comply.

47 CFR §§ 22.935, 22.936, 22.939, 22.940, and 24.16 CTIA also asks that the Commission adjust these license renewal rules to harmonize them with other mobile bands.[20] We support harmonization of rules, provided the Commission considers and adequately addresses how harmonization will impact examination of buildout obligations.

47 CFR § 24.3 CTIA asks for modification of this rule, which would essentially repeal the gating requirement.[21] While we understood the Commission's reasoning underlying this rule, this is in fact a prime example of a rule that has outlived its usefulness

B. Rules Overseen by the Wireline Bureau.

Section 251 Interconnection and Network Unbundling Rules CenturyLink and USTelecom ask the FCC to effectively forbear from Section 251 of the Communications Act, affecting a vast sea-change to the competitive broadband industry and removing the very regulations upon which any sign of competitiveness in the marketplace relies.[22] Given the strong record in the business data services and tariff investigation proceedings, which demonstrate significant market power on the part of dominant providers like AT&T and CenturyLink, a change of this magnitude is far beyond the scope of the Biennial Review process. The allegedly

[20] Comments of CTIA at 10-11.
[21] Comments of CTIA at 11.
[22] Comments of Centurylink at 10-11; Comments of the United States Telecom Association to the Wireline Competition Bureau at 8.

robust competition cited by commenters exists as a direct result of the rules they seek to remove, and would completely collapse in their absence.

Pole Attachment Rates CenturyLink asks the FCC to revise its pole attachment rate rules, citing what it claims are below-market prices it is required to offer, as well as other complaints.[23] Pole attachment rules do not disadvantage incumbents like CenturyLink, however; to the contrary, they have enabled ILECs like CenturyLink and AT&T to aggressively inhibit competition, preventing the growth of competitive alternatives like Google Fiber through exercise of their total control over these vital rights of way and utility poles.[24] Furthermore, the National Broadband Plan contains an entire section dedicated to documenting the critical importance of pole attachments to the growth and expansion of competitive broadband. Suggesting that modification of these rules to further favor incumbents like CenturyLink is nothing more than a power grab from an incumbent seeking greater power to suppress competition.

Nationwide Contract-based Tariffing CenturyLink asks the FCC to allow price-cap LECs to offer contract-based tariffs on a nationwide basis.[25] A change of this sort is precisely the type of request best addressed through the Commission's pending Business Data Services proceeding.

[23] Centurylink at 12
[24] *See, e.g.* Steven Hale, *What's Behind the Slow Rollout of Google Fiber?*, Nashville Scene (Jul. 28, 2016), http://www.nashvillescene.com/news/columns/article/20829208/whats-behind-the-slow-rollout-of-google-fiber (noting obstructionism from Comcast and AT&T to efforts for competitors to utilize power company poles to deploy competitive broadband).
[25] Comments of Centurylink at 11-12.

Annual Consultation with Tribes Verizon asks the FCC to eliminate its requirement that high-cost support recipients consult annually with Native American tribes.[26] While it may be appropriate to examine the issues presented by Verizon's experience of low response rates, it is important for the Commission to examine whether the process could in some way be improved or modernized, rather than simply eliminating it.

BOC or LEC-exclusive Requirements United States Telecom Association ("USTA") asks that the FCC reexamine any and all regulations or statutory sections that apply exclusively to RBOCs or LECs, citing allegedly robust competition in the broadband marketplace.[27] The information collected in the BDS proceeding suggests otherwise, however. To the extent that individual rules may no longer be necessary, USTA and its members may pursue Petitions for Forbearance, the appropriate vehicle for such requests. The fact that USTA doesn't cite a long list of exclusive provisions, but instead speaks broadly and in generalities, appears to be an attempt to manipulate the Commission into pursuing a recklessly deregulatory agenda. The Commission should see through this transparent attempt, and reject USTA's efforts to hijack this proceeding to effect broad deregulation.

C. Rules Overseen by the Public Safety and Homeland Security Bureau.

Part 4 Outage Notifications Several commenters request modifications to the Commission's Part 4 outage reporting rules, citing what they claim are unfair burdens related to the timeliness of reporting.[28] Despite these claims, the Commission has an ongoing obligation to measure the resiliency of our national communications network, an obligation which is furthered

[26] Comments of Verizon at 13.
[27] Comments of the United States Telecom Association to the Wireline Competition Bureau at 8-9.

by these reporting requirements. Furthermore, in an IP-based network, incident reports such as these may prove to be an important tool to identify a system-wide failure in something closer to real-time than the Commission would be able to learn from delaying both initial and post-incident final reports.

D. Rules Overseen by the Media Bureau.

It is of note that the Biennial Review applies only to those regulations which impact telecommunications carriers. Accordingly, rules related to broadcasters and cable systems overseen by the Media Bureau are not properly raised in this proceeding, as evidenced by the absence of a Media Bureau docket relating to the Biennial Review.[29]

Cable Operator Public Inspection File Obligations Verizon asks the FCC to revisit its cable system public inspection file rules.[30] As is the case with broadcast public inspection file obligations, these rules serve an important public interest. To the extent the Commission seeks to modernize and expand the public inspection file rules, that would well be worth its own discrete proceeding in furtherance of the public interest.

Prohibition on Advertising Sales by Non-Commercial Broadcasters Christian Worldview Broadcasting Corporation and Broadcasting for the Challenged, Inc. request that the FCC remove the limitation in 47 CFR § 73.621 regarding advertising sales on non-commercial broadcasters' non-primary channels.[31] Regardless of the merits of this request, it is procedurally defective. If a public broadcaster is engaged in broadcasting as defined in the statute, that

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[28] Comments of the United States Telecom Association to the Public Safety and Homeland Security Bureau at 2-4; Comments of CTIA at 11; Comments of Verizon at 14-15.
[29] *See* 47 USC § 161.
[30] Comments of Verizon at 19.
[31] Comments of Christian Worldview Broadcasting Corporation and Broadcasting for the Challenged, Inc. at 4.

broadcasting must be noncommercial in nature lest it violate 47 USC § 399(a).[32] Accordingly, the proper vehicle for this request would be a Petition for Forbearance.

V. Conclusion

In sum, the record reveals that dominant firms in incumbent industries, along with their trade associations, view the Biennial Review not as the simple procedural vehicle for housekeeping that it is, but instead as a vehicle to attempt to lead the Commission down a path toward broad forbearance and competition-destroying deregulation. Consumers would pay the price, and the public interest would in no way be served by the vast majority of requests made by industry interests.

The Commission should see through these attempts to push the FCC away from its statutory duties to promote competition and the public interest while protecting consumers, and disabuse these industry giants of the notion that the Commission is a tool meant to do their bidding at the expense of consumers.

Respectfully Submitted,

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[32] *See* 47 USC § 399(a).