No. 17-73283

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of State Utility Consumer Advocates,

Petitioners,

v.

Federal Communications Commission and the United States of America,

Respondents,

and

USTelecom,

Intervenors.

PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioners submit the following corporate disclosure statements:

The Greenlining Institute is a private, non-profit organization. It has no parent company, and no publicly held company holds more than 10% of its stock.

The Utility Reform Network ("TURN") is a California nonprofit corporation and operates under §501(c)(3) of the Internal Revenue Code. TURN has no parent corporation or stockholders.

National Association of State Utility Consumer Advocates ("NASUCA") is a voluntary association of 54 consumer advocate offices in 43 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates for utility ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or

do not have statewide authority. Some NASUCA member offices advocate in states whose respective state commissions do not have jurisdiction over certain telecommunications issues. NASUCA has no parent company, subsidiary, or affiliates that have issued securities to the public. No publicly traded company owns any equity interest in NASUCA.

Public Knowledge ("PK") is a non-profit organization incorporated in the District of Columbia. PK has no parent corporation, nor is there any publicly-held corporation that owns stock or other interest in PK.

Date: September 26, 2018

Harold Feld

/s/ Harold Feld

Coordinating Attorney for Petitioners
Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of Utility Consumer Advocates

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 47 U.S.C. § 402 and 28 U.S.C. § 2342(1). Petitioners were active participants in the Commission's proceeding filing comments, reply comments, and *ex partes*.[1] Greenlining specifically has standing to file a petition for review in this court, as a nonprofit advocacy organization that represents members in California currently subscribed to copper lines provided by incumbent local exchange carriers. Public Knowledge, TURN, and NASUCA join

[1] *See* Comments of The Greenlining Institute on Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84 (filed June 15, 2017); Comments of The Greenlining Institute on Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84 (filed July 17, 2017); Comments of Public Knowledge, WC Docket No. 17-84 (filed June 15, 2017); Reply Comments of Public Knowledge, WC Docket No. 17-84 (filed July 17, 2017); Comments of NASUCA et al, WC Docket No. 17-84 (filed June 15, 2017); Reply Comments of NASUCA et al, WC Docket No. 17-84 (filed July 17, 2017); Written Ex Parte of Public Knowledge et al, WC Docket No. 17-84 (filed Nov. 9, 2017).

Greenlining in this petition for review. The petitioners request the court hold unlawful and vacate the challenged Commission decisions.

STATUTORY AND REGUATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this Brief.

ISSUES PRESENTED

I. Whether the Federal Communication Commission's sudden departure from its preceding definition of "service" in section 214 of the Communications Act was a violation of the plain meaning of the statute.

II. Whether the Federal Communications Commission's unexplained policy change in its 2017 Order was arbitrary and capricious in violation of the Administrative Procedure Act.

STATEMENT OF THE CASE

In 1934, Congress created the Federal Communications Commission to ensure "to all the People of the United States a Nation-wide wire and radio communications service."[2] In 1943, recognizing the vital importance of consistent, reliable communications service to all Americans, Congress prohibited communications carriers from "discontinu[ing], reduc[ing] or impair[ing] service to a community, or part of a community" without first demonstrating that doing so would serve "the public convenience and necessity."[3] Since then, the Commission has used its authority under Section 214 to protect residential subscribers from losing access to basic phone service, 911 access, and other critical communications services. In the order under review, the Commission arbitrarily eliminated critical safeguards developed over nearly five years of proceedings. Furthermore, the Commission deliberately obscured its intentions by characterizing a key portion of its public notice as a "Request for Comment" (a term undefined in the Commission's regulations).

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[2] Federal Communications Commission Act, Pub. L. 73-416, § 1, 48 Stat. 1064, 1064 (1934).
[3] 47 U.S.C. § 214(a) (2012).

A. The Transition of Our National Phone Network From A Single Legacy Copper Line Network To Interconnected, Internet-Based Networks Is A Complicated Process Involving Years Of FCC Planning and Rulemakings.

Our nation is undergoing a fundamental transition in the architecture of the communications network.[4] The traditional, legacy circuit-switched network[5] is giving way to a combination of wired and wireless technologies that rely on packet-switched networks.[6] As in previous transitions of our national communications network, the FCC has primary responsibility to ensure that this upgrade does not disrupt vital services.[7] In particular, carriers have incentive to abandon unprofitable rural areas where the local telephone company is the "carrier of last resort" ("COLR").[8] These areas often lack reliable mobile coverage, or competition in broadband and/or voice services. As the FCC has repeatedly

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[4] *See generally* Kevin D. Werbach, *No Dial Tone: The End of the Public Switched Telephone Network*, 66 FED. COMM. L. J. 203 (2014) (describing transition and policy concerns).

[5] Legacy telephone system technology over copper wires is referred to in the relevant FCC proceedings as "TDM," which stands for "Time Division Multiplexing." Documents may refer to the "public switched telephone network" ("PSTN"), or "plain old telephone service" ("POTS"). *Id.* at 18.

[6] A "packet-switched" network relies on transmitting small, discrete packets of data digitally. Networks using the Internet Protocol (IP) are packet-switched networks. *Id.*

[7] *See*, *e.g.*, *id*. at 4-5, 15.

[8] *See Petition for Forbearance of the Independent Telephone & Telecommunications Alliance,* Report and Order, 14 FCC Rcd. 11364, 11381, para. 32 (Rel. June 30, 1999) ("*1999 ITTA Forbearance Petition*").

acknowledged, rural telephone service is important to the safety and well-being of rural communities, and its protection is a core responsibility of the FCC.[9] Accordingly, the transition of the telephone network from traditional POTS to an all-IP network requires careful monitoring by the Commission and substantial outreach to the public to ensure a smooth transition for all Americans.[10]

The FCC first began discussion of what it would call the "Tech Transition" during the National Broadband Plan in 2010.[11] In 2011, the FCC's Technical Advisory Council (TAC) recognized that without action by the FCC, small systems (primarily in rural areas) would likely continue to maintain legacy systems rather than incur the cost of conversion.[12] TAC emphasized that the FCC needed to create

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[9] *See*, *e.g.*, *Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd. 16155, 16155, paras. 1-2 (2013) ("*Rural Call Completion Order*").

[10] *See In the Matter of Technology Transitions et al.*, Order, Report and Order and Further Notice of Proposed Rulemaking, Report and Order, Order and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative, 29 FCC Rcd. 1433, 1442, 1485, paras. 25, 157 (Jan. 31, 2014) ("*2014 Tech Transitions Order*").

[11] *See* FED. COMMC'NS COMM'N, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

[12] *See* Memorandum from Tom Wheeler, Chairman, Technical Advisory Council to Chairman Genachowski, Commissioners Copps, McDowell, Cyburn and Baker, Recommendation 7 (Apr. 22, 2011), https://apps.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf ("*2011 TAC Memo")*; *Sun-setting the PSTN*, Memorandum from Critical Legacy Transition

new metrics to ensure robust, reliable service across IP-based networks to meet its statutory obligation to ensure reliable service to all Americans.[13] TAC warned that absent regulation, access to basic voice service for the vulnerable would be put at risk. Accordingly, TAC recommended that the FCC work to develop a regulatory framework to protect "universal communications access for the disabled, the poor, and those in rural areas, Reliable access to emergency services, [and] Consumer protection."[14]

B. 2012 Petitions of US Telecom and AT&T To Waive Section 214 Discontinuance Requirements.

On February 16, 2012, the United States Telecom Association[15] ("USTelecom") filed a petition for forbearance under Section 10 of the Communications Act[16] from multiple Section 214 regulations.[17] USTelecom

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Working Group to Technical Advisory Council (Sept. 27, 2011), https://www.fcc.gov/oet/tac/2011#block-menu-block-4.

[13] *See 2011 TAC Memo* at Recommendation 6.

[14] Technology Advisory Council, Presentation to the Federal Communications Commission, Slide 17 (June 29, 2011), https://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf.

[15] *See Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Order, DA 13-172 (WCB rel. Feb. 7, 2013) ("2013 USTelecom Petition").

[16] *See* 47 U.S.C. § 160(c) (2012).

[17] *See United States Telecom Association Petition for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61 (Fil. Feb. 16, 2012); *Pleading Cycle*

argued extensively that in areas where broadband was already available, Section 214 should not apply to termination of TDM service, because customers would not be losing service but would instead be getting service delivered via a new, more technologically advanced IP network.[18] Even if Section 214 did apply, USTelecom argued, the Commission should forbear from enforcement because competition and provider incentives would ensure that providers offered broadband services quickly to customers. USTelecom explicitly argued that maintaining existing Section 214 obligations imposed burdens that delayed deployment of broadband, and that eliminating these requirements would therefore accelerate deployment of broadband services.[19]

Established for Comments on United States Telecom Association Petition for Forbearance from Certain Telecommunications Regulations, Public Notice, 27 FCC Rcd. 2326 (2012).

[18] *Petition of United States Telecom Association for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Legacy Telecommunications Regulations*, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd. 7627, 7683, para. 126 (Rel. May 17, 2013) ("*2013 USTelecom Forbearance Order*").

[19] 2013 USTelecom Petition at para. 120.

While the USTelecom Petition was pending in November 2012, AT&T submitted a petition to launch a proceeding concerning the TDM-to-IP transition[20] arguing that termination of TDM service for "superior IP-based service" should not require approval under Section 214.[21] AT&T further argued, "the prospect of such piecemeal relief [the requirement to file multiple termination requests under Section 214(a)], rife with delay and regulatory uncertainty, is a deterrent to investment."[22] AT&T urged the FCC to grant USTelecom's forbearance petition and that the FCC authorize pilot projects to "help guide the Commission's nationwide efforts to facilitate the IP transition."[23] It recognized, however, that the proceeding would require detailed information on how notice is provided to customers.[24]

In response to the AT&T Petition, a diverse range of stakeholders opposed forbearance from Section 214 discontinuance.[25] Many argued that because of the

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[20] *See AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition*, GN Docket No. 12-353 (Fil. Nov. 7, 2012), https://ecfsapi.fcc.gov/file/7022086087.pdf ("*2012 AT&T Petition*").
[21] *Id.* at 13.
[22] *Id*.
[23] *Id*. at 20.
[24] *Id*. at 14.
[25] *See*, *e.g.*, New York Public Service Commission Comments, WC Docket No. 12-61 (Fil. Apr. 9, 2012); Reply Comments of the Pennsylvania Public Utility

critical nature of TDM-based services for many communities, the potential for disruption in the absence of oversight, and the incentive of carriers to end service to rural areas without providing an adequate replacement, the Commission needed to *enhance* its Section 214(a) process rather than forbear from it.[26]

The National Telecommunications Cooperative Association (NTCA), a trade association of primarily rural telecommunications cooperative providers, filed its own petition on November 19, 2012,[27] objecting to the entirely deregulatory approach proposed by USTelecom and AT&T, and describing that approach as taking a "'sledgehammer' to the regulatory foundation" that governed wireline voice communication in the United States.[28] NTCA observed that the transition to IP-based services constituted a natural evolution of the legacy network, not the

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Commission, WC Docket No. 12-61 (Fil. Apr. 24, 2012); Comments of AARP, WC Docket No. 12-353, 10 (Fil. Jan. 28, 2013).

[26] *See*, *e.g.*, Public Knowledge Comments, GN Docket No. 12-353, 3-4 (Fil. Jan. 28, 2013); AARP Comments, GN Docket No. 12-353, 12-14 (Fil. Jan. 28, 2013); Rural Broadband Policy Group Comments, GN Docket No. 12-353, 3-4 (Fil. Jan. 28, 2013) ("*Rural Broadband Comments*"); Consumer Federation of America Reply Comments, GN Docket No. 12-353, 3-4 (Fil. Feb. 25, 2013).

[27] *See Petition of the National Telecommunications Cooperative Association for a Rulemaking to Promote and Sustain the Ongoing TDM-to-IP Evolution*, GN Docket No. 12-353 (Fil. Nov. 19, 2012), https://ecfsapi.fcc.gov/file/7022086108.pdf ("*2012 NTCA Petition*").

[28] *Id.* at i.

"death" of the PSTN, and that a successful transition required a balance between retaining and adapting regulation to encourage investment.[29]

On December 12, 2012, the Commission sought comment on both the AT&T Petition and the NCTA Petition.[30]

C. 2013 Establishment of Tech Transition Task Force, US Telecom Petition Rejected.

In 2013, the Commission took multiple steps to develop a record on the technical and regulatory issues surrounding the discontinuance of legacy TDM-based service. First, the FCC established a "Technology Transition Policy Task Force."[31] The Commission then issued a Public Notice to refresh the record in its longstanding proceeding on modifying the rules governing retirement of copper lines pursuant to Section 214(a).[32] The Commission held two-day workshops,[33] and

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[29] *Id*. at 2.
[30] *See Pleading Cycle Established on AT&T and NCTA Petitions*, Public Notice, 27 FCC Rcd. 15766 (Dec. 12, 2012).
[31] *See Ex Parte Meetings with the Technology Transitions Task Force*, GN Docket No. 13-5 (Rel. Jan. 10, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DA-13-20A1_Rcd.pdf.
[32] *See Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission's Copper Retirement Rules*, Public Notice, 28 FCC Rcd. 986 (Rel. Feb. 4, 2013).
[33] *See FCC Provides Panelist Information for the First Technology Transitions Policy Task Force Workshop*, Public Notice, 28 FCC Rcd. 2517 (Mar. 14, 2013); *FCC Announces Second Technology Transitions Policy Task Force Workshop*, Public Notice, GN Docket No. 13-5 (Rel. Sept. 12, 2013),

sought additional comment on AT&T's proposal to initiate "pilot projects" to study the impact of discontinuance of TDM-based service and shift entirely to either wireless or wireline-based IP service.[34] This combination of public comment and proceedings generated thousands of pages of record evidence from hundreds of stakeholders representing state and local governments, incumbent carriers, rural carriers, competitive carriers, wireless and cable providers, equipment vendors, consumer advocates, civil rights advocates, advocates for rural communities, and potentially impacted individuals.

While the Commission was analyzing that record, it addressed the 2012 USTelecom Forbearance Petition.[35] The FCC found that USTelecom had failed to meet its burden for forbearance either from the existing network change notification rules or the Section 214(a) discontinuance rules. With regard to the notification requirements, the Commission found that carrier and Commission public notice jointly served to ensure that all interested parties received notice of impending permanent changes in sufficient time to file an objection, and allowed

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https://apps.fcc.gov/edocs_public/attachmatch/DA-13-1879A1_Rcd.pdf ("*Second Tech Transitions Workshop*").

[34] *See Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, Public Notice, 28 FCC Rcd. 6346 (Rel. May 10, 2013).

[35] *See 2013 USTelecom Forbearance Order* at 7680-83, para. 120-25, 7684-87, paras. 129-34.

the Commission to monitor changes in the telephone network.[36] Additionally, the Commission found that the public notice requirements imposed no additional delay to the network change process.[37]

The Commission explicitly rejected the argument that it should forbear from any existing Section 214(a) obligations. First, the Commission rejected that broadband constituted an "upgrade" of or adequate replacement for traditional telephone service.[38] The Commission found unpersuasive USTelecom's argument that Section 214 obligations imposed any significant cost or delay in deployment of broadband.[39] The Commission further found that even if requirements did impose additional cost or delay, the rules remained necessary to provide adequate protection to consumers.[40]

D. Verizon's Discontinuance on Fire Island and Resulting Public Outcry.

Almost immediately, events demonstrated the wisdom of the Commission's decision to maintain both the Network Change Notification Rules and the Section 214(a) discontinuance rules. In 2012, Hurricane Sandy destroyed significant

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[36] *Id.* at 7681, para. 120.
[37] *Id.*
[38] *Id.* at 7684, para. 129.
[39] *Id*. at 7680, para. 120
[40] *Id*.

portions of Verizon's telephone network and numerous wire centers in the New York City area. Verizon decided to upgrade multiple wire centers from copper to fiber, eliminating interconnection for competitors and leaving competitors' customers without service.[41]

Verizon decided it would not replace the destroyed copper network on New York's Fire Island. Instead, it would offer customers "Voicelink," a new service for their home telephone services. Voicelink attached a residence to the existing Verizon mobile telephone network. Verizon noted in regulatory filings to the New York Public Service Commission ("PSC") that Voicelink was not compatible with many legacy consumer devices. Specifically, Verizon warned that fax machines, medical alert devices and medical monitors, alarm services, and DVRs were largely incompatible with Voicelink.[42] Because population on Fire Island surged from approximately 500 permanent residents to over 50,000 visitors on weekends

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[41] *See* Gerry Smith, *AT&T, Verizon Phase Out Copper Networks, 'A Lifeline' After Sandy*, HUFF. POST (Nov. 9, 2012), https://www.huffingtonpost.com/2012/11/09/att-verizon-sandy_n_2094302.html; Harold Feld, *Verizon: Sandy Victims Should Be Customers, Not Guinea Pigs*, PUBLIC KNOWLEDGE (May 9, 2013), https://www.publicknowledge.org/news-blog/blogs/verizon-sandy-victims-should-be-customers-not.

[42] *Revised Terms of Service for VoiceLink*, Verizon, Case 13-C-0197 (May 20, 2013), https://www.publicknowledge.org/files/VZ%20Voice%20Link%20TOS.pdf (filed in response to the Commission's May 16, 2013 *Order Conditionally Approving Tariff Amendments in Part, Revising in Part, and Directing Further Comments*).

during the summer months, Verizon disclaimed any liability for the failure of Voicelink subscribers to reach 911 reliably in an emergency.[43]

Verizon filed an application with the FCC to discontinue service on Fire Island on June 7, 2013.[44] Residents of Fire Island and municipal public safety authorities filed comments in both the FCC's discontinuance proceeding and the parallel proceeding of the New York PSC. These comments detailed ongoing problems with Verizon's Voicelink service and the disruption caused by the discontinuance of traditional phone service. Businesses complained of the inability to run ATMs and credit card readers with sufficient reliability to conduct business. Rental agents complained that poor voice quality and the inability to receive faxes made renting summer houses almost impossible. Municipal authorities found Voicelink dangerously inadequate for health and safety needs.[45] In the face of

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[43] *Id*. at 5.

[44] *See Letter from Frederick E. Moacdieh, Executive Director – Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC,* Attach., WC Docket No. 13-150 (Fil. June 7, 2013), http://apps.fcc.gov/ecfs/document/view?id=7022424983.

[45] *See* Keith H. Gordon, Assistant Attorney General, New York Office of the Attorney General, *Letter to Jeffery Cohen, Secretary of the New York State Public Service Commission* (May 15, 2013), http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={6BA6CC48-2D06-4B1D-81BA-D1E1F88DE6A3}; Thomas F. Barraga, Suffolk County Legislator, *Letter to Jeffery Cohen, Secretary of the New York State Public Service Commission* (May 16, 2013),

increasingly negative press coverage and public pressure, Verizon withdrew its Section 214(a) application and committed to replacing the destroyed copper network with its FIOS fiber network.[46]

E. 2014 FCC Adopts Principles To Guide Transition in First Declaratory Ruling.

Based on the extensive record created in Dockets 12-353 and 13-5, and the experience of Fire Island, the Commission issued its first Memorandum Opinion and Order regarding the phase-out of legacy TDM services and the transition to an IP-based network.[47] The FCC stressed that, "our mission and statutory responsibility are to ensure that the core statutory values endure as we embrace modernized communications networks."[48] To inform the rules needed to simultaneously encourage the transition while fulfilling the Commission's statutory obligations to minimize disruption to residential, commercial and public

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http://documents.dps.ny.gov/public/Common/ViewDoc.aspx?DocRefId={F1D6CCAD-ADDA-4141-AB5C-8F9F3860A9DA.

[46] Candace Ruud, *Verizon offers alternative to Voice Link on Fire Island*, NEWSDAY LONG ISLAND (Sept. 10, 2013), https://www.newsday.com/news/verizon-offers-alternative-to-voice-link-on-fire-island-1.6046505?firstfree=yes.

[47] *See generally 2014 Tech Transitions Order*.

[48] *Id.* at 1436, para. 4.

safety communications, the Commission solicited applications for trials as requested by AT&T. The Commission concluded:

> Our over-arching purpose in soliciting these service-based experiment proposals is to speed technological advances by preserving the positive attributes of network services that customers have come to expect. These statutory values include "four enduring values that have always informed communications law – public safety, universal service, competition, and consumer protection."[49]

The FCC began its rulemaking in earnest with adoption of several Notices of Proposed Rulemaking and a Declaratory Ruling.[50] The Commission announced the purpose of the rulemaking: "to strengthen our public safety, pro-consumer and pro-competition policies and protections in a manner appropriate for the technology transitions that are underway and for the networks and services that emerge from those transitions."[51] The Commission noted that Verizon's experience on Fire Island informed the Commission's response.[52] The Commission again asserted that the four statutory values identified in the *First 2014 Tech Transition Order* – universal service, consumer protection, promoting competition, and public safety –

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[49] *Id.* at 1441, para. 23 (citations omitted).
[50] *See generally Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd. 14968 (Rel. Nov. 25, 2014) ("*2014 NPRM and Declaratory Ruling*").
[51] *Id.* at 14969, para. 2.
[52] *Id*. at 14970, para. 4.

remained guiding goals as it crafted the appropriate regulatory regime for the IP transition.[53] The Commission noted extensive record evidence that the existing copper loop retirement rules failed to adequately inform consumers, resulting in disruption of service and requests state commission requests to delay transition from copper to fiber.[54]

The Commission also sought comment on what it termed "*de facto*" retirement. Evidence in the record pointed to cases where carriers had allowed existing copper networks to deteriorate to the point where they did not provide consistent, reliable phone service.[55] The Commission sought comment on the extent of this problem, and whether it should create regulations to address it.

Likewise, the Commission sought comment on its existing Section 214(a) discontinuance rules "to ensure that the public interest – encompassing consumer protection, competition, public safety, and other statutory responsibilities – are protected."[56] The Commission sought comment on what would constitute a substitute service adequate to do so.[57]

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[53] *Id.* at 14973-74, para. 7.
[54] *Id.* at 14997-97, para. 60 & n.152.
[55] *Id.* at 14994, para. 53.
[56] *Id.* at 14982-83, para. 23.
[57] *Id.* at 15006, para. 92.

In the Declaratory Ruling, the Commission addressed whether it should consider only services listed in the carrier's tariff when considering whether or not a discontinuance would "impair" service to the community under Section 214(a). Verizon argued that because services such as 911, compatibility with medical monitors and fax machines, and other legacy equipment compatible with traditional TDM networks were not listed in Verizon's tariff for Fire Island, the Commission should not consider whether loss of these services impaired service in violation of Section 214(a).[58] In the Declaratory Ruling, the Commission rejected Verizon's argument. As the Commission observed: "The purpose of a tariff is not to define the full scope of the service provided. Rather, it is to provide 'schedules showing all charges for itself and its connecting carriers … and showing the classifications, practices, and regulations affecting such charges.'"[59] The Commission clarified that any carriers applying for Section 214(a) discontinuance before the Commission adopted more detailed requirements under Section 214(a)'s "functional test."[60] While the Commission did not adopt specific requirements, it rejected the argument in the dissents from Commissioners Ajit Pai and Michael O'Rielly that this policy departed from previous Commission precedent, relying on

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[58] *Id.* at 15015 para. 114 & n.222.
[59] *Id.* at 15015, para. 115 (citing 47 U.S.C. § 203(a) (2012)).
[60] *Id*. at para. 114.

Graphnet, Inc. v. AT&T.[61] The Declaratory Ruling noted that many of the commenters in the Fire Island proceedings had focused on the loss of use of third-party services and equipment such as medical monitoring services, alarm services and fax machines. It concluded that "[e]ven if the carrier's tariffs and other materials did not mention such functionalities, the practical impact of the proposed service change in Fire Island and the New Jersey islands is relevant to the analysis of Verizon's Section 214 discontinuance application."[62] Finding that since the 1968 *Carterfone* decision, the Commission had permitted customers to attach third-party devices to the phone network, the Declaratory Ruling concluded:

> ***"Such an interpretation of "service" under Section 214 is supported by the Commission's approach to common carrier services in other contexts, which has looked beyond the scope of the service as defined by the carrier to other possible uses***."[63]

Commissioners Pai and O'Reilly concurred in the Notice of Proposed Rulemaking, but dissented from the Declaratory Ruling. Commissioner Pai chastised the majority for its "Chicken Little" approach. Commissioner Pai insisted that there was no concrete evidence of any possibility of actual harm as a result of Verizon's VoiceLink experiment, contrary to the problems reported by hundreds of

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[61] *Id.* at 15015-16, para. 115 (internal citations omitted)
[62] *Id*. at 15016, para. 116.
[63] *Id.* at 15017-18, para. 117 (emphasis added).

Fire Island residents and businesses, which he referred to as "hypothetical harms."[64] Further expressing disdain for the statutory responsibility to protect consumers from possible disruption, Commissioner Pai stated despite his worry that the FCC was becoming like "Ducky Lucky, Loosey Goosey, and other characters who join in Chicken Little's hysteria,"[65] he was willing to vote for the item as it asked questions to inform a possible rulemaking. But he dissented from the Declaratory Ruling. Without reference, or even acknowledgement, of the record from Fire Island or other evidence relied upon by the majority, Commissioner Pai characterized Section 214 as "about as close to government central planning as you can get in free market America."[66] Commissioner Pai insisted that adoption of the Functional Test represented a dramatic departure from previous Commission precedent.[67] Commissioner O'Reilly likewise dissented from the "functional test" as too nebulous a standard to apply going forward.[68]

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[64] *Id.* at 15038 (Statement of Commissioner Ajit Pai, Concurring in Part and Dissenting In Part).
[65] *Id.*
[66] *Id.*
[67] *Id.* (citing *Western Union Telegraph Company Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC 2d 293, 295, para. 6 (1979)).
[68] *Id.* at 15041 (Statement of Commissioner Michael O'Rielly, Concurring in Part and Dissenting in Part).

On December 23, 2014, US Telecom filed a timely Petition for Reconsideration.[69] On January 23, 2015, Petitioner Public Knowledge filed an opposition to the Petition for Reconsideration, as did several other parties.[70]

F. In 2015 FCC Affirms Declaratory Ruling and Establishes "Functional Test," Notice Rules and Creates *De Facto* Retirement Test.

Thereafter, the Commission received thousands of pages of evidence in the record from a variety of stakeholders. In addition to Local Exchange Carriers ("LECs") and Competitive Local Exchange Carriers ("CLECs"), the Commission received submissions from providers of alarm service and other third-party services offered over TDM-based telephone lines,[71] enterprise and retail customers,[72] representatives of state, local and tribal governments,[73] and from organizations representing rural customers, physically disabled customers, and

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[69] *See Technology Transitions et al.*, Petition of the United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (Dec. 23, 2014), https://ecfsapi.fcc.gov/file/60001010989.pdf.

[70] *See Technology Transitions et al.*, Opposition of Public Knowledge to Petition for Reconsideration of United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (Jan. 23, 2015), https://ecfsapi.fcc.gov/file/60001016286.pdf.

[71] *See*, *e.g.*, Comments of ADT LLC d/b/a/ ADT Security Services, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (Oct. 26, 2015).

[72] *See*, *e.g.*, Comments of Alcatel-Lucent, GN Docket No. 12-353 (Jan. 28, 2013).

[73] *See*, *e.g.*, Comments of the National Association of State Utility Consumer Advocates, WC Docket No. 12-353, RM-11358 (Mar. 5, 2013).

minority communities.[74] On August 6, 2015, the Commission adopted, on 3-2 party-line vote, an order expanding the copper loop retirement notice rules, defining *de facto* copper loop retirement, and affirming the Functional Test adopted in the 2014 Declaratory Ruling.[75]

Once again, the Commission reaffirmed its focus on protecting the core values it identified in 2014 as the critical concerns identified by Congress. Specifically, the Commission again found that both the copper loop retirement notification rules and the existing Section 214(a) discontinuance process failed to protect consumers, protect competition or adequately provide for public safety.[76] The Commission carefully considered the numerous instances in the record where inadequate notice had created confusion for consumers, leaving consumers vulnerable to pressure from LECs to purchase expensive upgrades in the belief that these were necessary to continue to receive the same level of basic service.[77] The Commission also considered objections from carriers that the new notice rules would impose significant burdens and discourage investment in new services or

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[74] *See*, *e.g.*, Rural Broadband Comments at 3-4.
[75] *Technology Transitions*, Policies and Rules Governing Retirement of Copper Loop Lines by Incumbent Local Exchange Carriers, Report and Order, Order on Reconsideration, Further Notice of Proposed Rulemaking, 30 FCC Rcd. 9372 (2015) ("*2015 Tech Transitions Order*").
[76] *Id.* at 9382, para.13, 65; 9438, para. 120.
[77] *Id.* at 9395, para. 39.

slow down transitions to IP-based services. The Commission rejected these claims as "conclusory allegations" lacking supporting evidence.[78] The Commission also noted that because carriers maintain records of their customers and communicate with their wholesale customers, they did not face significant burdens from either in ascertaining which parties required notice or from providing notice.[79] The Commission also noted that copper loop retirement is a business decision fully within the control of the carrier, generally planned well in advance of the 180-day notice period the Commission adopted.[80]

Finally, the Commission concluded that to the extent the new notice rules imposed burdens on carriers, the need to provide adequate notice to wholesale and retail customers, and to state, local and tribal governments, outweighed the potential burdens to carriers.[81] Based on the record, the Commission found that government purchasers of telecommunications services required substantially more than 90 days to ensure adequate replacement services and provide necessary outreach and education to businesses and residents.[82] The Commission also found that business and residential customers needed to receive notice of copper

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[78] *Id.* at 9386, para. 22.
[79] *Id.* at 9391, para. 30.
[80] *Id.* at 9390, para. 29.
[81] *Id.*
[82] *Id.*

retirement to understand why they might lose existing services or experience disruptions in order to prepare – particularly for network changes impacting 911.[83] Expanding notice of copper loop retirement to include government entities and customers was therefore a necessary step to protect consumers, competition, and public safety.

The *2015 Tech Transitions Order* also adopted rules governing *de facto* service discontinuance. The Commission found numerous credible reports in the record of copper networks left to deteriorate to the point where customers complained they lacked reliable, basic voice service.[84] The Commission made clear that *de facto* discontinuance was not measured by the experience of a single customer, but rather by network deterioration sufficiently widespread impacting a substantial portion of the relevant community.[85]

The *2015 Tech Transitions Order* also affirmed the Declaratory Ruling's adoption of the Functional Test. First, the Commission observed that the experience of Verizon with Fire Island demonstrated a need for the Commission to clarify the scope of Section 214(a) and the importance of third-party services and

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[83] *Id.* at 9395-97, paras. 39-40.
[84] *Id*. at 9421, para. 89.
[85] *Id*. at 9423-24, paras. 93-95.

equipment to customers.[86] The Commission rejected the argument that the "Filed Rate Doctrine" required a finding that Section 214(a) applied solely to those services described in the tariff, given that Section 214(a) applied to non-tariffed services and the Filed Rate Doctrine is limited by its terms to tariffed services – and in any event applies only to the price of services and not their continuance or discontinuance.[87] The Commission also rejected the argument that the Functional Test was too vague a standard. As the Commission explained, carriers themselves advertised the types of equipment and services supported by their networks. Furthermore, examples from Fire Island and elsewhere in the *2014 Tech Transitions Order* record made clear the type of widely available and used services and equipment covered by the Functional Test.[88] The Commission found that the plain language of Section 214(a) directed it to consider the definition of "service" (and resulting "impairment" from discontinuance) from the perspective of the relevant community, rather than allowing the carrier to define the scope of service through its tariff.[89]

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[86] *Id.* at 9471, para. 182.
[87] *Id.* at 9474-75, para.191.
[88] *2014 NPRM and Declaratory Ruling* at 49-50 paras. 116-17.
[89] Id. at 50, para. 117.

Again, Commissioners Pai and O'Reilly dissented. Commissioner Pai expressed his disdain for the majority opinion, stating that: "It appears Chicken Little rules the roost."[90] Dismissing Section 214 as the "mother may I" of telecommunications, Commissioner Pai would have limited its application solely "to guard against loss of service during wartime, such as abandonment of existing telegraph offices or discontinuance of service to military establishments and industries" and "only when a carrier discontinues service to a particular community entirely, such as by the severance ... of physical connection, the dismantling ... of any trunk line, or the closing ... of a telephone exchange."[91] Commissioner Pai predicted that the rules adopted by the Commission would impose significant burdens, slowing the transition. Commissioner Pai also dissented from the Order affirming the Functional Test. Adopting the language of US Telecom's Petition for Reconsideration, Pai repeated that as a result of the Functional Test, "the Commission now requires carriers to seek permission before discontinuing almost every [network] feature no matter how little-used or old-fashioned."[92]

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[90] *Id*. at 71 (Dissenting Statement of Ajit Pai).
[91] *Id.* at 171 (internal quotations omitted).
[92] *Id.* at 174 (internal quotations omitted).

G. The FCC Makes An Abrupt About-Face In 2017.

The Commission concluded its multi-year rulemaking on the Technology Transition in August 2016.[93] On January 20, 2017, President Donald Trump appointed Commissioner Ajit Pai Chairman of the FCC. Chairman Pai soon acted on his previous dissents. Thus in April 2016, the new FCC Republican majority led by Chairman Pai voted to approve a "Notice of Rulemaking, Notice of Inquiry, And Request For Comment."[94] In theory focused on "Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment," the Notice of Proposed Rulemaking (NPRM) also revisited the copper loop retirement notice rules adopted as a "regulatory barrier."[95] Beyond noting the adoption of the rule in 2015, the NPRM made *no reference* to the events and lengthy proceeding that had prompted adoption of the expanded notice rules. Almost as an afterthought, the NPRM also sought comment on eliminating the *de facto*

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[93] *See generally 2016 Tech Transitions Order* (Rules adopted in the 2016 Order are not at issue in this proceeding). *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking, 32 FCC 11128, 11177 & n.425 (Rel. Nov. 29, 2017) ("*FCC 2017 Order*").
[94] *Id*.
[95] *Id.* at 3283-3287, para. 57-65.

Retirement rule as part of revisiting the definition of what constituted copper loop retirement.[96]

Far more puzzling and confusing was the Commission's treatment of the Functional Test. In a section designated a "Request For Comment"[97] – a term not found in the Commission's statute or procedural rules[98] – the Commission sought comment on a wide range of issues relating to the Functional Test, with no mention that it might reverse the Functional Test without further proceedings.

Apparently in response to the obscurity of the notice and the impression cultivated by designating the questions relating to the Functional Test as not even a "Notice of Inquiry" but a mere "Request for Comment," the bulk of the comments submitted focused on questions raised in the Notice of Proposed Rulemaking. It was not until the Commission published its proposed draft Order that it became clear that the Commission intended to use the instant proceeding as a vehicle for reversing its previous Declaratory Ruling.[99] On November 16, the Commission

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[96] *Id*. at 11143-45, paras. 37-39.
[97] *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, 3302, para. 115 (Rel. April 21, 2017).
[98] *See generally* 47 C.F.R. Part 1.
[99] *See Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, DRAFT Report and Order, Declaratory Ruling, and

adopted the Order and Declaratory Ruling reversing five years of deliberative process.[100] This appeal followed.

SUMMARY OF ARGUMENT

Under *Chevron*,[101] a court will defer to an agency's interpretation of an ambiguous term as long as the agency has examined the relevant considerations and has explained its position. Here, the Communications Act unambiguously defines "service" by function. Further, Congress clearly intended to empower the Federal Communications Commission to protect consumers from disruption or loss of service, meaning that a functional definition of "service" is the only permissible interpretation under *Chevron* analysis.

Further Notice of Proposed Rulemaking, FCC-CIRC1711-04, (Oct. 26, 2017), https://apps.fcc.gov/edocs_public/attachmatch/DOC-347451A1.pdf.

[100] *FCC 2017 Order* at 11177, n.425.

[101] *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

ARGUMENT

I. THE FCC'S INTERPRETATION OF "SERVICE" FOR PURPOSES OF SECTION 214 DISCONTINUANCE VIOLATES THE PLAIN MEANING OF THE STATUTE.

In *Michigan v. EPA*, the Supreme Court held that, though *Chevron* deference applied, executive agencies must operate within the bounds of a reasonable interpretation.[102] Although "the court must uphold a decision if the agency has 'examined the relevant considerations and articulated a satisfactory explanation for its action, including a rational connection between the facts found and the choice made'"[103] inconsistency, if unexplained by an agency is also "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice."[104]

Under the two-step process set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, the reviewing court must first determine whether Congress has made its intent plain, or whether an ambiguity exists for agency

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[102] *Michigan v. Envtl. Prot. Agency,* 135 S. Ct. 2699, 2712 (2015).
[103] *Fed. Energy Regulatory Comm'n v. Electric Power Supply Ass'n et al.*, 136 S. Ct. 760, 782 (2016) (internal quotations omitted); *see also California Pub. Utils. Comm'n v. Fed. Energy Regulatory Comm'n*, 879 F.3d 966, 973 (9th Cir. 2018) ("*CPUC v. FERC*").
[104] *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs*., 125 S.Ct. 2688, 2699 (2005).

interpretation.[105] If Congress' intention is clear, the court will not defer to the agency's contrary interpretation and "give effect to the unambiguously expressed intent of Congress."[106] In addition to the plain text of a statute, Courts look to traditional canons of statutory construction to analyze the context of a term. Specifically, Courts must consider the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[107] Analyzing the term's place in the statute is essential to determining step one of *Chevron*'s analysis, as "the meaning of certain words or phrases may only become evident when placed in context."[108]

Equally important, a court will not defer where Congress has foreclosed particular interpretations, or where the interpretation offered by the agency runs contrary to the overall structure and intent of the statute.[109] A finding that a word is

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[105] *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837, 842 (1984).
[106] *Id*. at 843.
[107] *United States Food & Drug Admin. v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000); *see also Util. Air Regulatory Grp. v. United States Envtl. Prot. Agency,* 134 S.Ct. 2427, 2441 (2014); *County of Amador v. United States Dep't of Interior*, 872 F.3d 1012, 1022 (9th Cir. 2017).
[108] *See Brown & Williamson*, 529 U.S. at 132.
[109] *Whitman v. American Trucking Association*, 531 U.S. 457, 481 (2001) ("*American Trucking*"); *MCI Telecommunications Corp. v. American Tel. &*

ambiguous does not open the door to any interpretation the agency wishes. An agency's interpretation may not go "beyond the meaning that the statute can bear."[110] Where an interpretation leads to an absurd result, would nullify substantial protections conferred by Congress, or is contrary to the purpose or structure of the statute, the reviewing court will not defer to the agency despite the presence of ambiguity.[111] Nor may an agency "create" ambiguity through strained interpretations and reliance on obscure or outlier definitions.[112]

Telegraph Co., 512 U.S. 218, 229 (1994) ("*MCI Telecommunications*"); *Adams v. US Forrest Service*, 671 F.3d 1138, 1144 (2012) ("*Adams"*).

[110] *MCI Telecommunications*, 512 U.S. at 229.

[111] *Id.* at 230. *See also American Trucking*, 531 U.S. at 468 (Congress "does not, one might say, hide elephants in mouseholes"); *Turtle Island Restoration Network v. U.S. Dept. of Commerce*, 878 F.3d 725, 733-35 (9th Cir. 2017) ("*Turtle Island"*).

[112] *See MCI Telecommunications*, 512 U.S. at 225-228.

A. The Communications Act Consistently and Unambiguously Defines "Service" By Function, Not Tariff.

Chevron I analysis begins with the language of the statute itself.[113] The Supreme Court held that, unless otherwise specified by Congress, statutory words hold their ordinary meaning.[114] The determination of statutory ambiguity does not solely rest on the physical words in isolation; context is imperative, both "the specific context in which that language is used and the broader context of the statute as a whole."[115] Because the Communications Act does not provide a specific definition for the term "service," the reviewing court begins with the standard dictionary definition to determine the natural meaning.[116] A brief survey of dictionary definitions finds no reference to tariffs. The Oxford Online Dictionary provides one definition of "service" as "a system for supplying a public need such as transport, communications or utilities such as electricity and

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[113] *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412 (2012); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Jackson Transit Auth. v. Local Div. 1285, Amalgamated Transit Union, AFL-CIO-CLC*, 457 U.S. 15, 23 (1982).
[114] *Roberts v. Sea-Land Services, Inc.*, 566 U.S. 93, 100 (2012); *Ingalls Shipbuilding, Inc. v. Director, Office of Workers' Compensation Programs,* 519 U.S. 248, 255 (1997).
[115] *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997).
[116] *Adams*, 671 F.3d at 1144.

water."[117] This certainly supports the Commission's 2015 interpretation that the functional test "is straightforward, consistent with the statutory language, and consistent with Commission precedent."[118] By contrast, absolutely nothing about the plain meaning of "service" in any dictionary relates the definition to "tariff."

Additionally, the Commission's effort to define "service" in Section 214 with reference to the carrier's tariff runs contrary to the general use of the word "service" in the Communications Act. Generally, the word "service" is used in conjunction with a word providing the general definition of the "service" indicated. For example, Section 3 of the Communications Act defines "telecommunications,"[119] and defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public."[120] The Act defines "cable service,"[121] and "mobile service,"[122] with reference to the broad nature of the type of service, not with reference to any tariff. Similarly, Section 303(b) empowers the Commission to "prescribe the nature of the ***service*** to be

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[117] *See* "Service," OxfordDictionaries.com, available at https://en.oxforddictionaries.com/definition/service.
[118] *2015 Tech Transitions Order*, 30 FCC Rcd. at 9476 para. 196.
[119] 47 U.S.C. § 153(50) (2012).
[120] 47 U.S.C. § 153(53) (2012).
[121] 47 U.S.C. § 153(8) (2012).
[122] 47 U.S.C. § 153(33) (2012).

rendered by each class of station."[123] Nowhere does the Act equate "service" with "tariff" (or service contract).

The Commission's new interpretation restricting "service" to what is defined in the tariff is directly at odds with the overall structure of the statute and at odds with the structure of Section 214. Section 214(a) and 214(c) describe three functions the Commission must perform with regard to "service." First, a carrier may not offer a "service" without prior authorization by the Commission. Second, a carrier may not transfer this certificate of service without Commission approval. Finally, a carrier may not "discontinue, reduce, or impair service to a community" without permission from the Commission. Section 214(c) then states that once the certificate is obtained, "the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby."[124]

In other words, the statute describes initial authorization, transfer of a certificate, and discontinuance all with reference to the word "service." The same

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[123] 47 U.S.C. § 303(b) (2012) (emphasis added).
[124] 47 U.S.C. § 214(c) (2012).

language also states that once the authorization is received, the carrier may act "without securing approval other than the certificate." The Commission has routinely treated the word "service" with regard to transfers as broader than the charges and services listed in the tariff.[125] But, contrary to the canons of statutory interpretation, the Commission points to no reason why the same word in the same sentence now has different meanings.

Finally, as the Commission has previously explained, tariffs and certificates of authorization serve different functions, and grant of a Section 214(a) authorization in no way impacts carriers' responsibilities under other provisions – including the tariffing provisions of Section 203.[126] If Congress had intended to limit the scope of "service" covered by Section 214(a) to the tariff, it would have said so explicitly. Instead, Congress employed the word "service," which in the context of the Communications Act clearly defines the broad scope of functionalities a carrier is permitted to offer under the "service rules" and "certificate of service."

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory

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[125] *FCC 2017 Order* at 11180, para. 140.
[126] *See AT&T Corp. v. All American Telephone Company*, Public Notice, 28 FCC Rcd. 3477, 3493-95 (2013).

scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme."[127] The Commission's effort to define "service" as solely defined by "tariff" or "service contract" is contrary to the use of the word "service" not only in the Communications Act as a whole, but in Section 214 itself. This interpretation is clearly "more than the statute will bear"[128] and should be rejected.

B. Limiting "Service" To the Tariff Is Contrary To the Intent of Section 214.

A reviewing court will reject an agency interpretation "inconsistent with a congressional directive . . .in light of the overall statutory and regulatory scheme."[129] As explained by the Commission in 2015, limiting the definition of "service" to the tariff or the carrier's service contract is contrary to the intent of Congress-- that Section 214 is designed to protect communities from disruption or loss of vital services.[130] As one of the first decisions interpreting Section 214

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[127] *Brown and Williamson*, 529 U.S. at 133 (citations and internal quotations omitted).
[128] *MCI Telecommunications*, 512 U.S. at 229.
[129] *Turtle Island*, 878 F.3d at 734-35.
[130] *2015 Tech Transitions Order*, 30 FCC Rcd. at 9474-75 para. 191. *See also IP Enabled Services Order*, 24 FCC Rcd. 6039, 6045-47, paras. 11-14 (Rel. May 13, 2009) (finding it necessary to apply discontinuance rules to VOIP services to fulfill

found, the purpose of Section 214(a) is to ensure that any grant of authority under Section 214(a) to provide, transfer or terminate service "be so construed as to secure for the public the broad aims of the Communications Act," specifically the purpose of Section 1 is to provide service to all Americans.[131] As the Commission has consistently found, Congress' intent in prohibiting carriers from discontinuing service without authorization is expressly to prevent the sort of disruption that occurred on Fire Island post-Sandy when Verizon sought to replace legacy service with Voicelink.[132]

Limiting the definition of service to the contents of a carrier's tariff can include as little as a dial tone,[133] and frustrate Congress' intent in drafting Section 214: comprehensive consumer protection. Under a tariff-only reading of Section 214, a carrier would only be responsible for ensuring that tariffed voice services

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statutory purposes of Section 151 and 214 of the Act); *1999 ITTA Forbearance Petition*, 14 FCC Rcd. at 11380-82, paras. 29-32.

[131] *Western Union Division, Commercial Telegraphers' Union, A.F of L. v. United States*, 87 F. Supp. 324, 336 (D.D.C. 1949).

[132] *2014 NPRM & Declaratory Ruling*, 29 FCC Rcd. at 15016-17 para. 116; *2015 Tech Transitions Order*, 30 FCC Rcd. at 9474-75 para. 191.

[133] *See* The New Jersey Division Of Rate Counsel, National Association Of State Utility Consumer Advocates, And The Utility Reform Network Comments, WC Docket No. 13-150, 16 (Fil. July 29, 2013).

continued working.[134] However, "after Verizon replaced its copper infrastructure with wireless systems on Fire Island, consumers expected their alarm systems and fax machines to continue working, clearly beyond" tariff services.[135] Congress explicitly chose to include language focused on the community perception of service instead of service defined by a carrier. It thus follows that Congress intended to empower the Commission to protect consumers, meaning a broad definition of the term "service" is the only permissible interpretation under *Chevron* analysis.

The *FCC 2017 Order*, echoing Verizon's comments in the record,[136] used Section 214's legislative history to justify its sudden change in definition and regulations.[137] But this history shows precisely the opposite. Section 214 was enacted by Congress in 1943 as an amendment to the previous decade's iteration of the Communications Act.[138] Although initially prompted with regard to concerns about telegraph service, both Congress and the Commission have long understood

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[134] *See Public Knowledge 2017 Reply Comments* at 9; Comments of the National Association of State Utility Consumer Advocates, et al., WC Docket No. 17-84, 30 (Fil. June 15, 2017).
[135] *See Public Knowledge 2017 Reply Comments* at 9; *see also supra* notes 43, 46.
[136] *See* Comments of Verizon, WC Docket No. 17-84, 30-32 (Fil. June 15, 2017). ("Verizon Comments").
[137] *See FCC 2017 Order* at 51, para. 133.
[138] *See* An Act to Amend the Communications Act of 1934, Pub. L. No. 4, § 2, 57 Stat. 5, 11 (1943) (codified at 47 U.S.C. § 214(a)).

this Section to apply broadly to protecting consumers from the disruption of vital telecommunications services.[139] As Verizon concedes, Section 214 was passed into law to make sure that as carriers were switching their equipment, consumers were not cut off from the outside world.[140] This Congressional intent perfectly informs a broad reading of the term "service." Congress meant service to encapsulate the entirety of telecommunications service, not just pieces of the transmission process.

II. THE COMMISSION'S ORDER WAS ARBITRARY AND CAPRICIOUS.

Under the Administrative Procedure Act (APA), this Court reviews the FCC's determination under the deferential *Chevron* standard. Although the standard is deferential, it is not toothless. As this Circuit has explained, a court will reverse agency decisions where it "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be

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[139] *See* S. Rep. No. 78-13 at 1-4 (1943); H.R. Rep. No. 78-69 at 3 (1943); 1943 Act, 57 Stat. 5; H.R. Rep. No. 78-69 at 1; 78 Cong. Rec. 10314 (1934) Remarks of Rep. Rayburn; *see also* Sharon K. Black, TELECOMMUNICATIONS LAW IN THE INTERNET AGE 34 (2001) (discussing Postal Telegraph & Cable System's merger with Western Union Telegraph Co.); *1999 ITTA Forbearance Petition*, 14 FCC Rcd. at 11366; *2014 NPRM and Declaratory Ruling* at 14971, para. 5.

[140] *See* Verizon Comments at 31.

ascribed to a difference in view or the product of agency expertise."[141] Similarly, the Court will reverse if "there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[142]

This includes an obligation for the agency to provide sufficient notice so that members of the public can reasonably anticipate the agency action and file meaningful comments. Nor can these comments be perfunctorily dismissed or ignored. "The opportunity to comment must be a meaningful opportunity."[143] This imposes upon the agency an obligation to engage with the record, and seriously consider the matters raised by the comments. "The FCC ha[s] an obligation to remain 'open-minded' about the issues raised and engage with the substantive responses submitted."[144]

Although the Court must not substitute its own judgment for that of the agency, the Court will reject an agency interpretation that is plainly contrary to

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[141] *Organized Vill. of Kake v. United States Dep't. of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015) (*en banc*) (citations omitted) ("*Village of Kake*").
[142] *CPUC v. FERC*, 879 F.3d at 974.
[143] *Rural Cellular Ass'n v. Fed. Commc'ns Comm'n*, 538 F.3d 1095, 1101 (D.C. Cir. 2009) ("*Rural Cellular v. FCC*").
[144] *Prometheus Radio Project v. Fed. Commc'ns Comm'n*, 652 F.3d 431, 453 (3rd Cir. 2011) ("*Prometheus Radio II*"); *see also Rural Cellular v. FCC*, 538 F.3d at 1101 ("In order to satisfy the requirement, an agency must also remain sufficiently open minded.").

Congressional intent,[145] where the agency has failed to articulate a clear rationale for its decision, or failed to support its decision with adequate record evidence.[146] Finally, "[u]nexplained inconsistency between agency actions is a reason for holding an interpretation to be arbitrary and capricious."[147]

Although an agency may change its mind, it cannot simply ignore its prior decisions and factual findings. In *FCC v. Fox Television Stations*, the Supreme Court held that, "[w]hen an agency changes policy, the requirement that it provide a reasoned explanation for its action demands, at a minimum, that the agency display awareness that it is changing position."[148] And specifically, "an agency may not, for example, depart from a prior policy *sub silentio*."[149] To ignore contrary precedent, or reverse course without explanation or acknowledgement, is the essence of arbitrary decision-making.[150] While "elections have policy consequences… even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."[151] In *Price v.*

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[145] *Turtle Island*, 878 F.3d at 733.
[146] *Id.* at 737.
[147] *Village of Kake*, 795 F.3d at 966 (citations and internal quotations omitted).
[148] *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("*FCC v. Fox*").
[149] *CPUC v. FERC*, 879 F.3d at 977 (citing *FCC v. Fox*, 556 U.S. at 515).
[150] *Village of Kake,* 795 F.3d at 966-67.
[151] *Id.* at 968.

Stevedoring Services of America, Inc., and confirmed again this year in *California Public Utilities Commission v. Federal Energy Regulatory Commission*, this Court held that "[i]ndicia of inadequate consideration include ... signs that the agency's interpretation amounts to no more than a convenient litigating position; or an appearance that the agency's interpretation is no more than a post hoc rationalization advanced by an agency seeking to defend past agency action against attack."[152]

As explained below, the *2017 Order* under consideration marked an abrupt, unexplained reversal of policy from the *2015 Tech Transitions Order*, and from nearly five years of detailed agency deliberation on a function central to its Congressional mandate -- ensuring that upgrades to our national communications network proceed in a manner that protects consumers, competition, and public safety. The multiple process irregularities, inconsistencies with previous decisions, and failure to seriously address the voluminous factual record that prompted the Commission to adopt the *2015 Tech Transitions Order* reflect a determination to arrive at a pre-ordained conclusion rather than fair and considered judgment by the agency, and must be reversed.

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[152] *Price v. Stevedoring Servs. of America, Inc.*, 697 F.3d 820, 829–30, n.4 (9th Cir. 2012).

A. The FCC Reversed Its Prior Determination To Prioritize Consumer Protection, Competition and Public Safety During the TDM Transmission, Without Acknowledgement or Explanation.

The Commission failed to explain why it reversed its longstanding determination that Congress intended to prioritize protecting consumers from loss of vital services rather than prioritize broadband deployment at all costs. Beginning with the rejection of USTelecom's 2012 Forbearance in 2013, the FCC explicitly rejected prioritizing deployment of broadband over protecting consumers from loss of service.[153] The Commission emphasized the importance of discontinuance rules in protecting consumers from disruption and losing access to 911 service.[154] Throughout the January *2014 Tech Transition Order* rulemaking, the Commission explicitly and repeatedly prioritized consumer protection, competition and public safety as the paramount goals governing its copper retirement rules and its interpretation of the 214(a) Functional Test.[155] Additionally, on a factual record even more extensive than the one before the Commission today, the Commission repeatedly found that the extended notice requirements and application of the

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[153] *See 2013 USTelecom Forbearance Order* at 7685.
[154] *See IP Enabled Services Order*, 24 FCC Rcd. 6039, 6045-47, paras. 11-14 (Rel. May 13, 2009) (finding it necessary to apply discontinuance rules to VOIP services to fulfill statutory purposes of Section 151 and 214 of the Act); *1999 ITTA Forbearance Petition*, 14 FCC Rcd. at 11380-82, paras. 29-32.
[155] *2014 NPRM and Declaratory Ruling* at 14969, para. 1

Functional Test were critical to protecting consumers and competitors.[156] The Commission found that these requirements would impose only a minimal burden on broadband deployment, and that even if the requirements did impose a non-negligible burden, the paramount goals of protecting consumers, competition, and public safety outweighed the potential to delay or disincentive to broadband deployment.[157]

Additionally, the *2017 Order* generally ignores the extensive findings made in the 2014 and 2015 Orders. Instead, the *2017 Order* focuses solely on the record collected in 2017. It makes no mention of the Commission's experience with Fire Island.[158] Instead, the *2017 Order* acts as if the disastrous implementation of Voicelink not only never happened, but never ***could*** happen.

The Commission is not free to disregard its previous factual findings. "Unexplained, conflicting findings . . . violate the APA."[159] Even if one could somehow reconcile the findings in the 2014 and 2015 Orders with the findings in the 2017 Order, the Commission nowhere explains why it suddenly altered its

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[156] *Id*. at 14970 at para.4; 14979, para. 19.
[157] *Id*. at 14981, para. 21.
[158] *Id.* at 14970, para. 4; *2015 Tech Transitions Order* at 9383, para. 14.
[159] *Village of Kake* 795 F.3d at 969; *see also Rural Call Completion Order* at 16169-71, paras. 29-32 (noting that central mission of FCC is to ensure access to basic communications services and 911 access for all Americans).

priorities to emphasize broadband deployment over protecting consumers and competitors. Likewise, the Commission provided no explanation why it now found credible the statements by carriers that it previously characterized as "conclusory" and unpersuasive.[160]

Petitioners do not argue that the FCC could not have decided to alter its priorities, or to reevaluate and reconsider similar evidence. "But *State Farm* teaches that even when reversing a policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation."[161] Here, the agency did not merely reverse its recent rulemaking without explanation; it failed to even consider its long-standing contrary precedents prioritizing consumer protection over deployment of new services. This is exactly the kind of "departure *sub silentio*" and reliance upon "factual findings that contradict those which underlay its prior policy" that "must include a reasoned explanation" for the abrupt about-face.[162] But the Commission has offered none.

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[160] *2015 Tech Transitions Order* at 9387, para. 22.
[161] *Village of Kake*, 795 F.3d at 969.
[162] *FCC v. Fox*, 556 U.S. at 515.

B. Specific Errors With Regard To Reversal of the Functional Test.

The Commission's analysis of the Functional Test is rife with errors and contradictions, inexplicably reverses its previous legal analysis, makes numerous unacknowledged departures from the Commission's precedent, and – when all else fails – simply ignores arguments it finds inconvenient. Most telling of all, the Commission deliberately sought to obscure its intent to reverse the Functional Test by providing deficient notice.

i. Notice and Procedural Defects

As noted above, "an agency's interpretation is not owed deference if there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question."[163] Additionally, an agency is required to present its proposals to the public in a manner designed to foster "an exchange of views, information and criticism between interested persons and the

[163] *CPUC v. FERC*, 879 F.3d at 985.

agency."[164] Finally, an agency is bound to follow its own rules and procedures, and failure to do so renders a decision arbitrary and capricious.[165]

Here, the Commission went out of its way to obscure that it would use the record developed in the instant proceeding to reverse the Functional Test rather than permit further opportunity for comment. The Commission designated this proceeding, "Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment." This is hardly a title that would suggest to interested stakeholders that the Commission intended to revisit a cornerstone of its Technology Transitions proceedings. Additionally, the Commission separated the Functional Test inquiry from the actual NPRM – which contained all other provisions under consideration from the same proceedings. Nor did the Commission include the questions as to the Functional Test in the Notice of Inquiry. Instead, the Commission invented an entirely undefined in Part 1 of the Commission's Rules on procedures – "Request For Comment." The language of

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[164] *Home Box Office, Inc. v. Fed. Commc'ns Comm'n*, 567 F.2d 9, 35 (D.C. Cir. 1977).

[165] *See Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43–57 (1983) (interpreting the arbitrary-and-capricious standard of review under the APA and applying it to the agency's decision to rescind previously adopted regulatory requirements).

the "Request for Comment" likewise strongly implied that the Commission was gathering information for a subsequent rulemaking.[166]

To accept this as reasonable notice designed to engender a genuine exchange of information and criticism from all interested parties strains credulity. Had the Commission genuinely wished to alert the public to its intentions, it could simply have included its questions with regard to the Functional Test in the NPRM alongside the other questions relevant to the *2015 Technology Transitions Order*. Judging from the impact on the record, the Commission's effort to obscure its intentions was largely successful. Although several parties did file comments, the volume of comments focused on this issue were dramatically reduced from the 2014 and 2015 proceedings.[167]

Not only did the Commission use a public notice vehicle far outside of the scope of its usual rulemaking process, but it also violated its own procedural rules by proceeding with a Declaratory Ruling. This ruling, purportedly adopted to "resolve controversy," would have been completely unnecessary had the

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[166] *See FCC 2017 Order* at 3302, para. 115 ("We seek comment on whether we should revisit, and *ultimately* the proper scope of, the Commission's 2014 Declaratory Ruling and subsequent 2015 Order on Reconsideration.") (emphasis added).

[167] *See Prometheus Radio II*, 652 F.3d at 452 (comparison of comments in records used to measure adequacy of notice).

Commission given explicit public notice of its intent in the NPRM. Under the Commission's procedural rules, the Commission may issue a declaratory ruling to "terminat[e] controversy and remov[e] uncertainty."[168] In the 2017 Order, the Commission declared that the Functional Test was "controversial" i.e., US Telecom, Chairman Pai and Commissioner O'Reilly did not like it, and that reversing the 2014 Declaratory Ruling would thus "remove controversy." Although an agency is entitled to deference with regard to its own procedures,[169] this deference is likewise subject to the requirements of reasoned decision-making. To accept this definition of "terminating a controversy and removing uncertainty" is to remove all meaningful definition – to the detriment of the Commission's usual processes for rulemaking and reconsideration.[170]

The Commission's recourse to such unusual procedures violated the notice requirements of the APA and the Commission's own procedures governing issuance of declaratory rulings. Accordingly, the Court should reverse the Commission's Declaratory Ruling.

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[168] 47 C.F.R. § 1.2.
[169] *FCC 2017 Order* at 11176-77, para. 129, 11187, para. 155.
[170] *See generally* 47 C.F.R. Chapter 1 Part 1 (describing Commission proceedings).

ii. The Declaratory Ruling Is Arbitrary.

First, the Commission fails to explain how Section 214(a) must be defined by its tariff when in the next breath the Commission explains that absent a tariff, the service agreement will do. If the statute mandates that "service" means "tariff," the Commission must explain how it can also mean something potentially more expansive than a tariff, negotiated by the parties absent any government oversight. This is precisely the kind of "unexplained inconsistency" which defines arbitrary and capricious decision-making.[171]

Furthermore, the Commission fails to provide a rational explanation for why the word "service" in both Section 214(a) and 214(c) should mean different things with regard to mergers and discontinuances. In the context of mergers and other transfers of assets, the Commission interpreted the word "service" as meaning the certificate of public service and convenience required under Section 214(a).[172] But with regard to discontinuance, the Commission – for the first time – defined

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[171] *Village of Kake* 795 F.3d at 966 (citing *State Farm*, 463 U.S. at 43).

[172] *See, e.g.*, *Applications for the Transfer of Control of Licenses and Authorizations from AT&T Wireless Services, Inc. and Its Subsidiaries to Cingular Wireless Corporation*, Order Adopting Protective Order, WT Docket No. 04-70 (Rel. Mar. 17, 2004); *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 09-95 (Rel. May 21, 2010).

"service" as a narrower definition of tariff (or, in the absence of tariff, a service contract).

In response, the Commission merely stated that because it is a "different provision" of Section 214, reference to merger precedent "is not dispositive." However, as Public Knowledge argued to the Commission, these are not separate provisions in the statute, but words in the same *sentence*.[173] While the Commission could arguably find reason to distinguish between the use of the exact same word in the same sentence, it cannot simply respond that mergers and discontinuances are different. It must explain *why* they are different, and *why* that difference produces different meanings for the exact same word.

Further, interpreting the term service to include only a carrier's tariff contradicts and departs from over a decade of Commission precedent. Until now, the Commission has never, in the context of discontinuance and copper retirement, defined service as what is detailed within a tariff or contract.[174] There also is not "anything in Section 214 or the Commission's rules establishing such limited parameters."[175] Logically, tariffs cannot define the scope of a service under Section

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[173] *FCC 2017 Order* at 11180, para. 140.
[174] *See 2015 Tech Transitions Orders* at 9473-74, para. 189.
[175] *Id*.

214, as there "are circumstances in which the Commission has forborne from tariffing requirements but which Section 214 requirements remain intact."[176]

Finally, the Commission fails to explain why it reversed course and found persuasive the exact same industry arguments it previously rejected. For example, the Commission had previously found persuasive that the long history of applying Section 214(a) discontinuance requirements to non-tariffed services demonstrated that Section 214(a) was not limited to the tariff – this in turn made recourse to the "filed tariff" doctrine inapposite.[177] Without explanation, the Commission now finds the arguments it had previously rejected persuasive, while rejecting the previously convincing arguments. Again, an agency is entitled to change course in response to a change in administration. This is what makes administrative agencies accountable in our democratic system of government. But the APA provides a necessary constraint against whiplash that would undermine the concept of reasoned decision-making and the need for some stability in the Rule of Law.[178]

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[176] *Id*. ("For example, when AT&T, Embarq, and Frontier were granted forbearance from tariffing requirements, the Commission stated, in no uncertain terms, that the services at issue remained subject to Section 214.").
[177] *2015 Tech Transitions Order* at 9474-75, para. 191.
[178] *See Village of Kake*, 795 F.3d at 970-71 (Christen, J., Thomas, Chief J., concurring); *see also FCC v. Fox*, 556 U.S. at 537 (Kennedy, J., concurring).

C. Specific Errors With Regard To the Elimination of *De Facto* Retirement.

As the Commission stated in 1999, carriers have the incentive to terminate service in rural areas where the cost of repairing networks or replacing them exceeds projected revenue from local customers.[179] As the Commission repeatedly emphasized in its Tech Transition proceedings, one of the core purposes of the Communications Act generally, and the Section 214 discontinuance process in particular, is to ensure that Americans do not lose access to 911 and other telephone services where carriers have economic incentive to terminate.

In the *2015 Tech Transitions Order*, the Commission responded to numerous instances in the record where carriers simply decided not to maintain their networks, depriving residents of vital basic telephone services-- including access to 911. Calling this behavior "*de facto* retirement," the *2015 Tech Transitions Order* required that where a carrier has allowed its network to degenerate, it must file a Section 214(a) discontinuance or repair its existing network. As the Commission explained, this would force the carrier either to demonstrate the availability of alternatives, provide a suitable alternative, or repair

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[179] *1999 ITTA Forbearance Petition,* 14 FCC Rcd. at 11381, para. 32.

the existing network.[180] The existence of a *de facto* retirement complaint process provided customers of effectively abandoned service with a clear mechanism to force carriers to repair their networks or provide an alternative. In response to the 2017 NPRM, the Commission received further evidence that carriers continued to engage in *de facto* retirement.[181] Communications Workers of America provided evidence that their filing of a *de facto* retirement complaint with the Commission had facilitated securing a settlement with Verizon to repair certain dangerously degraded copper lines.[182]

The Commission's reasoning for eliminating the *de facto* retirement rule not only ignored previous findings and existing record, but also "is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[183] First, the FCC cast doubt that carriers would ever allow their networks to degrade in such a fashion, observing that "[i]f an incumbent LEC has no plans to deploy fiber or other next-generation technology, it must maintain its

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[180] *See 2015 Tech Transitions Order* at 9421-22, para. 90.
[181] *See* Written Ex Parte of Public Knowledge et al., WC Docket No. 17-84 (Fil. Nov. 9, 2017).
[182] *See* Comments of Communications Workers of America, WC Docket No. 17-84, 17, n.38 (Fil. June 15, 2017).
[183] *Village of Kake*, 795 F.3d at 966.

copper network, or it will have fewer customers."[184] This is true, but as the Commission itself acknowledged since 1999, that is exactly the economically rational thing for carriers to do – stop serving these customers because the cost of repair exceeds the anticipated revenue. Further, as the Commission found in 2015, carriers ***did*** abandon their wireline facilities in precisely the manner the 2017 Order found that carriers would not do. The Commission also failed to address the evidence in the record that carriers continued to allow their networks to degrade absent regulatory action.[185]

Additionally, the 2017 Order appears misconstrues the point of expanding the copper retirement definition to include *de facto* retirement. To justify repealing the *de facto* rule (providing no additional assistance to customers suffering from systems allowed to decay,) the Commission found copper retirement notice was merely "[a] mandatory notice requirement with no accompanying remedy," which provided customers "little solace."[186] But as the Commission made plain in 2015, treating *de facto* retirement as actual copper retirement required not merely notice of retirement but concomitant filing of a Section 214(a) discontinuance, and was to provide clarity that incumbents could not evade Section 214(a) by simply refusing

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[184] FCC 2017 Order at 111143, para. 30.
[185] *See generally Id*.
[186] *FCC 2017 Order* at 11144, para. 39.

to maintain their lines.[187] As the Commission explained: "[W]e adopt this change to ensure incumbent LECs are aware that intentional neglect of copper facilities triggers [this notification responsibility]."[188] The Commission advises that customers may still seek relief under Section 214(a), but the Commission provides no explanation on how to do so now that failure to maintain the network no longer qualifies as copper retirement. The Commission's reasoning is therefore not only unresponsive to the comments in the record, it has "entirely failed to consider an important aspect of the problem."[189]

The Commission's decision to eliminate the *de facto* retirement rule fails the arbitrary and capricious standard on every front. It departs without acknowledgement from past precedent and previous factual findings. Its prediction as to carrier incentives is directly contradicted by the factual record and runs counter to the entire reason Congress passed the statute in the first place – carriers will often have economic incentives to abandon rural markets and the Commission must therefore take action to reverse this market failure and ensure reliable service

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[187] *2015 Tech Transitions Order*, 30 FCC Rcd. at 9421 para. 90 ("we adopt this change"); *2014 NPRM and Declaratory Ruling* 29 FCC Rcd. at 14979 para. 19 & 14995 para. 53.
[188] *Id.*
[189] *Turtle Island*, 878 F.3d at 732.

for consumers and public safety. Consequently, the Commission has failed to address the very problem Congress directed it to solve.

D. The FCC Failed To Explain Why The Goal of Encouraging Broadband Deployment, Previously Considered Secondary To Protecting Consumers, Became the Paramount Goal of the Commission.

In the *Report and Order*, the FCC explicitly reversed requiring direct notice to retail customers of impending transitions away from copper, despite only having adopted those requirements in 2015.[190] This complete reversal of regulations in such a short time is arbitrary and capricious in violation of Section 706(2) of the APA.

Adequate notice, as required by Section 251(c)(5),[191] is a foundation principle of due process. The Commission's reversal of its policy of protecting consumers by ensuring adequate notice creates unacceptable risks for consumers. Here, it is important that the notice period provide opportunity for affected consumers to learn of and evaluate the impact of proposed changes and communicate their concerns to the Commission. Adequate notice of copper retirement is the sole due process protection for ordinary consumers to rely on in

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[190] *See FCC 2017 Order* at 111147, para. 45.
[191] 47 U.S.C. §251(c)(5).

what is otherwise an inaccessible and arcane process to them. Without adequate notice, the service changes will occur before the consumer has an adequate opportunity to react.

In adopting the notice requirements in 2015, the FCC explained that it modified its network change disclosure rules "to require direct notice to retail customers of planned copper retirements" and "consistent with the public interest, *including our core value of consumer protection*, and with Section 251(c)(5)'s requirement of reasonable public notice network changes."[192] Section 251(c)(5) imposes a statutory duty on ILECs to provide "reasonable public notice" of changes in networks.[193] Clearly, the retirements of copper networks – whether or not they are replaced by fiber or other facilities – are such changes.

The process that led to the implementation of the current rules in the *2015 Tech Transition Order* evolved over several years. In contrast, only a year and a half after enacting those rules, and after only perfunctory public comment, the FCC changed not only the rules, but the underlying policy goal the rules were meant to encourage. Specifically, in the *Report and Order*, the FCC stated, "To facilitate the rapid transition to next-generation services, we eliminate unnecessary copper

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[192] *2015 Tech Transitions Order* at 9395, para. 39 (emphasis added).
[193] *See* 47 U.S.C. § 251(c)(5) (2012).

retirement notice requirements."[194] The FCC's core value of consumer protection was not merely moved down the priority list, but completely eliminated from it.

The elimination of notice provisions adopted in 2015 must be seen as a complete policy reversal of the FCC's stated core principle of consumer protection and not merely as a change in strategy for enforcing the underlying policy. In the *Report and Order*, the FCC replaced the core value of consumer protection with a core value of broadband deployment without acknowledging, or explaining, its justification for abandoning the goal of consumer protection. The Supreme Court explained that "the requirement that an agency provide a reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position."[195] Because the FCC failed to demonstrate awareness that it was changing its primary goal from that of consumer protection to that of broadband deployment, the decision is arbitrary and capricious and violates Section 706(2) of the APA.

The Commission's explanation that previous rules were burdensome is insufficient. The Commission's rules for copper retirement had only been in effect for a year and a half when the NPRM was issued; the ink on the rules for IP

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[194] *See FCC 2017 Order* at 11147, para. 44.
[195] *FCC v. Fox*, 556 U.S. 502 at 515 (emphasis in original).

transition under Section 214 was barely dry.[196] Given this short time and the minimal activity that has occurred pursuant to these rules, even had the Commission clearly stated it intended to change policy by prioritizing deployment over consumer protection, there was insufficient experience to support a complete reversal in policy underlying tech transition rules.

E. Again, The FCC Failed To Explain Why Evidence Previously Considered Inadequate Now Became Sufficient.

As previously noted, the *2015 Tech Transitions Order* was the result of numerous years of study, commentary, and deliberation. The 2015 Order was the culmination of efforts that began in 2012 with the establishment of the Technology Transitions Policy Task Force.[197] That Task Force's work led to public workshops,[198] field trials,[199] multiple rounds of comment and feedback from

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[196] These rules were published in the Federal Register on September 12, 2016. *See* 81 Fed. Reg. 62632 (Sept. 12, 2016). Some rules were effective October 12, 2016, while others became effective only after review by the Office of Management and Budget.

[197] *See Ex Parte Meetings with the Technology Transitions Policy Task Force*, Public Notice, GN Docket No. 13-5 (Rel. Jan. 10, 2013).

[198] *See*, *e.g.*, *FCC Announces First Technology Transitions Policy Task Force Workshop,* Public Notice, GN Docket No. 13-5 (Rel. Feb. 12, 2013); *Second Tech Transitions Workshop*.

[199] *See*, *e.g.*, *Commission Seeks Comment on AT&T Proposal for Service-Based Technology Transitions Experiments,* Public Notice, GN Docket Nos. 12-353, 13-5 (Rel. Feb. 28, 2014); *Commission Seeks Comment on Proposal of Iowa Network*

stakeholders, and clear Commission actions including the 2014 Declaratory Ruling.[200]

Though the Commission reopened the same issues in a new proceeding, it cannot simply ignore the factual records or Commission findings made in earlier proceedings. When the Commission proposes to set aside findings of previous proceedings, it has an obligation to consider the evidentiary record that was established in those proceedings and articulate its rationale in choosing a different path. As the Supreme Court has noted, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[201] No such explanation has been offered in the current proceeding.

To the contrary, in the 2017 *Report and Order*, the FCC acted hastily and failed to consider the previous evidence. Unlike the earlier proceedings, there was no task force, no trials, no workshops, and only perfunctory rounds of public comment. The FCC's reversal of its 2015 implementation of notice rules occurred *despite* the FCC's previous findings, and without explanation as to why those findings were no longer valid.

Services, Inc., for Service-Based Technology Transitions Experiment, Public Notice, GN Docket Nos. 12-353, 13-5 (Rel. Feb. 21, 2014).

[200] *See generally 2014 NPRM and Declaratory Ruling.*

[201] *FCC v. Fox*, 556 U.S. 502 at 516.

F. The FCC Failed To Address The Reliance By States On The Settled Notice Rules.

Although the general standard under *Chevron* is deferential, the Supreme Court has recognized that when a rule engenders substantial reliance, an agency faces a more significant burden when abruptly changing course.[202] Since 1999, the Commission has expressly recognized the important role of the states in protecting local consumers from disruption.[203] In 2015, recognizing the important role states play in education and outreach and in averting disruption of service, the Commission found that "[i]n light of the accelerated pace of copper retirements and the allegations in the record of this and other proceedings, ... the states should be fully informed of copper retirements occurring within their respective borders so that they can plan for necessary consumer outreach and education."[204]

In response to the 2017 NOI/RFC, multiple commenters reiterated that the states – at the urging of carriers -- had expressly relied on ongoing federal protections and notice requirements. In particular, the Attorney General of Illinois filed comments observing that only a few months prior, AT&T had persuaded the state legislature to override the governor's veto to significantly relax its copper

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[202] *Id.* at 515.
[203] *See 1999 ITTA Forbearance Petition* at 11380-81, para. 31.
[204] *2015 Tech Transitions Order* at 9411-12, para. 70.

retirement and discontinuance regulations on the basis of the FCC's 2015 and 2016 rules.[205]

Nevertheless, in the 2017 *Report and Order*, the FCC again reversed itself and eliminated that requirement. The FCC explained this reversal by stating that "in some cases such entities lack regulatory authority over or take a deregulatory approach to network changes."[206] The FCC failed to address the explicit arguments in the record that the reason for states' lack of regulation was the consistent reassurance from both the FCC and the carriers themselves that the FCC would continue to ensure adequate notice.[207]

The FCC failed to address the reasons given in the 2015 Order for adopting the enhanced notice requirement – that failure to provide states with adequate notice would significantly undermine the consumer education and outreach efforts needed to secure a smooth transition. This failure to address a significant argument raised in the record would, on its own, constitute grounds for reversal.[208] Here,

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[205] *See* Robert Channick, *Illinois OKs end of landlines, but FCC approval required*, CHICAGO TRIBUNE (Jul. 6, 2017, 6:55 AM), http://www.chicagotribune.com/business/ct-att-landline-end-illinois-0706-biz-20170705-story.html.
[206] *FCC 2017 Order* at 11152, para. 57.
[207] *See Public Knowledge 2017 Reply Comments* at 7.
[208] *See Village of Kake* 795 F.3d at 978 (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 42–43 (1983) ("Normally, an

where previous Commission policy and rules were relied upon by the states as a reason to relax or eliminate their own safeguards, this failure is inexcusable. As the Supreme Court explained in *Fox Television*, an agency must "provide a more detailed justification than what would suffice for a new policy created on a blank slate...when its prior policy has engendered serious reliance interests that must be taken into account."[209]

The Commission not only failed to "provide a more detailed justification" for its reversal based on this reliance, it used the state's deregulation in reliance of the Commission's rules as affirmative evidence that the rules were not necessary. It did not address the record evidence that states relied on the FCC's notice rules as the reason for deregulation, failing the requirement to address the reliance arguments raised in the record. Nor did the 2017 Order explain why the concerns that prompted the Commission to adopt the 2015 notice no longer applied.

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agency rule would be arbitrary and capricious if the agency has … entirely failed to consider an important aspect of the problem.").

[209] *FCC v. Fox*, 556 U.S. 502 at 515.

G. The Commission Did Not Approach With An Open Mind Or Meaningfully Engage With the Record.

As this Court has stressed, "an agency's interpretation is not owed deference if there is reason to suspect that the interpretation does not reflect the agency's fair and considered judgment."[210] Taken together, it is clear that Chairman Pai and Commissioner O'Rielly began this proceeding determined to make their minority dissents from the 2014 and 2015 Commission Orders the majority opinion now that they controlled the Commission.[211] Chairman Pai's disdainful dissent from the Declaratory Ruling, characterizing Section 214(a) as "central planning" and a "mother may I" provision with no purpose but to impose costly delays on carriers, mocking referral to his colleagues as "Chicken Little," "Lucky Ducky," and "Loosey Goosey," and his consistent refusal to acknowledge evidence from five years of rulemaking prior to 2017. The irregular notice designed to minimize comment on what had been a high-profile and active docket, especially the efforts to obscure the intent to reverse the Functional Test immediately following its "Request for Comment," likewise indicate that only one outcome was possible when the Chairman initiated this proceeding -- his. The failure of the 2017 Order to

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[210] *CPUC v. FERC*, 879 F.3d at 975 (internal quotes and citations omitted).
[211] When the Commission adopted the 2017 NPRM, the Commission consisted of three members: Chairman Pai, Commissioner O'Rielly and Democratic Commissioner Clyburn.

discuss the factual record or policy concerns that led to the adoption of the Functional Test, the expanded notice requirements, and the *de facto* retirement rule demonstrate that the FCC failed "to remain 'open-minded' about the issues raised and engage with the substantive responses submitted."[212] Taken together, these actions constitute clear "indicia of inadequate consideration,"[213] rendering the Commission's determination arbitrary.

CONCLUSION

Until 2017, the FCC regarded the transition of our nation's phone system as a massive undertaking offering enormous promise, but, one which also required reasonable oversight to prevent disruption of vital communications. For five years, the Commission embraced its Congressional mandate to strike a balance between encouraging broadband deployment and investment in new communications technologies with protecting the core statutory values of consumer protection, competition, and public safety. In 2017, the FCC abruptly shifted course, in

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[212] *Prometheus Radio II*, 652 F.3d at 453; *see also Rural Cellular v. FCC*, 538 F.3d at 1101 ("The opportunity to comment must be a meaningful opportunity . . . in order to satisfy the requirement, an agency must also remain sufficiently open minded.").

[213] *CPUC v. FERC,* 879 F.3d at 975.

violation of both the express terms and goals of the Communications Act and in violation of the requirements of the APA.

"When a regulation is not promulgated in compliance with the APA, the regulation is invalid."[214] The Court should therefore vacate the Commission's 2017 Order and restore the Commission's 2015 Order with regard to the Functional Test, notice requirements, and *de facto retirement*.

Date: September 26, 2018

Harold Feld
/s/ Harold Feld
Attorneys Petitioners Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of State Utility Consumer Advocates

[214] *Village of Kake*, 795 F.3d at 970.

STATEMENT OF RELATED CASES

There are no related cases.

Date: September 26, 2018

Harold Feld

/s/ Harold Feld
Attorneys for Petitioners Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of State Utility Consumer Advocates

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,858 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 147.7.3 Times New Roman 14-point font.

Date: September 26, 2018

Harold Feld

/s/ Harold Feld
Attorneys for Petitioners Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of State Utility Consumer Advocates

CERTIFICATE OF SERVICE

I hereby certify that on September 26, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: September 26, 2018

Harold Feld

/s/ Harold Feld
Attorneys for Petitioners Greenlining Institute, Public Knowledge, The Utility Reform Network, and National Association of State Utility Consumer Advocates

ADDENDUM

Statutes

Federal Communications Commission Act, Pub. L. 73-416, § 1, 48 Stat. 1064, 1064 (1934).

For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

47 U.S.C. § 153(50) (2012).

(50) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

47 U.S.C. § 153(53) (2012).

(52) Telecommunications equipment

The term "telecommunications equipment" means equipment, other than customer premises equipment, used by a carrier to provide telecommunications services, and includes software integral to such equipment (including upgrades).

47 U.S.C. § 153(8) (2012).

(8) Cable service

The term "cable service" has the meaning given such term in section 522 of this title.

47 U.S.C. § 153(33) (2012).

(33) Mobile service

The term "mobile service" means a radio communication service carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves, and includes (A) both one-way and two-way radio communication services, (B) a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications by eligible users over designated areas of operation, and (C) any service for which a license is required in a personal communications service established pursuant to the proceeding entitled "Amendment to the Commission's Rules to Establish New Personal Communications Services" (GEN Docket No. 90-314; ET Docket No. 92-100), or any successor proceeding.

47 U.S.C. § 160(c) (2012).

§ 160. Competition in provision of telecommunications service.

(c) Petition for forbearance
Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) of this section within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet

the requirements of subsection (a) of this section. The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

47 U.S.C. § 203 (2012).

§ 203 . Schedules of charges

(a) Filing; public display

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

47 U.S.C. § 214(a) (2012).

§ 214. Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: *Provided*, That no such certificate shall be required under this

section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221of this title: *Provided further*, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: *Provided, however*, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 U.S.C. § 251(c)(5) (2012).

§ 251. Interconnection

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) **Duty to negotiate**
The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) **Interconnection**
The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;
(B) at any technically feasible point within the carrier's network;
(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

(3) **Unbundled access**
The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.
(4) **Resale**
The duty--
(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) **Notice of changes**
The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) **Collocation**
The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

47 U.S.C. § 303(b) (2012)

§ 303. Powers and duties of the Commission
Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within each class.

47 U.S.C. § 214(a) (2012).

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment

No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: Provided, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: Provided further, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the

supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: Provided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission for any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.

47 U.S.C. § 160(c) (2012).

(c) Petition for forbearance

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

Regulations

47 C.F.R. Part 1.

§ 1.1 Proceedings before the Commission

The Commission may on its own motion or petition of any interested party hold such proceedings as it may deem necessary from time to time in connection with the investigation of any matter which it has power to investigate under the law, or for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations. For such purposes it may subpena witnesses and require the production of evidence. Procedures to be followed by the Commission shall, unless specifically prescribed in this part, be such as in the opinion of the Commission will best serve the purposes of such proceedings.

47 C.F.R. § 1.2.

§ 1.2 Declaratory rulings

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.
(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.