

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment)	WC Docket No. 17-84
)	
Technology Transitions)	GN Docket No. 13-5
)	
AT&T Petition to Launch a Proceeding Concerning the TDM-to-IP Transition)	GN Docket No. 12-353

REPLY COMMENTS OF PUBLIC KNOWLEDGE

Yosef Getachew
Public Knowledge
1818 N St. NW, Suite 410
Washington, DC 20036
(202) 861-0020

July 17, 2017

Table of Contents

I. INTRODUCTION1

II. THE RECORD SUPPORTS WHY THE COMMISSION MUST MAINTAIN ITS CURRENT COPPER RETIREMENT NOTIFICATION RULES2

A. Copper Networks Represent a Unique Transition and Should Be Governed Separately From Other Section 214 Procedures3

B. Streamlining Copper Retirement Would Negatively Impact Consumers and Competitive Carriers.....4

C. There Is No Evidence That Streamlining Copper Retirement Would Accelerate Broadband Deployment6

D. States are Now Relying Solely on the Commission’s Copper Retirement Rules.....7

III. THE COMMISSION SHOULD MAINTAIN THE FUNCTIONAL TEST FOR DETERMING WHAT CONSTITUTES SERVICE UNDER SECTION 214.....7

A. The Record Supports a Broad Interpretation of ‘Service Under Section 214 That Goes Beyond The Tariff8

B. The Commission’s Application of The Filed Rate Doctrine is Inconsistent With Section 2149

IV. THE COMMISSION CAN NOT PREEMPT STATE AND LOCAL LAWS THAT ARE INHERENTLY INTRASTATE.....10

V. CONCLUSION11

I. INTRODUCTION

Public Knowledge submits these reply comments in response to the Federal Communications Commission's ("Commission" or "FCC") combined Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, collectively entitled *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*.¹ After an initial round of comments, the record supports why the Commission must maintain its current copper retirement notification rules. The Commission's proposals regarding copper retirement rules, and streamlining the section 214(a) discontinuance process would have a negative impact on both consumers and competitive providers. Further, there is no evidence in the record that streamlining copper retirement would accelerate broadband deployment. The Commission should also maintain its functional test for determining when a section 214(a) discontinuance process is triggered. Finally, the record does not support the Commission's inquiry into preempting state and local laws. In fact, as more states pass legislation allowing legacy carriers to discontinue copper networks, the FCC's copper retirement rules are the only requirements left in place. Public Knowledge reiterates that the technology transition process is of critical importance to closing the digital divide. Streamlining broadband deployment is important, but should not come at the expense of providing sufficient notice to consumers and competitors, and should not threaten the reliability of the nation's communications networks.

¹ *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd 3265 (2017) ("*Proposal*" or "*2017 Proposal*").

II. THE RECORD SUPPORTS WHY THE COMMISSION MUST MAINTAIN ITS CURRENT COPPER RETIREMENT NOTIFICATION RULES.

The Commission adopted its current copper retirement rules in 2015 after reaffirming that copper networks play a unique role in providing communications services compared to non-copper networks.² Indeed, copper networks exhibit unique performance characteristics as compared to fiber-based networks such as maintaining functionality during power outages. As demonstrated in the record, streamlining the copper retirement rules, and the section 214(a) discontinuance process would negatively impact consumers and competitive carriers. Consumers and small businesses rely on copper networks for a host of communications services such as fax machines, home alarms, and credit card readers. Competitive carriers who purchase copper networks from legacy providers must also receive adequate notice in order to plan accordingly and minimize disruption to their customers. Further, the record provides no support that streamlining the copper retirement rules would in fact accelerate broadband deployment. Finally, states are becoming increasingly reliant on the Commission's rules as incumbent carriers continue to advance state legislation allowing them to discontinue copper service. For these reasons, the Commission must maintain its current copper retirement rules.

² See *Technology Transitions et al*, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372 ¶ 13 (concluding that “the foreseeable and increasing impact that copper retirement is having on competition and consumers warrants revisions to our network change disclosure rules to allow for greater transparency, opportunities for participation, and consumer protection.”) (“*2015 Tech Transitions Order*”).

A. Copper Networks Represent a Unique Transition and Should Be Governed Separately From Other Section 214 Procedures.

Despite the protests of some carriers that copper networks are no different from non-copper networks,³ the Commission has already established that copper loops are an essential communications service relied on by both consumers and competitive providers.⁴ In addition to traditional voice services, consumers use copper networks for a range of third party services such as fax machines, home alarms, and medical alert devices.⁵ Competitive carriers lease copper lines from incumbents to provide services to schools, libraries, hospitals, and small businesses.⁶ Further, copper is unique for the mere fact that it carries an independent source of power, allowing it to maintain service during electrical power outages.⁷ The Commission has also noted another unique quality - copper networks have been deployed and maintained through subsidies at the expense of ratepayers.⁸

The unique characteristics and reliance of copper networks are precisely why the Commission adopted copper retirement rules to ensure consumers and competitive carriers would not be negatively affected during the transition to IP-based networks.⁹ Indeed, the record from the Commission's prior proceeding revealed several instances of incumbent carriers involuntarily migrating their customers from copper networks to fiber or IP-based networks

³ See Comments of AT&T Services, Inc. on Notice of Proposed Rulemaking, Notice of Inquiry and Request for Comment, WC Docket No. 17-84, at 33 (June 15, 2017) (“AT&T Comments”).

⁴ See *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al*, Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 14981, 14996-97 ¶¶ 22, 60-61 (2014) (“2014 Tech Transitions NPRM”).

⁵ See *2014 Tech Transitions NPRM*, 29 FCC Rcd at 15008 ¶ 97; see also *2015 Tech Transitions Order*, 30 FCC Rcd at 9471 ¶ 182.

⁶ See *2014 Tech Transitions NPRM*, 29 FCC Rcd at 14981 ¶ 22.

⁷ See *id.*

⁸ See *id.*

⁹ See Comments of Communications Workers of America, WC Docket No. 17-84, at 9 (June 15, 2017) (explaining why copper is “indeed different in magnitude and impact than other short-term network changes.”) (“CWA Comments”).

without adequate notice or consent, resulting in customer confusion and some even losing basic voice services.¹⁰ As discussed in the next section, the record relevant to the Commission’s current proceeding provides further evidence why streamlining the current copper retirement and network notification rules would negatively impact consumers and competitive carriers. If copper were not uniquely placed in the marketplace, the Commission would not have been compelled to establish common sense notification rules nor would it be a burden for incumbent carriers to transition their networks. The increasing pace of copper transitions not only shows why copper is unique but also solidifies why the current rules must be in place.

B. Streamlining Copper Retirement Would Negatively Impact Consumers and Competitive Carriers.

The record demonstrates why streamlining copper retirement rules would negatively impact both consumers and competitive carriers. The Communications Workers of America (“CWA”) details startling evidence of the dangers of not providing retail customers advance notice of copper retirement.¹¹ For example, the New Jersey Rate Counsel began to receive several complaints from Verizon customers after the carrier announced it was transitioning its copper network pursuant to the Commission’s short-term network notification rules. Customers expressed concern over whether they would continue to receive service post-migration, if they would be affected by power outages, and if third party equipment such as their medical devices would still work.¹² Further, the Maryland Public Service Commission found that Verizon sent “untimely, contradictory, and defective copper retirement notices to residential customers,

¹⁰ See *2015 Tech Transitions Order* 30 FCC Rcd at 9395-36 ¶ 39.

¹¹ See CWA Comments at 12-13.

¹² See *id.* at 12.

including some with only seven-day advance notification before suspension of service.”¹³ As the National Association of State Utility Consumer Advocates (“NASUCA”) notes, adequate notice of copper retirement is not only essential for carriers’ customers but also for public safety officials and other state authorities to conduct consumer outreach and education to clarify any confusions associated with technology transitions.¹⁴ Other commenters point out that streamlining the copper retirement rules would significantly impact the nation’s most vulnerable communities. For example, several consumer groups explain that consumers with disabilities rely on text telephone (“TTY”) devices and without adequate notices, these devices could be inoperable by a change in service.¹⁵ Greenlining Institute also points out that the Commission’s proposal to streamline the copper retirement rules has the potential to disproportionately negatively impact communities of color.¹⁶ The Commission adopted the copper retirement rules to ensure consumers will have a voice in the technology transition process. The record clearly indicates that abandoning these rules would have an adverse impact on the quality of service consumers expect.

In addition to harming consumers, the record demonstrates why streamlining the copper retirement rules would negatively impact competitive carriers. INCOMPAS discusses the extent competitive carriers rely on incumbents’ copper networks and how streamlining the rules would impact their ability to serve their customers.¹⁷ The Competitive Carriers Association explain that

¹³ See CWA Comments at 13 n.28.

¹⁴ See Comments of the National Association of State Utility Consumer Advocates et al, WC Docket No. 17-84 at 11-12 (June 15, 2017) (“NASUCA Comments”).

¹⁵ See Comments of Consumer Groups and RERCS in Response to NPRM, WC Docket No. 17-84, at 203 (June 15, 2017).

¹⁶ See Comments of the Greenlining Institute on Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, WC Docket No. 17-84, at 9 (June 15, 2017) (“Greenlining Comments”).

¹⁷ See Comments of INCOMPAS, WC Docket No. 17-84, at 13-14 (June 15, 2017) (“INCOMPAS Comments”) (explaining that an “entity that is providing service over a leased

the current rules provide a level of transparency surrounding the copper retirement and network change notification process that competitive carriers rely on in order to plan changes to their own network as necessary.¹⁸

C. There Is No Evidence That Streamlining Copper Retirement Would Accelerate Broadband Deployment.

Several carriers assert that streamlining the copper retirement process would remove unnecessary burdens in order to spur broadband deployment.¹⁹ However, incumbent carriers fail to provide any evidence that streamlining the rules would actually accelerate broadband deployment. Instead, they simply call for a complete elimination of all notification rules given their burdensome nature.²⁰ As NASUCA notes, there is no reason to believe, or effort to assure, that the outcome of accelerated broadband deployment would actually take place if the Commission streamlined the rules.²¹ Further, the Commission fails to offer any cost-benefit analysis or other substantive evidence to support its presumptive conclusion that copper retirement rules hinder broadband deployment. This type of analysis is critical to determine whether the greatest burdens on copper retirement fall on incumbent carriers rather than consumers and competitors. As the record demonstrates, the Commission adopted the copper retirement rules specifically because of the significant burdens short notice periods placed on

copper loop needs sufficient time to engage with its customers and the incumbent LEC to identify the nature and technical characteristics of the service that will be provided over the replacement fiber facilities and to obtain, install, test, and turn-up the equipment and interfaces necessary to deliver uninterrupted service to the customer.”)

¹⁸ See Comments of Competitive Carriers Association, WC Docket No. 17-84, at 52-54 (June 15, 2017) (“CCA Comments”).

¹⁹ See Comments of Frontier Communications, WC Docket No. 17-84, at 22-26 (June 15, 2017) (“Frontier Comments”); Comments of the USTelecom Association, WC Docket No. 17-84, at 22 (June 15, 2017) (“USTelecom Comments”).

²⁰ See AT&T Comments at 31-35 (calling for a complete elimination of the Commission’s rules given their burdensome nature).

²¹ See NASUCA Comments at 17.

consumers and competitors.²² The Commission's purpose is to further the public interest. While the interests of business play a role, cannot eliminate the copper retirement rules without any support from the record or the Commission itself that this will in fact spur broadband deployment.

D. States are Now Relying Solely on the Commission's Copper Retirement Rules.

The Commission's copper retirement rules are even more important now that more and more states are passing legislation allowing incumbent carriers to discontinue their copper service. Just recently, the state of Illinois passed an AT&T-supported bill allowing incumbent carriers to end traditional landline phone services in the state.²³ In fact, AT&T has gotten similar legislation passed in 19 of the 20 states where it serves as the incumbent carrier.²⁴ With more and more states passing legislation that allows incumbents to discontinue service, the Commission's copper retirement rules become a last line of defense for consumers and competitive carriers from being negatively impacted.

III. THE COMMISSION SHOULD MAINTAIN THE FUNCTIONAL TEST FOR DETERMINING WHAT CONSTITUTES SERVICE UNDER SECTION 214.

The Commission's use of the term 'service' in section 214 has long been understood to extend beyond the four corners of the tariff. The record shows support for the Commission to maintain the functional test both from statutory interpretation and the practical application of section 214. Further, the Commission's proposal to replace the functional test with the Filed Rate

²² *See id.* at 18-19.

²³ *See* Robert Channick, Illinois Oks end of landlines, but FCC approval required (July 6, 2017), Chicago Tribune, *available at* <http://www.chicagotribune.com/business/ct-att-landline-end-illinois-0706-biz-20170705-story.html>.

²⁴ *See id.*

Doctrine is inconsistent with section 214. For these reasons, the Commission must maintain the functional test for determining what constitutes ‘service’ under the statute.

A. The Record Supports a Broad Interpretation of ‘Service’ Under Section 214 That Goes Beyond The Tariff.

Commenters agree that the Commission must have a broad legal interpretation of ‘service’ in Section 214 that goes beyond the tariff to define what constitutes a service. For example, CWA notes that the plain language of section 214(a) focuses on “service to a community.”²⁵ Not only does the plain language not include the word ‘tariff’ but it also indicates the the Commission must tie service to the needs of the community.²⁶ Under this interpretation of Section 214, a community can review the impact of a change in service and have an opportunity to comment.²⁷ A broad reading of the statute is further solidified when section 214(a) and section 214(c) are read together. Section 214(c) authorizes the Commission to issue a certificate granting approval of a carrier’s change in communications service.²⁸ As Public Knowledge stated in its comments, the carrier must comply with the terms and conditions of the *certificate*, not in the tariff.²⁹ Indeed, the Commission applied this interpretation of section 214 when it used its ancillary authority to impose service discontinuance obligations on interconnected Voice over IP (VoIP) providers - a non-tariffed service.³⁰ The Commission specifically notes that by extending discontinuance requirements to interconnected VoIP providers it’s protecting “American consumers from the unanticipated and harmful consequences that could follow the loss of

²⁵ CWA Comments at 30-31.

²⁶ *See id.* at 31.

²⁷ *See id.*

²⁸ 47 U.S.C. § 214(c).

²⁹ Comments of Public Knowledge, WC Docket No. 17-84, at 9 (June 15, 2017) (“Public Knowledge Comments”).

³⁰ *See IP-Enabled Services*, Report and Order, 24 FCC Rcd 6039, 6044-46 (2009).

telephone service without sufficient notice.”³¹ The Commission’s own actions show it has no problem broadly interpreting its authority under section 214 to apply to non-tariffed services.

In addition to a plain language reading, commenters explain that the practical application of section 214 lends itself to a broad interpretation supported by the functional test. NASUCA notes that a functional test gives consumers all of the attributes that they valued in the service being replaced.³² Under a tariff-only reading of section 214, a carrier would only be responsible for ensuring tariffed services continued working, which could just be limited to voice.³³ Incumbent carriers who support this interpretation believe the purpose of section 214 is to simply ensure that consumers do not get disconnected or are not left behind.³⁴ However, after Verizon replaced its copper infrastructure with wireless systems on Fire Island, consumers expected their alarm systems and fax machines to continue working, which clearly went beyond the tariff.³⁵ This is why the Commission’s past practice and precedent has extended beyond the four corners of the tariff to have a functional approach focusing on the nature of the service provided to consumers.³⁶ Merely exempting a service from a tariff should not relieve its provider of obligations under section 214.

B. The Commission’s Application of The Filed Rate Doctrine is Inconsistent With Section 214.

The Commission proposes to define ‘service’ by applying the Filed Rate Doctrine, limiting the carrier to what it describes and holds itself out as offering.³⁷ However, the Filed Rate

³¹ *Id.* at 6045-46.

³² NASUCA Comments at 30.

³³ *See id.*

³⁴ *See* Comments of Frontier Communications, WC Docket No. 17-84, at 27 (June 15, 2017) (“Frontier Comments”); *see also* AT&T Comments at 62.

³⁵ *See* NASUCA Comments at 30.

³⁶ *See* CWA Comments at 32; Public Knowledge Comments at 10.

³⁷ *See 2017 Proposal*, 32 FCC Rcd at 3302.

Doctrine applies specifically to federally tariffed services and was intended to prevent legacy services from engaging in price discrimination.³⁸ As CWA points out, section 214 is not intended to protect from price-fixing, but rather to ensure a community is receiving service.³⁹ As a result, the Commission has detariffed and prohibited states from tariffing certain offerings that were not part of the service but were still connected to the service such as customer premises equipment (CPE).⁴⁰ The fact that the Commission chose to detariff CPE did not implicate the definition of service under section 214(a) as those requirements still applied. The ability to preempt state tariffing as part of its overall Title II jurisdiction over interstate communications services illustrates that the Commission maintained service jurisdiction over the detariffed elements without regard to their tariff.

IV. THE COMMISSION CAN NOT PREEMPT STATE AND LOCAL LAWS THAT ARE INHERENTLY INTRASTATE

The Commission proposes to broadly use its authority under section 253 to preempt state and local laws that prohibit broadband deployment.⁴¹ First, it is critical to understand when the Commission can actually use its preemption authority for broadband services. The Commission only has authority to regulate interstate communications services,⁴² and the Commission has consistently found that broadband is an interstate service.⁴³ The Commission may preempt intrastate activities that are related to interstate communication only if it is not possible to

³⁸ See 47 U.S.C. 203(c).

³⁹ See CWA Comments at 32.

⁴⁰ See *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384, 496.

⁴¹ See *2017 Proposal*, 32 FCC Rcd at 3296.

⁴² See, e.g., *Internet Over Cable Declaratory Ruling*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185 ¶ 59 (2002).

⁴³ 47 U.S.C. 152. The DC Circuit recently issued an opinion that hinges in large part on the Commission's lack of authority over interstate elements of communication. See *Global Tel*Link v. FCC*, 2017 U.S. App. Lexis 10428 (D.C. Cir. June 13, 2017).

separate the interstate and intrastate components.⁴⁴ For example, in *Public Utility Commission of Texas v. FCC*, the Commission preempted state authority to designate franchise service areas where the state order conflicted with a federal right to access an interstate connection point.⁴⁵ However, the inseparability between interstate and intrastate services is not found in the types of laws the Commission proposes to preempt nor is the Commission’s proposal supported by the plain language of section 253.

The plain language of section 253(a) only allows the Commission to preempt laws which “prohibit or have the effect of prohibiting” the deployment of telecommunications service.⁴⁶ Further, section 253(b) and (c) preserve broad authority for states and localities to implement policies governing telecommunications service.⁴⁷ The Commission specifically proposes to preempt state laws such as deployment moratoria, right-of-way negotiation, and excessive fees.⁴⁸ However, as several commenters point out, these laws govern the intrastate part of broadband and fall within state and local authority under section 253.⁴⁹

V. CONCLUSION

The record in this proceeding clearly supports that the Commission must maintain its current copper retirement rules. There is ample evidence from the current proceeding as well as prior proceedings that eliminating common sense notification rules would negatively impact consumers and competitive carriers, particularly the nation’s most vulnerable communities.

⁴⁴ *Louisiana Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368-69 (1986).

⁴⁵ *PUC of Texas v. FCC*, 866 F.2d 1325 (D.C. Cir. 1989).

⁴⁶ 47 U.S.C. § 253(a).

⁴⁷ 47 U.S.C. § 253(b)-(c).

⁴⁸ *2017 Proposal*, 32 FCC Rcd at 3296-97.

⁴⁹ See CWA Comments at 24-26; NARUC Comments at 22-28; Comments of the National Association of Regulatory Utility Commissioners, WC Docket No. 17-84, at 8-11 (June 15, 2017 (“NARUC Comments”).

Public Knowledge has always supported the transition to next-generation network technologies, and our belief remains strong that the transition can bring a variety of benefits to Americans, in furtherance of the Commission's core statutory objective. We do not, however, support efforts to streamline broadband deployment which come at the expense of consumer education, protection, local choice, or competitive forces. For these, and all the forgoing reasons, we strongly urge the Commission to take a more thoughtful, reasoned, and deliberate approach as it seeks to further its laudable goal of closing the digital divide.

Respectfully Submitted,

/s/ Yosef Getachew

Public Knowledge

1818 N St. NW, Suite 410

Washington, D.C. 20036

(202) 861-0020

July 17, 2017