

January 24, 2014

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: GN Docket No. 12-353, Comment Sought on the Technological Transition of the Nation's Communications Infrastructure; GN Docket No. 13-5, Technology Transitions Policy Task Force

Dear Ms. Dortch:

On January 22, 2014, and again on January 23, 2014, I spoke with Dan Alvarez, advisor to Chairman Wheeler, with regard to the above captioned proceedings. In particular, we discussed AT&T's January 21 *ex parte* letter proposing a two-stage process for proceeding with the trials. Under this approach, the Stage 1 would consist of voluntary trials, whereas Stage 2 would include mandatory trials until the relevant geographic service area is entirely converted.

As a general matter, Public Knowledge agrees with much of AT&T's proposal. Trials will, among other things, provide an important test of AT&T's outreach efforts and compile data critical to making the transition as seamless as possible. This is one reason why Public Knowledge has continued to support the proposal for trials since AT&T first made the suggestion in November 2012.

It is unfortunate that, after months of pressing AT&T to provide further details on how it would structure its trials, it has only now, scant days before the Sunshine period kicks in, come forward with further details on how to address concerns raised by PK and others with regard to the risks of involuntary testing. As PK has pointed out repeatedly in this context and elsewhere, consumers should not be treated as guinea pigs.¹

PK agrees that, eventually, forced migration will occur as part of the IP Transition and that therefore trials that address forced migration will ultimately need to occur.² But any mandatory trials must be informed by the results of voluntary testing. Had AT&T submitted its

¹ See, e.g., Comments of Public Knowledge, Docket No. 13-5, at 2 (filed July 8, 2013) observing: "*Consumers hate being used as guinea pigs against their will.*" (emphasis in original)

² As Centers for Disease Control (CDC) observed, rates of wireless substitution have slowed recently. Stephen J. Blumberg and Julian V Luke, "Wireless Substitution: Early Release of Estimates From the National Health Survey, January-June 2013," Centers for Disease Control (December 2013) (finding that rate of wireless only homes ("cord cutters") rose by only 1.2% over first 6 months of 2013 and observing this was "the smallest increase in the last 6 years") available at: <http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201312.pdf> There have also been complaints by some Verizon POTS customers of being pressured to migrate from existing copper TDM to FIOS, triggering an investigation by the Maryland PSC. See Washington NBC News Channel 4, "Killing Copper? Customers Say They Felt Pressured Into FIOS," (Tuesday December 10, 2013) available at: <http://www.nbcwashington.com/news/local/Verizon-Fios-Phone-Copper-Customers-Say-They-Felt-Pressured-Into-Fios-235098041.html>

January 21 *ex parte* in time to allow sufficient discussion, it is entirely possible that an appropriate balance could have been reached. At this point in the process, given that there is no time to assess how under AT&T's proposed Stage 1 voluntary trials would inform construction of proper safeguards for the Stage 2 mandatory trials, Public Knowledge continues to believe that voluntary trials are the best way to proceed.³

Test Design Issues: Purpose Of Stage 1 Voluntary Trials. Relationship To Stage 2 Trials.

It is sometimes asked how voluntary trials would differ from the current market situation where parties switch from traditional TDM based systems to IP based systems every day. This misunderstands the purpose of trials and testing. It is rather like saying "what's so hard about setting up a website for the Affordable Care Act? Amazon has a website. How hard can it be?"

As an initial matter, there is an inherent contradiction between this position and the argument that we need to grant AT&T's request for trials as quickly as possible to facilitate the IP Transition. Either we must acknowledge the potential risks and the need to develop a proper record to know how to create procedures for the conversion, in which case we should begin with voluntary trials, or critics of the trial proposal are correct and trials are simply a Trojan Horse to further a deregulatory agenda.

AT&T has not taken this position, and Public Knowledge continues to believe that AT&T genuinely recognizes the need for tests as set forth in its January 21 *ex parte*. As noted above, Public Knowledge supports AT&T's goal of conducting trials in part to develop effective community outreach strategies that will allow AT&T to respond to the unique needs of each community and make the transition as easy as possible.

This Is Not A "Market Based Transition." Large Numbers of POTS Users Will Be Forcibly Migrated.

Similarly, constant repetition that this is a "market based transition" misses the point. The FCC's Technological Advisory Committee (TAC) advised in 2011 that when total number of homes served by traditional POTS access lines dropped to 6% of the U.S. population (approximately 20 million access lines). Still, if this were a genuinely market based transition, we would simply wait for actual use rates to drop to 6%, or even 10%, before we worried about filing for discontinuances.

³ Public Knowledge notes that, for its part, has consistently pressed AT&T for further details since the FCC sought comment on possible trials in this docket and publicly, *see* Jodie Griffin, "What We Need To See In A Pilot Program Proposal," Public Knowledge Blog (august 26, 2013) available at: <http://publicknowledge.org/blog/what-we-need-see-pilot-program-proposal>, in an effort to prod AT&T to provide further details, Public Knowledge filed a framework for testing and an explanation for why the FCC should, at this stage, rely on voluntary trials. *See* Letter of Harold Feld, Senior V.P., Public Knowledge to Chairman Tom Wheeler (January 13, 2014), available at: <http://apps.fcc.gov/ecfs/document/view?id=7521065344>

The reality, however, is that no one wants to wait for a genuine market transition. AT&T (and to some extent Verizon, CenturyLink, and other ILECs) wish to stop offering TDM-based service regardless of the total number of customers. There is nothing wrong with admitting this. Public Knowledge agrees that there are enormous potential advantages to consumers in converting networks from their current mix of technologies to all IP. But this reality has consequences, and one consequence is that this is not a standard 214(a) process where a Title II discontinues a service no one actually uses anymore.

This has profound implications for the 214(a) process. Under 214(a), the Commission must determine if grant of the discontinuance request will “impair” service to all or part of the relevant community.⁴ Where no one actually uses the service, this “Impairment Standard” is easily met. Where a significant number of subscribers continue to rely on the service, a more detailed showing is required. To meet the Section 214(a) Impairment Standard requires more than a simple showing that “you can make voice calls, but we can’t even tell you whether the voice quality or the call completion rate is better or worse because we never actually bothered to measure all that stuff once we got a dial tone.”

Proof of Concept v. Section 214(a) “Impairment Standard.”

Part of the confusion here is that people keep thinking this is a “proof of concept” trial. It is not. Everyone knows you can have some IP based service that will do something. For those people who do not regard best efforts IP based services as sufficient, which by the FCC’s last count was 96 million people and unlike to drop to only 6% of the country anytime soon, how do you demonstrate whether or not replacing TDM with IP Based services constitutes an “impairment of service?” The Commission has no standard, nor does the Commission have a factual record on which it could base a record.

It is in large part to provide a factual record on which the FCC could develop a sound Impairment Standard to provide certainty to carriers wishing to discontinue TDM-based service for which these trials are needed. Ideally, as part of its process to support a smooth transition, the FCC will determine what a carrier must show to meet the standard under Section 214(a). Essentially, at some point, the FCC will need a “checklist” for carriers interested in moving forward. This will provide certainty for both carriers and for the communities where carriers seek to discontinue service.

Such a checklist needs to rest on a well developed record. The alternative is an endless series of *ad hoc* determinations that serves no one. But without any baseline beyond the fact that a large number of subscribers in a variety of circumstances like whatever existing alternatives

⁴ 47 U.S.C. §214(a).

they have available in their specific market, while a substantial number of subscribers do not, the FCC has no basis for compiling this checklist.⁵

Public Knowledge has submitted a lengthy analysis by an engineering firm identifying 10 core areas where the Commission should determine how the proposed replacement service operates in comparison to existing TDM service to answer the question of whether replacing the existing TDM service with the proposed alternative service constitutes an impairment. *This is an empirical question, not simply a qualitative analysis.*⁶ But as of today, as far as Public Knowledge can determine, the FCC has absolutely no set of metrics by which it could conduct these comparisons and thus arrive at a well determined and reasonable analysis as to whether elimination of the TDM service would constitute an impairment.

Again, it is important to note that this isn't whether you can push voice through a wire sometimes and a bunch of people somewhere else decided it was worth saving money by getting cheap basic voice bundled with their cable. This isn't a qualitative analysis based on a handful of random testimonials from a national customer base. To establish a routinized check list so that Section 214(a) requests for forced migrations of substantial numbers of customers can be granted in a regular manner rather than in lengthy ad hoc proceedings, the Commission must establish a baseline to compare the existing TDM service and the new proposed service.

Voluntary trials to inform this checklist would therefore be wholly different from the existing *ad hoc* market based transition. Voluntary trials will provide the needed baseline information to develop the checklist, which would then inform mandatory trials/beta testing. Nothing in the current marketplace could come close to producing the same record as sound, standardized *voluntary* engineering trials conducted using industry accepted best practices for testing, data collection, and reporting.

Voluntary Trials Would Not Skew Data.

Two additional objections to voluntary trials are also frequently raised. First, it is suggested that voluntary trials will skew data toward technophiles and early adopters. Second, by allowing the “hard cases” to voluntarily opt out, the study will not provide necessary information to adequately address such cases.

This is not, of course, a new problem in testing. Best practices for testing for safety and efficacy have long recognized these concerns, and test designs have been developed accordingly. The most common is the “double blind, population switch” study, explained below.

⁵ Furthermore, Section 214(a) requires a determination focused on impairment to the specific community served. Public Knowledge notes the wide disparity of adoption rates between communities. *See* 2013 Competition Report Tables 10, 11, 12, 13, 14 (reporting adoption rates of VOIP v. access lines by state). This suggests that reliance on broad national trends is particularly ill-suited to developing the necessary standard for Section 214(a).

⁶ This is not to say that qualitative analysis has no place in the FCC's 214(a) determination. But even a qualitative analysis needs standards, and must be specific to the target community. “Lots of customers seem to like it” is not a serious qualitative analysis.

The Technophiles Problem

First, Public Knowledge observes that the bulk of the testing should, as proposed by Public Knowledge, rely on empirical standardized engineering observations and not on qualitative analysis where the mental state of the test subject would impact results. Things as the number of dropped calls and the quality of voice service have standard, measurable objective tests. While a technophilic customer may imagine great improvement from the “new technology” in a qualitative satisfaction survey, test equipment will actually measure as against the control group the extent to which service actually improves or degrades.

Second, for studies where the “placebo affect” can profoundly influence the outcome, a standard test design for “double blind switch population” studies can be used here. The volunteer pool is divided into two groups. One group gets the test technology, the other group keeps their existing service. Neither the volunteers nor those personnel dealing with the volunteers know which individuals have the test technology. (This is the “double blind” component.) Approximately halfway through the study period, switch populations without informing the volunteers or the personnel in contact with the volunteers when they are switched. This equalizes the test across the study population. (This is the “switched population” part.)

To the extent the study population skews to the technophilic, this bias can be eliminated by comparing the qualitative analysis of the control population and the test population. To the extent the control population report “improvements in service” or other increases in qualitative measures, that is “placebo effect.” The difference between the control population and the test population for qualitative measures represents an actual qualitative improvement, since the populations should experience the same “placebo effect.” To the extent there is variation in “placebo effect,” the population switch provides a basis for normalizing it.

Need to Test Hard Cases

As Public Knowledge explained in its January 13 letter, the Commission will ultimately need to examine the effect on the “hard cases” in order to determine the steps needed to address this issue. But the protocol for doing so must be informed by the baseline. Having outliers and complicated cases in the initial baseline study would itself skew the baseline.

It is a cliché to say “walk before you can run.” In this case, the use of voluntary trials before attempting to design mandatory trials that would deliberately include the most complex outliers is “prove you can walk before you try to run an obstacle course.”

Trials Should Rely On Waiver of §214(a) Requirements, Not Grant Requests For Discontinuance of Service.

On one critical point, Public Knowledge must vigorously disagree with AT&T. The Commission should *not* grant a request under Section 214(a) to discontinue Title II TDM service

to conduct a trial. Rather, the Commission should grant a limited waiver of the Section 214(a) to offer the relevant tariffed service for the duration of the trial, or until the provider conducting the trial requests a permanent 214(a) after the successful conclusion of the trial and after the necessary relevant policy decisions (which will be informed by, but not determined by, the trials) are made.

This may seem a modest difference, but it is critical in light of the “common carrier prohibition” established by the D.C. Circuit in *Verizon v. FCC* (the Net Neutrality Case). Because the common carrier prohibition is an absolute statutory bar to common carrier regulation, grant of the 214(a), even on a temporary basis, would cloud the legal authority of the Commission to ensure that the provider complies with necessary obligations (such as the obligation to complete calls) during the test period.

As Public Knowledge noted in previous *ex partes* filed January 15, 2014,⁷ it is not necessary for the FCC to grant a request for discontinuance of service under Section 214(a) to permit the trials to move forward. Instead, the better approach is to grant a waiver of Section 214(a) obligations to the extent needed to conduct the trial. Furthermore, grant of such a request prejudices the trial outcome by assuming that the provider may discontinue service before the provider has demonstrated the safety and efficacy of the replacement service. Grant of a 214(a) request, rather than grant of a waiver for the duration of the trial, directly contradicts the FCC’s stated intent that trials should inform the process and not create “facts on the ground” that shortcut the policy process.

Such an approach also provides benefits to AT&T, or any other provider conducting a trial. As long as the provider remains subject to the Section 214(a) tariff and the FCC approves its conduct, liability for the trial is covered under the “filed rate doctrine” which protects carriers from liability when acting in accordance with a government approved tariff. Without such protection, AT&T (or other trial provider) could potentially incur liability for its conduct during the trial.

As the FCC bears ultimate responsibility for protecting the integrity and stability of the phone system, the FCC must ensure that it retains adequate authority throughout the trial to maintain oversight and act swiftly in the event a need arises. Grant of a Section 214(a) request, rather than granting a waiver, may interfere with the FCC’s ability to adequately monitor the trial or to act swiftly when needed. As Public Knowledge has previously explained,⁸ a key component of conducting trials is to determine what can go wrong and properly manage the risk. As the entity ultimately responsible for protecting the safety and integrity of the telephone system, the FCC should not take steps that would potentially compromise its ability to discharge those responsibilities.

⁷ Available at: <http://apps.fcc.gov/ecfs/document/view?id=7521065880>, <http://apps.fcc.gov/ecfs/document/view?id=7521065879>, <http://apps.fcc.gov/ecfs/document/view?id=7521065876>,

⁸ Letter of Harold Feld, Senior Vice President, Public Knowledge to Chairman Tom Wheeler, January 13, 2014, available at: <http://apps.fcc.gov/ecfs/document/view?id=7521065344>



In accordance with Section 1.1206(b) of the Commission's rules, this letter is being filed with your office. If you have any further questions, please contact me at (202) 861-0020.

Respectfully submitted,

/s/ Harold Feld
Senior Vice President
PUBLIC KNOWLEDGE

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