

**FACT SHEET\***

**Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment**  
Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment - WC Docket No. 17-84

**Background:** High-speed broadband is an increasingly important gateway to jobs, healthcare, education, and information. Access to high speed broadband is essential to creating economic opportunity for all Americans. Streamlining rules, accelerating approvals, and removing other barriers, where possible, will better enable broadband providers to build, maintain, and upgrade their networks, which in turn will lead to more affordable and accessible Internet access and other broadband services for consumers and businesses alike.

The Chairman of the Federal Communications Commission (FCC) has proposed a *Notice of Proposed Rulemaking (NPRM)*, *Notice of Inquiry (NOI)*, and *Request for Comment (RFC)*, on a number of actions designed to accelerate: (1) the deployment of next-generation networks and services by removing barriers to infrastructure investment at the federal, state, and local level; (2) the transition from legacy copper networks and services to next-generation fiber-based networks and services; and (3) the reduction of Commission regulations that raise costs and slow, rather than facilitate, broadband deployment.

**What the NPRM Would Do:**

Proposes and/or seeks comment on:

- Reforming the FCC’s pole attachment rules to make it easier, faster, and less costly to access the poles, ducts, conduits, and rights-of-way necessary for building out next-generation networks.
- Providing greater regulatory flexibility and expediting the process when retiring copper facilities and making other network changes to enable carriers to transition more rapidly to modern networks.
- Streamlining the regulatory process by which carriers must obtain FCC authorization to discontinue legacy services so that scarce capital is free to be spent on delivering modern, innovative services.

**What the NOI Would Do:**

- Seeks comment on a number of specific areas where the FCC could use its preemption authority to prevent the enforcement of state and local laws that inhibit broadband deployment.

**What the RFC Would Do:**

- Requests comment on changing the FCC’s legal interpretations of when carriers must ask for permission to alter or discontinue a service, to clarify when permission is required, and thereby reduce the regulatory uncertainty that is costly and burdensome to the industry.

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\* This document is being released as part of a “permit-but-disclose” proceeding. Any presentations or views on the subject expressed to the Commission or its staff, including by email, must be filed in WC Docket No. 17-84, which may be accessed via the Electronic Comment Filing System (<https://www.fcc.gov/ecfs/>).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of )
)
Accelerating Wireline Broadband Deployment by ) WC Docket No. 17-84
Removing Barriers to Infrastructure Investment )

NOTICE OF PROPOSED RULEMAKING, NOTICE OF INQUIRY, AND REQUEST FOR COMMENT\*

Adopted: []

Released: []

Comment Date: [30 days after date of publication in the Federal Register]

Reply Comment Date: [60 days after date of publication in the Federal Register]

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\* This document has been circulated for tentative consideration by the Commission at its April open meeting. The issues referenced in this document and the Commission's ultimate resolution of those issues remain under consideration and subject to change. This document does not constitute any official action by the Commission. However, the Chairman has determined that, in the interest of promoting the public's ability to understand the nature and scope of issues under consideration by the Commission, the public interest would be served by making this document publicly available. The FCC's ex parte rules apply and presentations are subject to "permit-but-disclose" ex parte rules. See, e.g., 47 C.F.R. §§ 1.1206, 1.1200(a). Participants in this proceeding should familiarize themselves with the Commission's ex parte rules.

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**I. INTRODUCTION**

1. High-speed broadband is an increasingly important gateway to jobs, health care, education, information, and economic development. Access to high-speed broadband creates economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world, and revolutionize entire industries. Today, we propose and seek comment on a number of actions designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment.

2. This *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* seeks to better enable broadband providers to build, maintain, and upgrade their networks, which will lead to more affordable and available Internet access and other broadband services for consumers and businesses alike. Today’s actions propose to remove regulatory barriers to infrastructure investment at the federal, state, and local level; suggests changes to speed the transition from copper networks and legacy services to next-generation networks and services; and proposes to reform Commission regulations that increase costs and slow broadband deployment.

**II. NOTICE OF PROPOSED RULEMAKING**

**A. Pole Attachment Reforms**

3. Pole attachments are a key input for many broadband deployment projects. Reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment and in turn increase broadband availability and competition in the provision of high-speed services.

4. The Communications Act of 1934, as amended (Act), grants the Commission authority to regulate attachments to utility-owned and -controlled poles, ducts, conduits, and rights-of-way (collectively, poles).<sup>1</sup> Among other things, the Act authorizes the Commission to prescribe rules<sup>2</sup> ensuring “just and reasonable” “rates, terms, and conditions” for pole attachments<sup>3</sup> and “nondiscriminatory access” to poles,<sup>4</sup> rules defining pole attachment rates for attachers that are cable television systems and telecommunications carriers,<sup>5</sup> rules regarding the apportionment of make-ready<sup>6</sup>

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<sup>1</sup> 47 U.S.C. § 224(b)(1).

<sup>2</sup> 47 U.S.C. § 224(b)(2).

<sup>3</sup> Section 224(a)(4) of the Act defines a pole attachment as any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility. 47 U.S.C. § 224(a)(4). Accordingly, we use the term pole attachment in this Notice to refer to attachments not only to poles, but to ducts, conduits, and rights-of-way as well.

<sup>4</sup> 47 U.S.C. § 224(f).

<sup>5</sup> 47 U.S.C. § 224(d), (e).

costs between utilities and attachers,<sup>7</sup> and rules requiring all local exchange carriers (LECs) to “afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications service . . . .”<sup>8</sup> The Act also allows states to reverse-preempt the Commission’s regulations so long as they meet certain federal standards.<sup>9</sup>

5. We seek to exercise this authority to accelerate the deployment of next-generation infrastructure so that consumers in all regions of the Nation can enjoy the benefits of high-speed Internet access as well as additional competition.

#### **1. Speeding Access to Poles**

6. We seek comment on proposals to streamline and accelerate the Commission-established timeline for processing pole attachment requests, which currently envisions up to a five-month process (assuming all contemplated deadlines are met).<sup>10</sup> Several proposals to speed pole access allow telecommunications and cable providers seeking to add equipment to a utility pole (a “new attacher”) to adjust, on an expedited basis, the preexisting equipment of the utility and other providers already on that pole (“existing attachers”). We emphasize at the outset that we are seeking to develop an approach that balances the legitimate needs and interests of new attachers, existing attachers, utilities, and the public. In particular, we recognize that speeding access to poles could raise meaningful concerns about safety and protection of existing infrastructure. We intend to work toward an approach that facilitates new attachments without creating undue risk of harm. We intend for the proposals below to be a starting point that will stimulate refinements as we work toward potential adoption of a final pole attachment process.

##### **a. Speeding the Current Commission Pole Attachment Timeline**

7. We seek comment on potential reforms to the various steps of the Commission’s current pole attachment timeline to facilitate timely access to poles. Access to poles, including the preparation of poles for new attachments, must be timely in order to constitute just and reasonable access under Section 224 of the Act.<sup>11</sup> The Commission’s current four-stage timeline for wireline and wireless requests to access the “communications space” on utility poles, adopted in 2011, provides for: application review and engineering survey (45 days), cost estimate (14 days), attacher acceptance (14 days), and make-ready (60-75 days).<sup>12</sup> It also allows timeline modifications for wireless attachments above the communications space and for large requests.<sup>13</sup>

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<sup>6</sup> “Make-ready” generally refers to the modification of poles or lines or the installation of certain equipment (e.g., guys and anchors) to accommodate additional facilities. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98, 95-185, Order on Reconsideration, 14 FCC Rcd 18049, 18056 n.50 (1999).

<sup>7</sup> 47 U.S.C. § 224(h), (i).

<sup>8</sup> 47 U.S.C. § 251(b)(4).

<sup>9</sup> To date, twenty states and the District of Columbia have reverse-preempted Commission jurisdiction over the rates, terms, and conditions of pole attachments in their states. *States That Have Certified That They Regulate Pole Attachments*, Public Notice, WC Docket No. 10-101, 25 FCC Rcd 5541 (WCB 2010).

<sup>10</sup> See 47 CFR § 1.1420.

<sup>11</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11864, 11873, para. 17 (2010).

<sup>12</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, Report and Order and Order on Reconsideration, WC Docket No. 07-245, GN Docket No. 09-51, 26 FCC Rcd 5240, 5252, paras. 22-23 (2011) (*2011 Pole Attachment Order*).

<sup>13</sup> 47 CFR § 1.1420.

8. *Application Review.* We seek comment on whether we should require a utility to review and make a decision on a completed pole attachment application within a timeframe shorter than the current 45 days.<sup>14</sup> Is 15 days a reasonable timeframe for utilities to act on a completed pole attachment application? Is 30 days? We seek comment on, and examples of, current timelines for the consideration of pole attachment applications, especially in states that regulate their own rates, terms, and conditions for pole access. If we adopt a shorter timeline, we also seek comment on situations in which it might be reasonable for the utility's review of a pole attachment application to extend beyond the new shortened timeline.

9. In addition, we seek comment on retaining the existing Commission rule allowing utilities 15 extra days to consider pole attachment applications in the case of large orders (i.e., up to the lesser of 3,000 poles or five percent of the utility's poles in a state).<sup>15</sup> We also seek comment on capping, at a total of 45 days, utility review of those pole attachment applications that are larger than the lesser of 3,000 poles or five percent of a utility's poles in a state. We seek comment on possible alternatives by which we may take into account large pole attachment orders. We seek comment regarding the expected volume of pole attachment requests associated with the 5G rollouts of wireless carriers and whether the extended timelines for larger pole attachment orders might help utilities process the large volume of requests we anticipate will be associated with the 5G buildouts.

10. *Survey, Cost Estimate, and Acceptance.* We seek comment on whether the review period for pole attachment applications should still include time for the utility to survey the poles for which access has been requested.<sup>16</sup> With regard to the estimate and acceptance steps of the current pole access timeline, should we require a timeframe for these steps that is shorter than the current 28 days?<sup>17</sup> Would it be reasonable to combine these steps into a condensed 14-day (or 10-day) period? Could we wrap these two steps into the make-ready timeframe?<sup>18</sup> Would it be reasonable to eliminate these two steps entirely? If so, without the estimate and acceptance steps, then what alternatives should there be for requiring utilities and new attachers to come to an agreement on make-ready costs?

11. *Make-Ready.* We also seek comment on approaches to shorten the make-ready work timeframe. The Commission currently requires that existing attachers be given 60 days after the make-ready notice is sent to complete work on their equipment in the communications space of a pole.<sup>19</sup> In adopting a 60-day period for existing attachers to complete make-ready work, the *2011 Pole Attachment Order* recommended as a "best practice" a make-ready period of 30 days or less for small pole attachment requests and 45 days for medium-size requests.<sup>20</sup> Should the Commission adopt as requirements the "best practices" timeframes set forth in the *2011 Pole Attachment Order*? What other timeframes would be reasonable, recognizing the safety concerns and property interests of existing attachers and utilities when conducting make-ready work on a pole? We seek comment on any state experience with this phase of the make-ready process—how long is it taking existing attachers to perform make-ready work in states that are not subject to Commission pole attachment jurisdiction? Do existing attachers require the full make-ready periods to move their attachments such that the total timeline for a new attacher exceeds the

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<sup>14</sup> See 47 CFR §§ 1.1403(b), 1.1420(c).

<sup>15</sup> See 47 CFR § 1.1403(g).

<sup>16</sup> See 47 CFR § 1.1403(c).

<sup>17</sup> See 47 CFR § 1.1420(d).

<sup>18</sup> See 47 CFR § 1.1420(e).

<sup>19</sup> 47 CFR § 1.1420(e)(1)(ii).

<sup>20</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5258, para. 32.

Commission's existing pole attachment timeline?<sup>21</sup> Are there situations in which it is reasonable for existing attachers to go beyond the current Commission timeframes to complete make-ready work? Further, are there ways that the Commission can eliminate or significantly reduce the need for make-ready work? For example, what can the Commission do to encourage utilities to proactively make room for future attachers by consolidating existing attachments, reserving space on new poles for new attachers, and allowing the use of extension arms to increase pole capacity?<sup>22</sup>

12. In addition, the Commission has adopted longer periods for existing attachers and utilities to complete make-ready work in the case of large pole attachment orders (an additional 45 days) and in the case of wireless attachments above the communications space (a total of up to 90 days for such attachments or up to 135 days in the case of large wireless attachment orders).<sup>23</sup> We seek comment on whether it is reasonable to retain these extended time periods for large pole attachment orders and for wireless attachments above the communications space. We seek comment on reasonable alternatives to these timelines, bearing in mind the safety concerns inherent in make-ready work above the communications space on a pole and the manpower concerns of existing attachers and utilities when having to perform make-ready on large numbers of poles in a condensed time period.

**b. Alternative Pole Attachment Processes**

13. We seek comment generally on possible alternatives to the Commission's current pole attachment process that might speed access to poles. We also seek comment on potential remedies, penalties, and other ways to incent utilities, existing attachers, and new attachers to work together to speed the pole attachment timeline. If the Commission were to adopt any of the revisions proposed below or other revisions to our process, would Section 224 of the Act support such an approach? What other statutory authority could the Commission rely on in adopting such changes? In considering the proposals below for alternatives to the pole attachment timeline, we seek comment on the need to balance the benefits of these alternatives against the safety and property concerns that are paramount to the pole attachment process. For example, we seek comment on the extent to which any of the proposals may violate the Fifth Amendment protections of utilities and existing attachers against the taking of their property without just compensation.

14. *Use of Utility-Approved Contractors to Perform Make-Ready Work.* We seek comment on whether the Commission should adopt rules that would allow new attachers to use utility-approved contractors to perform "routine" make-ready work and also to perform "complex" make-ready work (i.e., make-ready work that reasonably would be expected to cause a customer outage) in situations where an existing attacher fails to do so. Under the Commission's current pole attachment timeline, existing attachers can take up to 60 days to complete make-ready work on their equipment in the communications space and utilities have the right to ask for an additional 15 days to complete the work when the existing attacher fails to do so.<sup>24</sup> Only after that 75-day period has run, and neither the existing attachers nor the utilities have met their deadlines, can new attachers begin to perform make-ready work using utility-approved contractors. The timelines are even longer in cases of larger pole attachment requests and for wireless make-ready work above the communications space on a pole.<sup>25</sup> We seek comment on whether it would be reasonable to expand the use of utility-approved contractors to perform make-ready work,

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<sup>21</sup> See Letter from Austin C. Schlick, Director, Communications Law, Google Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-245, GN Docket No. 09-51, at 3-4 (filed July 19, 2016) (submitting that "[r]epetitive climbs by multiple teams" unreasonably slow down the pole attachment process).

<sup>22</sup> See, e.g., Gigabit Communities, *Technical Strategies for Facilitating Public or Private Broadband Construction in Your Community*, at 47-49, <http://www.ctcnet.us/wp-content/uploads/2014/01/GigabitCommunities.pdf>.

<sup>23</sup> 47 CFR § 1.1420(e)(2).

<sup>24</sup> 47 CFR § 1.1420(e)(1).

<sup>25</sup> See 47 CFR §§ 1.1420(e)(2)(ii), 1.1420(g).

especially earlier in the pole attachment process. Would it be reasonable to eliminate the utility's right to complete make-ready work in favor of a new attacher performing the make-ready work after an existing attacher fails to meet its make-ready deadline?

15. We seek comment on balancing the benefits of allowing new attachers to use utility-approved contractors to perform make-ready work against any drawbacks of allowing contractors that may not be approved by existing attachers to move existing equipment on a pole. We urge commenters, whenever possible, to provide quantifiable data or evidence supporting their position. We note that AT&T, in its federal court challenge of Louisville, Kentucky's pole attachment ordinance, argued that utility-approved contractors "have on occasion moved AT&T's network facilities, with less-than-satisfactory results," while Comcast argued in its federal court challenge to Nashville, Tennessee's pole attachment ordinance that third-party contractors "are significantly more likely to damage Comcast's equipment or interfere with its services."<sup>26</sup> We seek comment on other safety and property concerns that the Commission should account for in considering whether to allow an expanded role in the make-ready process for utility-approved contractors. We also seek comment on liability safe harbors that would protect the property and safety interests of existing attachers, utilities, and their customers when new attachers use utility-approved contractors to perform make-ready work on poles and existing equipment on the poles. For example, to ensure protections for existing attachers and utilities, would it be reasonable to impose on new attachers requirements such as surety bonds, indemnifications for outages and damages, and self-help remedies for utilities and existing attachers to fix problems caused by new attacher contractors? Are there other safeguards that we can adopt to protect existing attachers, utilities, and their customers in the event that the new attacher's contractors err in the performance of make-ready work?

16. For make-ready work that would be considered "routine" in the communications space of a pole, is it reasonable to allow a new attacher to use a utility-approved contractor to perform such work after notice has been sent to existing attachers? Would it be reasonable to allow new attachers to use utility-approved contractors to perform complex make-ready work as well? Also, because of the special skills required to work on wireless attachments above the communications space on a pole,<sup>27</sup> we seek comment on whether utilities should be required to keep a separate list of contractors authorized to perform this specialized make-ready work.<sup>28</sup> Should utility-approved contractors that work for new attachers be allowed to perform make-ready work on wireless attachments above the communications space on a pole?

17. We also seek comment on the following proposals that address the safety and property concerns of existing attachers and utilities:

- requiring all impacted attachers (new, existing, and utilities) to agree on a single contractor that the new attacher could use to perform make-ready work; and/or
- requiring that existing attachers (or their contractors) be given the reasonable opportunity to observe the make-ready work being done on their existing equipment by the new attachers' contractors.

We seek comment on the benefits of these and other alternative proposals involving the use of utility-approved contractors to perform make-ready work.

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<sup>26</sup> See Plaintiff's Reply in Support of its Motion for Summary Judgment, and Opposition to Defendants' Cross-Motion for Summary Judgment or for Alternative Relief at 19, *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016); Complaint at 2, para. 3, *Comcast of Nashville I, LLC, v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. Oct. 25, 2016).

<sup>27</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5276, para. 78.

<sup>28</sup> Currently, utilities are required to make available and keep up-to-date a reasonably sufficient list of contractors authorized to perform make-ready work in the communications space on a utility pole. 47 CFR § 1.1422(a).

18. *New Attachers Performing Make-Ready Work.* We seek comment on whether we should adopt rules to allow new attachers (using utility-approved contractors) to perform routine make-ready work in lieu of the existing attacher performing such work.<sup>29</sup> Recognizing that existing attachers may oppose such proposals,<sup>30</sup> we seek comment on alternatives that would address their safety and property concerns, while still shortening the make-ready timeline. Allowing the new attacher to perform make-ready work would save time over the current Commission timeline by permitting the new attacher to initiate routine make-ready work after giving brief (or no) notice to existing attachers.<sup>31</sup> We recognize that such a process would exclude existing attachers from the opportunity to perform routine make-ready work and we seek comment on whether such an exclusion is reasonable. We note that in crafting the pole attachment timeline adopted in 2011, the Commission sought to strike a balance between the goals of promoting broadband infrastructure deployment by new attachers and safeguarding the reliability of existing networks.<sup>32</sup> We seek comment on the risks and drawbacks of any proposal that seeks to change that balance by letting new attachers conduct routine make-ready work without allowing existing attachers the opportunity to do so.

19. We also recognize that a number of carriers have raised concerns about allowing new attachers to conduct routine make-ready work on equipment belonging to existing attachers. As AT&T pointed out in its challenge to Louisville's pole attachment ordinance, the movement and rearrangement of communications facilities has public safety implications; we thus seek comment on AT&T's claim that the "service provider whose pre-existing facilities are at issue plainly is in the best position to determine whether required make-ready work could be service-affecting or threaten the reliability of its network."<sup>33</sup> Charter, in a separate challenge to Louisville's ordinance, argues that allowing competitors to perform make-ready work on its equipment could intentionally or unintentionally "damage or disrupt [Charter]'s ability to serve its customers, creating an inaccurate perception in the market about [Charter]'s service quality and harming its goodwill."<sup>34</sup> We seek comment on Charter's claim and whether make-ready procedures that exclude existing attachers could lead to consumer misunderstandings in the event of service disruptions that occur during make-ready work by other attachers. Should new attachers that perform make-ready work be required to indemnify, defend, and hold harmless existing attachers for damages or outages that occur as a result of make-ready work on their equipment?

20. *Post Make-Ready Timeline.* If existing attachers are not part of the make-ready process, then we seek comment on an appropriate timeline for inspections and/or surveys by the existing attachers after the completion of make-ready work. For example, Nashville, Tennessee's pole attachment ordinance allows for a 30-day timeline for the inspection and resolution of problems detected by existing attachers to the make-ready work done on their equipment.<sup>35</sup> Is 30 days enough time to detect and rectify problems caused by improper make-ready work? Are there reasonable alternative time periods for

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<sup>29</sup> See, e.g., Nashville Ordinance No. BL2016-343, § 13.18.020 (A); Louisville Ordinance No. O-427-15, § 116.72(D)(2).

<sup>30</sup> See *infra* para. 19 (objections of AT&T and Charter to the ability of new attachers to perform make-ready work on existing equipment on a pole).

<sup>31</sup> See, e.g., Nashville Ordinance No. BL2016-343, § 13.18.020 (A); Louisville Ordinance No. O-427-15, § 116.72(D)(2).

<sup>32</sup> 2011 Pole Attachment Order, 26 FCC Rcd at 5270, para. 61.

<sup>33</sup> Plaintiff's Reply in Support of its Motion for Summary Judgment, and Opposition to Defendants' Cross-Motion for Summary Judgment or for Alternative Relief at 19, *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016).

<sup>34</sup> Complaint at 3, *Insight Kentucky Partners II, LP. v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. Oct. 31, 2016) (according to Charter, the Louisville ordinance improperly shifts responsibility for negligent make-ready work from the new attacher (the entity performing the work) to Charter).

<sup>35</sup> Nashville Ordinance No. BL2016-343, § 13.18.020 (D).



existing attachers to review make-ready work and fix any detected problems? For example, the Louisville, Kentucky pole attachment ordinance allows for a 14-day inspection period.<sup>36</sup> Further, is it reasonable to allow the existing attacher to elect to fix the defective make-ready work on its own (at the new attacher's expense) or to require the new attacher to fix the problems caused by its work?

21. *One-Touch, Make-Ready.* We seek comment on the potential benefits and drawbacks of a pole attachment regime patterned on a “one-touch, make-ready” (OTMR) approach, which includes several of the concepts discussed above as part of a larger pole attachment framework. Both Nashville, Tennessee and Louisville, Kentucky have adopted pole attachment regimes that involve elements of an OTMR policy.<sup>37</sup> The Commission has noted that OTMR policies “seek to alleviate ‘a significant source of costs and delay in building broadband networks’ by ‘lower[ing] the cost of the make-ready process and speed[ing] it up.’”<sup>38</sup> Would a new pole attachment timeline patterned on an OTMR approach help spur positive decisions on broadband infrastructure deployment? According to the Fiber to the Home Council, an OTMR approach “minimizes disruption in the public rights-of-way and protects public safety and aesthetics” while also speeding broadband deployment.<sup>39</sup> We seek other assessments and analysis of the benefits and drawbacks of an OTMR pole attachment process. Would some blend of an OTMR approach coupled with the current Commission pole attachment timeline and protections help spur timely access to poles?

22. Under the Nashville OTMR ordinance, the pole attachment process works as follows: (1) a new attacher submits an attachment application to the utility and after approval of the application, the new attacher notifies the utility of the need for make-ready work; (2) the new attacher then contracts with a utility-approved contractor to perform all of the necessary make-ready work; (3) the new attacher gives 15 days' prior written notice to existing attachers before initiating make-ready work; (4) within 30 days after the completion of make-ready, the new attacher sends written notice of the make-ready work to existing attachers; (5) upon receipt of such notice, the existing attachers may conduct a field inspection of the make-ready work within 60 days; (6) if an existing attacher finds a problem with the make-ready work, then it may notify the new attacher in writing (within the 60-day inspection window) and elect to either fix the problem itself at the new attacher's expense or instruct the new attacher to fix the issue; and (7) if a new attachment involves “complex” make-ready work, then the new attacher must notify each existing attacher of the make-ready work at least 30 days before commencement of the work in order to allow the existing attachers the opportunity to rearrange their equipment to accommodate the new attacher — if such work is not performed by the existing attachers within 30 days, then the new attacher can perform the required make-ready work using utility-approved contractors.<sup>40</sup> We seek detailed comment on the benefits and drawbacks of this approach. Are there steps in the Nashville pole attachment process

<sup>36</sup> Louisville Ordinance No. O-427-15, § 116.72(D)(2).

<sup>37</sup> See Nashville Ordinance No. BL2016-343, Title 13 of the Metropolitan Code, § 13.18 *et seq.*; Louisville Ordinance No. O-427-15, Series 2015, Chapter 116 of the Louisville Metro Code, §§ 116.70(J), 116.72(D). We note that both the Nashville and Louisville OTMR ordinances currently are being challenged by existing attachers in separate cases in federal district court. See *BellSouth Telecommunications, LLC v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016), consolidated with *Comcast of Nashville I, LLC, v. Metro. Gov't of Nashville & Davidson Cty, Tenn.*, No. 3:16cv2794 (M.D. Tenn. 2016); *BellSouth Telecommunications, LLC v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. 2016), consolidated with *Insight Kentucky Partners II, L.P. v. Louisville/Jefferson Cty. Metro Gov't*, No. 3:16cv00124 (W.D. Ky. 2016).

<sup>38</sup> Federal Communications Commission, *Connecting America: The National Broadband Plan* at 111, Recommendation 6.2 (2010), <https://www.fcc.gov/general/national-broadband-plan>.

<sup>39</sup> Fiber to the Home Council, *Role of State and Local Governments in Simplifying the Make-Ready Process for Pole Attachments*, at 2 (Nov. 2015), [http://www.ct.gov/broadband/lib/broadband/ctgig\\_project/attachment\\_c\\_ftth\\_council\\_makereadywhitepaper25october2015.pdf](http://www.ct.gov/broadband/lib/broadband/ctgig_project/attachment_c_ftth_council_makereadywhitepaper25october2015.pdf).

<sup>40</sup> Nashville Ordinance No. BL2016-343, § 13.18.020.

where utilities, new attachers, and existing attachers could all benefit from streamlined access to poles, especially as compared to the current Commission pole attachment timeline? Rather than adopting a wholesale OTMR approach to the pole attachment process, are there individual OTMR elements that could form the basis of a more preferable timeline than what currently exists in the Commission's rules?

23. The Louisville OTMR ordinance differs from the one in Nashville in that it does not require new attachers to send pre-make-ready notices to existing attachers for routine requests, it shortens the timeline for the post-make-ready field inspection for routine make-ready work from 60 days to 14 days, it requires existing attachers to notify the new attacher of any problems (and the election of how to fix those problems) within 7 days after the field inspection, and it requires new attachers to correct any problems within 30 days of the notice.<sup>41</sup> We seek comment on the alternatives advanced in the Louisville OTMR ordinance and whether the Commission should incorporate any or all of these concepts into a new pole attachment regime. Does the Louisville ordinance better balance the concerns of existing attachers and utilities than the Nashville approach?

24. In addition, CPS Energy, a utility based in San Antonio, Texas, has implemented an OTMR approach for access to its poles.<sup>42</sup> Under the CPS Energy policy, the timeline for the pole attachment process is as follows: (1) 21 days for CPS Energy to review completed pole attachment applications (with a unilateral option for an additional 7 days), survey affected poles, and produce a make-ready cost estimate; (2) 21 days for the new attacher to approve the make-ready cost estimate and provide payment; (3) CPS Energy notice to existing attachers of impending make-ready work; (4) 60 days for CPS Energy to complete any required make-ready work in the electrical space, and 90 days for the new attacher to complete all other routine make-ready work at its expense using contractors approved by CPS Energy (with option to request additional 30 days); (5) new attachers must give 3 days' notice to existing attachers of impending make-ready work and must specify whether the work is complex, such that it "poses a risk of disconnection or interruption of service to a Critical Communications Facility";<sup>43</sup> (6) 15 days' notice from new attachers to affected existing attachers after completion of make-ready work; (7) 15 days for existing attachers to inspect make-ready work on their equipment; (8) 15 days for new attachers to fix any problems after notice from existing attachers. We seek comment on this approach, which varies from the ordinances adopted in Nashville and Louisville, especially in terms of the timing of the various pole attachment stages and the ability of new attachers to perform complex make-ready work themselves. What are the benefits and drawbacks of the process adopted by CPS Energy? Is it significant that this process is a utility-adopted approach as opposed to a government-adopted approach? What can the Commission do to encourage other utilities to adopt pole attachment policies like the one instituted by CPS Energy?

25. *Other Pole Attachment Process Proposals.* Another pole attachment proposal, advanced by members of the Nashville City Council who opposed the OTMR ordinance, is styled "right-touch, make-ready" (RTMR), and it would provide a utility 30 days in which to review a pole attachment application, then provide existing attachers 45 days to complete make-ready work.<sup>44</sup> Existing attachers failing to meet the 45-day deadline would be charged \$500 per pole per month until required make-ready

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<sup>41</sup> See Louisville Ordinance No. O-427-15, § 116.72(D)(2).

<sup>42</sup> See CPS Energy, *Pole Attachment Standards*, at 55-69 (issued May 6, 2016), available at <https://www.cpsenergy.com/content/dam/corporate/en/Documents/PoleAttachments/Pole%20Attachment%20Standards.pdf>.

<sup>43</sup> *Id.* at 68, para. 5(g). Any complex make-ready work must be completed by the new attacher within 30 days after notice is provided to affected existing attachers. *Id.* at 69, para. 6.

<sup>44</sup> See Jamie McGee, *Google Fiber plan faces new hurdles*, The Tennessean (Sep. 14, 2016), available at <http://www.tennessean.com/story/money/2016/09/14/google-fiber-plan-faces-new-hurdles/90368764/>; Nashville Resolution No. RS2016-380, sponsored by Nashville City Councilwoman Sheri Weiner (Sep. 20, 2016), available at [http://www.nashville.gov/mc/resolutions/term\\_2015\\_2019/rs2016\\_380.htm](http://www.nashville.gov/mc/resolutions/term_2015_2019/rs2016_380.htm).

work is completed. We seek comment on the reasonableness of this approach. What are the advantages and drawbacks of a RTMR approach as opposed to an OTMR approach? Could elements of both approaches be blended together to form a better alternative to the Commission's current pole attachment timeline? Would the \$500 fee per pole per month charge be enough of an incentive to encourage existing attachers to complete make-ready work by the 45-day deadline? Would it be reasonable to include in a RTMR approach the ability of new attachers (or the utility) to perform make-ready work at the expense of existing attachers who fail to meet the 45-day deadline?

26. As another way to incent accelerated make-ready timelines, could there be a standard "bonus" payment or multiplier applied to the make-ready reimbursements sought by existing attachers from new attachers if the *overall* timelines are met? By basing such incentive payments on the overall timeline being achieved by existing attachers, does this create effective incentives for parties to collaborate and find opportunities for efficiency? For instance, might multiple existing attachers agree to use the same make-ready contractor so they all can reap the reward of the incentive payments? While such incentives could theoretically be arranged through private contracting, would using this as the default system benefit smaller, new attachers who may find complicated negotiations a challenge?

27. We seek comment on these proposals and any others (or combinations thereof) that could help speed the pole attachment process, yet still address the safety and property concerns of existing attachers and utilities. Might there be "hybrid" approaches that incent parties to expeditiously complete the make-ready process when private negotiations fail within a given time period? For instance, if utilities, existing attachers, and new attachers cannot agree on make-ready plans within 15 days, could the following arrangement be used: first, the new attacher would select a "default" contractor (approved by the utility); second, the existing attachers would be able to accept the default contractor or do the make-ready work themselves (and be reimbursed by the new attacher) within a specified timeframe with penalties for failure to meet the make-ready deadline? If having a single default contractor do all the work at once will speed deployment, are there ways within this framework to incent existing attachers to allow the new attacher to use the default contractor? For instance, might existing attachers choosing to do make-ready work themselves be limited in the amount they charge for the work? Could such a limit be set as a proportional split among existing attachers that is based on the total make-ready costs that the new attacher would have incurred under an OTMR approach? Would such incentives encourage existing attachers to choose the default contractor in situations where they have little concern about harm to their equipment but still allow them to do the work themselves when they have concerns?

28. We seek discussions of the relative merits and drawbacks of these pole attachment approaches or combinations thereof. For example, would an OTMR approach (or some variant thereof) benefit consumers through increased efficiencies that could lower the costs of deployment? Is there any evidence to show how much less pole attachment costs are if using an OTMR approach as compared with the Commission's current pole attachment timeline? How should we balance the benefits to society from greater speed of deployment and cost savings versus the need to ensure that safety and property concerns are not compromised?

## **2. Re-examining Rates for Make-Ready Work and Pole Attachments**

### **a. Reasonableness of "Make-Ready" Costs**

29. We seek comment on proposals to reduce make-ready costs and to make such costs more transparent. In general, make-ready charges must be just and reasonable under Section 224(b)(1) of the Act.<sup>45</sup> Currently, however, make-ready fees are not subject to any mandatory rate formula set by the Commission. We seek comment on whether the make-ready costs being charged today are just and reasonable, and whether such costs represent a barrier to broadband infrastructure deployment. Further, we seek comment on ways to encourage utilities, existing attachers, and new attachers to resolve more

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<sup>45</sup> 47 U.S.C. § 224(b)(1).

make-ready pole attachment cost and responsibility issues through private negotiations.

30. *Requiring Utilities to Make Available Schedules of Common Make-Ready Charges.* We seek comment on whether we should require utilities to provide potential new attachers with a schedule of common make-ready charges to create greater transparency for make-ready costs. To what extent does the availability of schedules of common make-ready charges help facilitate broadband infrastructure deployment? INCOMPAS suggests that the Commission should revisit its 2011 decision refraining from requiring utilities to provide schedules of common make-ready charges upon request.<sup>46</sup> According to INCOMPAS, “make ready charges are not predictable or verifiable in many cases, making it difficult for competitors to plan their builds and accurately predict construction.”<sup>47</sup> We seek comment on the benefits and any potential burdens associated with requiring utilities to provide schedules of make-ready charges.

31. Further, we seek comment on whether and how schedules of common make-ready charges are made available, used, and implemented by both utilities and potential new attachers today. In the *2011 Pole Attachment Order*, the Commission received evidence from utilities that many already make information about common make-ready charges available on request.<sup>48</sup> Is that practice still prevalent today and, if so, what methods are most frequently used to provide such schedules (e.g., websites, paper schedules, telephonically)? We also seek comment on which make-ready jobs and charges are the most common, and thus most easily included in a generalized schedule of charges. In addition, we seek comment on any comparable state requirements that require utilities to publish or make available schedules of common make-ready charges. We also seek comment on whether there are other mechanisms currently in use, such as standardized contract terms, that provide the necessary information and transparency to the make-ready process.

32. *Reducing Make-Ready Charges.* We seek comment on reasonable ways to limit the make-ready fees charged by utilities to new attachers. Would it provide certainty to the make-ready process if the Commission adopted a rule limiting make-ready fees imposed on new attachers to the actual costs incurred to accommodate a new attachment? As part of the pole attachment complaint process, the Commission has held that utilities “are entitled to recover their costs from attachers for reasonable make-ready work necessitated by requests for attachment. Utilities are not entitled to collect money from attachers for unnecessary, duplicative, or defective make-ready work.”<sup>49</sup> Would codifying the holding that new attachers are responsible only for the cost of make-ready work made necessary because of their attachments help to ensure that make-ready costs are just and reasonable?

33. We also seek comment on other alternatives for reducing make-ready costs. For example, would it be reasonable to allow utilities to set a standard charge per pole that a new attacher may choose in lieu of a cost-allocated charge? Should the choice belong to the utility or the new attacher? Would a per-pole charge of, for example, \$300, \$400, or \$500 permit utilities to recover their reasonable make-ready costs and provide new attachers with an affordable alternative to negotiating with the utility over the applicable costs to be included in make-ready charges? We seek comment on the viability of such an approach. We also ask whether it would be reasonable to require utilities to reimburse new attachers for make-ready costs for improvements that subsequently benefit the utility (e.g., the modification allows utilities to use additional space on a pole for its own uses or creates a vehicle for the utility to receive additional revenues from subsequent attachers). If so, then how would the new attachers

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<sup>46</sup> See Letter from Chip Pickering, CEO, INCOMPAS, to Ajit Pai, Chairman, FCC, WT Docket No. 16-138 et al., at 3 (filed Feb. 3, 2017) (INCOMPAS *Ex Parte* Letter).

<sup>47</sup> *Id.*

<sup>48</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5279, para. 86 & n.252.

<sup>49</sup> *Knology, Inc. v. Georgia Power Co.*, Memorandum Opinion and Order, 18 FCC Rcd 24615, 24625, para. 26 (2003); see also *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.*, Consolidated Order, 14 FCC Rcd 11599 (Cable Serv. Bur. 1999).

and utilities manage that process? We seek comment on the potential tradeoffs of such an approach, which may help to keep make-ready costs low for new attachers, but also pose new challenges for utilities and new attachers to administer. We note that pursuant to Section 1.1416(b) of the Commission's rules, attachers who directly benefit from a new pole or attachment already are required to proportionately share in the costs of that pole or attachment.<sup>50</sup> In adopting this requirement, the Commission "intended to ensure that new entrants, especially small entities with limited resources, bear only their proportionate costs and are not forced to subsidize their later-entering competitors."<sup>51</sup> Should we interpret (or modify) this rule to apply to utilities when make-ready improvements subsequently benefit the utility? Conversely, we seek comment on whether requiring utilities to pass a percentage of additional attachment benefits back to parties with existing attachments would result in a disincentive to add new competitors to modified poles.

34. We also seek comment on whether the Commission's complaint process provides a sufficient mechanism by which to ensure that make-ready costs are just and reasonable. Commenters arguing that the Commission's complaint process is not a sufficient limitation on make-ready costs should propose specific alternatives to ensure the reasonableness of make-ready charges and explain why the benefits of such alternatives would outweigh the burdens of a new Commission-imposed mandate for make-ready charges. Are there state regulatory approaches or alternatives governing the reasonableness of make-ready charges that the Commission should consider implementing?

#### **b. Excluding Capital Expenses from Pole Attachment Rates**

35. *Capital Expenses Recovered via Make-Ready Fees.* We propose to codify a rule that excludes capital costs that utilities already recover via make-ready fees from pole attachment rates. Almost forty years ago, the Commission found that "where a utility has been directly reimbursed by a [cable television] operator for non-recurring costs, including plant, such costs must be subtracted from the utility's corresponding pole line capital account to insure that [cable television] operators are not charged twice for the same costs."<sup>52</sup> Since that time, the Commission has made clear that "[m]ake-ready costs are non-recurring costs for which the utility is directly compensated and as such are excluded from expenses used in the rate calculation."<sup>53</sup> As such, "if a utility is required to replace a pole in order to provide space for an attacher [and] the attacher pays the full cost of the replacement pole,"<sup>54</sup> the capital expenses associated with the installation of those poles should be wholly excluded from pole attachment rates for all attachers. Nonetheless, it appears that not all attachers benefit from lower rates in these circumstances, in part because our rules do not explicitly require utilities to exclude already-reimbursed capital costs from their pole attachment rates. We seek comment on how utilities recalculate rates when make-ready pays for a new pole, what rate reductions pole attachers have experienced when poles are replaced through the make-ready process, and whether attachers have experienced the inclusion of already-

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<sup>50</sup> 47 CFR § 1.1416(b); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Report and Order, CC Docket Nos. 96-98, 95-185, 11 FCC Rcd 15499, 16097, para. 1214 (1996) (*1996 Local Competition Order*). The proportionate share of the costs attributable to the subsequent attacher are reduced to take into account depreciation to the pole that occurs after the modification. *Id.*

<sup>51</sup> *1996 Local Competition Order*, 11 FCC Rcd at 16097, para. 1214.

<sup>52</sup> *See Adoption of Rules for the Regulation of Cable Television Pole Attachments*, CC Docket No. 78-144, Second Report and Order, 72 FCC 2d 59, 72, para. 27 (1979); *Florida Cable Telecom. Assn., Inc. et al. v. Gulf Power Co.*, EB Docket No. 04-381, Decision, 26 FCC Rcd 6452, 6455-56, para. 9 (2011).

<sup>53</sup> *Amendment of Rules and Policies Governing Pole Attachments*, CS Docket No. 97-98, Report and Order, 15 FCC Rcd 6453, 6472-73, para. 28 (2000); *Amendment of Commission's Rules and Policies Governing Pole Attachments; Implementation of Section 703(E) of the Telecommunications Act of 1996*, Consolidated Partial Order on Reconsideration, CS Docket Nos. 97-98, 97-151, 16 FCC Rcd 12103, 12118, n.120 (2001) (*Pole Attachment Fees Recon Order*).

<sup>54</sup> *Pole Attachment Fees Recon Order*, 16 FCC Rcd at 12118, para. 24.

reimbursed capital costs in their pole attachment rates. We similarly seek comment on how utilities treat capital expenses associated with their own make-ready work. When utilities replace poles to accommodate their own needs or to create additional electrical space, do they appropriately treat associated capital expenses as make-ready work that is wholly excluded from pole attachment rates? How do existing attachers know when new attachers or the utility have fully paid the capital expenses as make-ready costs so that those expenses should be wholly excluded from rates going forward?

36. We seek comment on whether amending Section 1.1409(c) of our rules to exclude capital expenses already recovered via make-ready fees from “actual capital costs” is sufficient to ensure no double recovery occurs by utilities.<sup>55</sup> We seek comment on whether any other changes to the Commission’s rules are necessary and reasonable to provide certainty to attachers and utilities about the treatment of pole capital costs that already have been recovered via make-ready.

37. *Capital Costs Not Otherwise Recovered Via Make-Ready Fees.* We seek comment on whether we should exclude capital costs that are not otherwise recoverable through make-ready fees from the upper-bound cable and telecommunications pole attachment rates. In setting those rates, the Commission previously found it appropriate to allow utilities to include in the rates some contribution to capital costs aside from those recovered through make-ready fees.<sup>56</sup> In revisiting this issue, we seek comment on the extent to which the capital costs of a pole, other than those paid through make-ready fees, are caused by attachers other than the utility (especially when there is space already available on the pole). If none or only a small fraction of the capital costs, other than those paid for through make-ready fees, are caused by attachers other than the utility, would this justify the complete exclusion of these capital costs from the pole attachment rate? To what extent would the exclusion of such capital costs further reduce pole attachment rates? To what extent would the exclusion of these particular capital costs from the rate formulas burden the ratepayers of electric utilities? What policy justifies charging pole attachers, whose costs of deployment may determine the scope of their investment in infrastructure, anything more than the incremental costs of attachment to utilities?

38. We note that although the rate formula for operators “solely” providing cable service sets an upper bound explicitly tied to “actual capital costs,” the rate formula for telecommunications carriers is tied only to “costs.”<sup>57</sup> The Commission has previously interpreted the term “cost” in the latter formula to exclude at least some capital costs.<sup>58</sup> Should we revisit this interpretation and interpret the term “cost” in the telecommunications pole attachment formula to exclude all capital costs? Would doing so avoid the awkward interpretation contained in our present rules that defines the term “cost” in two separate different ways at the same time?

39. Similarly, we note that our more general authority over pole attachments only requires that rates be “just and reasonable.”<sup>59</sup> We seek comment on the appropriate rate for commingled services, including when a cable operator or a telecommunications carrier offers information services as well as cable or telecommunications services over a single attachment.<sup>60</sup> Should we set that rate for commingled services based on the upper bound of the cable rate formula, the telecommunications rate formula, or

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<sup>55</sup> 47 CFR §§ 1.1409(c), (e).

<sup>56</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5304, para. 149.

<sup>57</sup> *Compare* 47 U.S.C. § 224(d) *with* 47 U.S.C. § 224(e).

<sup>58</sup> *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order on Reconsideration, 30 FCC Rcd 13731, 13742, para. 37 (2015).

<sup>59</sup> 47 U.S.C. § 224(b)(1).

<sup>60</sup> *Cf. National Cable & Telecommunications Ass’n v. Gulf Power Co.*, 534 U.S. 327, 339 (2002) (“Congress may well have chosen to define a ‘just and reasonable’ rate for pure cable television service, yet declined to produce a prospective formula for commingled cable service. The latter might be expected to evolve in directions Congress knew it could not anticipate.”).

some third option? Should we exclude capital costs from the rate formula we use to determine the commingled services rate? The cable rate formula also sets a lower bound of “the additional costs of providing pole attachments.” How would that differ from any of the rates discussed heretofore? Should we set the commingled services rate equal to the lower bound of the cable rate formula?

40. We seek comment on what specific amendments we should consider to Section 1.1409 of our rules to effectuate any changes.

**c. Pole Attachment Rates for Incumbent LECs**

41. In the *2011 Pole Attachment Order*, the Commission declined to adopt a pole attachment rate formula for incumbent LECs, opting instead to evaluate incumbent LEC complaints on a case-by-case basis to determine whether the rates, terms, and conditions imposed on incumbent LEC pole attachments are consistent with Section 224(b) of the Act.<sup>61</sup> The Commission held that it is “appropriate to use the rate of the comparable attacher as the just and reasonable rate for purposes of section 224(b)” when an incumbent LEC enters into a new agreement with a utility and can demonstrate “that it is obtaining pole attachments on terms and conditions that leave them comparably situated to telecommunications carriers or cable operators.”<sup>62</sup> Conversely, when the incumbent LEC attacher cannot make such a demonstration, the Commission found that a higher rate based on the Commission’s pre-2011 telecommunications rate formula should serve as a “reference point” for evaluating whether pole attachment rates charged to incumbent LECs are just and reasonable.<sup>63</sup> In the years since adoption, this formulation has led to repeated disputes between incumbent LECs and utilities over appropriate pole attachment rates.

42. To end this controversy, we propose that the “just and reasonable rate” under Section 224(b) for incumbent LEC attachers should presumptively be the same rate paid by other telecommunications attachers, i.e., a rate calculated using the most recent telecommunications rate formula. Under this approach, the incumbent LEC would no longer be required to demonstrate it is “comparably situated” to a telecommunications provider or a cable operator; instead the incumbent LEC would receive the telecommunications rate unless the utility pole owner can demonstrate with clear and convincing evidence that the benefits to the incumbent LEC far outstrip the benefits accorded to other pole attachers. We seek comment on this proposal. What demonstration should be sufficient to show that an incumbent LEC attacher should not be entitled to the telecommunications rate formula? For instance, should an incumbent LEC have to own a majority of poles in a joint ownership network? Should an incumbent LEC have to have special access to modify a utility’s poles without prior notification? How should the relative rates charged to the utility and the incumbent LEC factor into the analysis? If an incumbent LEC has attachments on utility poles pursuant to the terms of a joint use agreement, should the incumbent LEC entitlement to the telecommunications rate be conditioned on making commensurate reductions in the rates charged to the utility for attaching to the incumbent LEC’s poles? We also seek comment on the rate that should apply to incumbent LECs in the event the utility owner can demonstrate the telecommunications rate should not apply. In these instances, should the Commission use the pre-2011 telecommunications rate formula? We also seek comment on an alternative pole attachment rate formula approaches for incumbent LECs. Commenters supporting alternative approaches should provide specific inputs and methodology that could be used in such a formula.

43. Given that the Commission based its decision in the *2011 Pole Attachment Order* to refrain from establishing pole attachment rates for incumbent LECs in part on the high levels of incumbent LEC pole ownership, we seek comment on the relative levels of pole ownership between utilities, incumbent LECs, and other industry participants. If pole ownership levels have changed, what

<sup>61</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5238, para. 203; *id.* at 5334, para. 214.

<sup>62</sup> *Id.* at 5336, para. 217.

<sup>63</sup> *Id.* at 5337, para. 218.

bearing should that have on the rates charge to incumbent LECs?

### 3. Pole Attachment “Shot Clock” For Pole Attachment Complaints

44. *Establishing a 180-Day Shot Clock.* We propose to establish a 180-day “shot clock” for Enforcement Bureau resolution of pole access complaints filed under Section 1.1409 of our rules.<sup>64</sup> We seek comment on this proposal. The *2011 Pole Attachment Order* noted that “a number of commenters expressed concern about the length of time it takes for the Commission to resolve pole attachment complaints,” but the Commission determined that the record at the time did not warrant the creation of new pole attachment complaint rules.<sup>65</sup> We now seek comment on whether we should revisit that earlier conclusion by creating a shot clock and whether 180 days is a reasonable timeframe for the Enforcement Bureau to resolve pole access complaints. We note that under Section 224(c)(3)(B) of the Act, a state that has asserted jurisdiction over the rates, terms, and conditions of pole attachments could lose the ability to resolve a pole attachment complaint if it does not take final action within 180 days after the complaint is filed with the state.<sup>66</sup> Should this statutory time period for state resolution of a pole attachment complaint inform our consideration as to what constitutes a reasonable timeframe for Enforcement Bureau consideration of a pole attachment complaint? We additionally seek alternatives to the 180-day time period. For example, are there shorter state timelines for the resolution of pole attachment complaints? Also, we seek comment regarding whether the current length of Enforcement Bureau consideration of pole access complaints has burdened broadband infrastructure deployment. How, if at all, would a shot clock (whether it be 180 days or some different time period) affect new attacher decisions to deploy broadband infrastructure? We seek comment on the ramifications of the Enforcement Bureau exceeding the shot clock. We propose that the shot clock be an informal target, as it is in the transactions context.<sup>67</sup> However, we seek comment on reasonable consequences for the Enforcement Bureau exceeding the clock.

45. *Starting the Shot Clock at the Time a Complaint Is Filed.* We seek comment on when to start the proposed 180-day shot clock. We propose starting the shot clock at the time the pole access complaint is filed, as is the case for state complaints under Section 224(c)(3)(B) of the Act,<sup>68</sup> and we seek comment on this proposal. We also seek comment on alternatives that would start the shot clock later in the process, such as when a reply is filed by the complainant pursuant to Section 1.1407(a) of our rules<sup>69</sup> or, if discovery is requested, when discovery is complete. Starting the clock at these later junctures would allow the Enforcement Bureau sufficient time to review the relevant issues involved in a pole access complaint and would not disadvantage the timing of the Enforcement Bureau’s review if the pleading cycle or discovery takes longer than expected. Are there instructive alternative starting points adopted by states for the initiation of their pole attachment complaint proceedings? If the shot clock does not start until sometime after a pole access complaint is filed, would it make sense to institute a shot clock that is

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<sup>64</sup> 47 CFR § 1.1409. A “pole access complaint” is a complaint that alleges a complete denial of access to utility poles. This term does not encompass a complaint alleging that unreasonable rates, terms, or conditions that the utility demands as a condition of attachment (e.g., adherence to certain engineering standards) amounts to a denial of pole access.

<sup>65</sup> *2011 Pole Attachment Order*, 26 FCC Rcd at 5286, para. 102 & nn.317-18.

<sup>66</sup> 47 U.S.C. § 224(c)(3)(B)(i). A state also could lose jurisdiction over a pole attachment complaint if it fails to take final action within the time period prescribed in the state’s rules, provided such period does not extend beyond 360 days after the filing of a complaint. 47 U.S.C. § 224(c)(3)(B)(ii). If a state does not meet the statutory deadlines for resolving a pole attachment complaint, then jurisdiction for the complaint falls to the Commission. 47 U.S.C. § 224(c).

<sup>67</sup> See 47 CFR § 63.03(c)(2).

<sup>68</sup> 47 U.S.C. § 224(c)(3)(B).

<sup>69</sup> 47 CFR § 1.1407(a).



shorter than 180 days?

46. *Pausing the Shot Clock.* We seek comment on whether the Enforcement Bureau should be able to pause the proposed shot clock for a reasonable time in situations where actions outside the Enforcement Bureau's control are responsible for delaying its review of a pole access complaint. In the transactions context, the reviewing Bureau pauses the shot clock when the parties need additional time to provide key information requested by the Bureau.<sup>70</sup> We propose to allow the Enforcement Bureau the discretion to pause the shot clock in that situation, as well as:

- when the parties decide to pursue informal dispute resolution or request a delay to pursue settlement discussions after a pole access complaint is filed;
- when the parties engage in significant discovery or briefing of the disputed issues that prolongs the complaint process; or
- when the complaint involves large pole access requests of a complex nature that necessitate Enforcement Bureau requests for significant additional information from the parties in order to resolve the complaint.

We ask whether these are valid reasons to pause the shot clock, and we seek comment on objective criteria for the Enforcement Bureau to use in deciding whether such situations are significant enough to warrant a pause in the shot clock. We also seek comment on when the Enforcement Bureau should resume the shot clock. Are there objective criteria that the Enforcement Bureau could use to judge the satisfactory resolution of an outstanding issue such that the shot clock could be resumed? Further, we propose to alert parties to a pause in the shot clock (and to a resumption of the shot clock) via written notice to the parties. We seek comment on this proposal.

47. *Establishment of Pre-Complaint Procedures.* We propose requiring the parties to resolve procedural issues and deadlines in a meeting to be held either remotely or in person prior to the filing of the pole access complaint (and prior to the starting of the shot clock). We seek comment on this proposal. We propose that, at a minimum, the parties contact and work with Enforcement Bureau staff before a complaint is filed to narrow the factual and legal issues in a particular dispute; discuss the need to exchange relevant documents and discovery and the timeframe for doing so; and agree on various case management issues, such as the entry of a protective order for the exchange of confidential information. We seek comment on any other types of issues that the parties should resolve in a pre-complaint meeting. We note that it has been our standard practice to request that parties participate in pre-complaint meetings in order to resolve procedural issues and deadlines; we find that such a practice has resulted in the complaint process proceeding much more smoothly as a result. We seek comment on the benefits and drawbacks of requiring a pre-complaint meeting and ask whether there are any state pre-complaint procedures that could inform the rules that we develop.

48. *Use of Shot Clock for Other Pole Attachment Complaints.* We seek comment on whether the Commission should adopt a 180-day shot clock for pole attachment complaints other than those relating to access. We also request comment on whether the length of time to resolve other pole attachment complaints has stymied the deployment of broadband infrastructure. We additionally seek comment on reasonable alternatives to a 180-day shot clock and ask whether there are state shot clocks for other pole attachment complaints that could help inform our review. Should the procedures set forth above for pole access complaints also apply to other pole attachment complaints? What alternatives could we adopt that would further streamline the pole attachment complaint process?

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<sup>70</sup> See, e.g., Letter from Matthew S. DeNero, Chief, Wireline Competition Bureau, FCC, to Bryan Tramont, Adam Krinsky, and Jennifer Kostyu, Counsel to Verizon, and Thomas Cohen and Edward Yorkgitis, Jr., Counsel to XO Holdings, WC Docket No. 16-70 (July 20, 2016).

#### 4. Reciprocal Access to Poles Pursuant to Section 251

49. *Background.* Section 251 of the Act provides that “[e]ach local exchange carrier” has the duty “to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 [of this Act].”<sup>71</sup> Section 224(a) defines a “utility” that must provide telecommunications carriers nondiscriminatory pole access at regulated rates to include both incumbent LECs and competitive LECs.<sup>72</sup> However, the definition of “telecommunications carrier” used in Section 224 “does not include” incumbent LECs, thus denying incumbent LECs the benefits of Section 224’s specific protections for carriers.<sup>73</sup>

50. According to CenturyLink, the disparate treatment of incumbent LECs and competitive LECs in Section 224(a) prevents incumbent LECs from gaining access to competitive LEC-controlled infrastructure and in doing so dampens the incentives for all local exchange carriers to build and deploy the infrastructure necessary for advanced services.<sup>74</sup> The Commission initially examined this issue during its implementation of the 1996 Act in the *1996 Local Competition Order*, where it determined that Section 251 cannot “[r]estore] to an incumbent LEC access rights expressly withheld by section 224.”<sup>75</sup> The Ninth Circuit Court of Appeals disagreed in dicta, noting that Sections 224 and 251 could “be read in harmony” to support a right of access for incumbent LECs on other LEC poles.<sup>76</sup> CenturyLink requests the Commission revisit our interpretation.<sup>77</sup> Other commenters in the latest Biennial Review contend that the Commission’s interpretation remains valid given incumbent LECs’ “first-mover advantage” and “the ability of large incumbent LECs to abuse their market positions to foreclose competition.”<sup>78</sup>

51. *Discussion.* We propose that the interconnection requirements for telecommunications carriers in Section 251 of the Act and the pole attachment requirements of Section 224 should be interpreted in a manner that avoids unnecessary conflict between the two provisions. We seek comment on this proposal. Specifically, we seek comment on reading the statutes in harmony to create a reciprocal system of infrastructure access rules in which incumbent LECs, pursuant to Section 251(b)(4) of the Act, could demand access to competitive LEC poles and *vice versa*, subject to the rates, terms, and conditions described in Section 224. We seek comment on whether such a reading would eliminate unnecessary barriers to advanced telecommunications capability and facilitate broadband deployment in a “reasonable and timely fashion” in keeping with our mandate under Section 706 of the Telecommunications Act of 1996 (1996 Act).<sup>79</sup> Further, we seek comment on necessary amendments to our rules to effectuate the changed interpretation. We also seek comment on how similar the rules for incumbent LEC access under Section 251 must be to those for other carriers under Section 224 for the rules to be “consistent” with each other.

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<sup>71</sup> See 47 U.S.C. § 251(b)(4).

<sup>72</sup> See 47 U.S.C. § 224(a)(1).

<sup>73</sup> See 47 U.S.C. § 224(a)(5).

<sup>74</sup> CenturyLink Comments, WC Docket No. 16-132, at 12-13 (Dec. 5, 2016) (CenturyLink Biennial Comments).

<sup>75</sup> *1996 Local Competition Order*, 11 FCC Rcd at 16102-16104, paras. 1226-1231.

<sup>76</sup> *US West Communications, Inc. v. Hamilton*, 224 F.3d 1049, 1053-54 (9th Cir. 2000). Despite its skepticism of the Commission’s analysis in the *1996 Local Competition Order*, the Ninth Circuit held it was obligated to adhere to that analysis because the parties had not directly challenged the *1996 Local Competition Order* via the Hobbs Act. *See id.* at 1054-55.

<sup>77</sup> CenturyLink Biennial Comments at 12-13.

<sup>78</sup> CCA Reply, WC Docket No. 16-132, at 7 (Jan. 3, 2017); INCOMPAS Reply, WC Docket No. 16-132, at 11 (Jan. 3, 2017).

<sup>79</sup> See 47 U.S.C. § 1302.

52. Additionally, we seek comments and data that will help establish how often incumbent LECs request access to competitive LEC infrastructure. How often do incumbent LECs request access to infrastructure controlled by competitive LECs, how frequently are incumbent LECs denied access, and how much of an effect does this have on competition and broadband deployment? Would the frequency of incumbent LEC requests for access to competitive LEC poles change as a result of our proposal, and how would that impact broadband deployment?

### **B. Expediting the Copper Retirement and Network Change Notification Process**

53. Section 251 of the Act<sup>80</sup> imposes specific obligations on incumbent LECs to promote competition so as to allow industry to bring “increased innovation to American consumers.”<sup>81</sup> To that end, Section 251(c)(5) and the Commission’s Part 51 implementing rules require incumbent LECs to provide public notice of network changes, including copper retirement, that would affect a competing carrier’s performance or ability to provide service.<sup>82</sup> Changes to these Part 51 rules over the past few years, especially those pertaining to the transition from copper to fiber, appear to unnecessarily extend, rather than expedite, the copper retirement process, “diverting scarce capital from new networks to old.”<sup>83</sup> As a result, we propose revisions to our Part 51 network change disclosure rules to allow providers greater flexibility in the copper retirement process and to reduce associated regulatory burdens, to facilitate more rapid deployment of next-generation networks. We also seek comment on streamlining and/or eliminating provisions of the more generally applicable network change notification rules.

#### **1. Copper Retirement**

54. We seek comment on revisiting our copper retirement and notice of network change requirements to reduce regulatory barriers to the deployment of next-generation networks. First, we propose eliminating some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*. We seek comment on this proposal and on the Commission’s authority to impose the copper retirement notice requirements adopted in the *2015 Technology Transitions Order*.<sup>84</sup> Among other things, the new rules doubled the time period during which an incumbent LEC must wait to implement a planned copper retirement after the Commission’s release of public notice from 90 days to 180 days, required direct notice to retail customers, states, Tribal entities, and the Secretary of Defense, and expanded the types of information that must be disclosed.<sup>85</sup>

55. *Repeal of Section 51.332 and Return to Prior Short-Term Network Change Notification Rule.* We seek comment on how best to handle incumbent LEC copper retirements going forward to

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<sup>80</sup> 7 U.S.C. §251.

<sup>81</sup> *1996 Local Competition Order*, 11 FCC Rcd at 15506, para. 4.

<sup>82</sup> *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers et al.*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) (*Triennial Review Order*), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020, *aff’d in part, remanded in part, vacated in part, United States Telecom Ass’n v. FCC*, 359 F.3d 554, 564-93 (D.C. Cir. 2004) (*USTA II*), *cert. denied*, 543 U.S. 925 (2004), *on remand, Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd 2533, 2541, para. 12 (2004) (*Triennial Review Remand Order*) *aff’d, Covad Commc’ns Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006); *see also See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 et al.*, CC Docket No. 96-98 et al., Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392, 19471, para. 168 (1996) (*Second Local Competition Order*).

<sup>83</sup> *See Technology Transitions et al.*, GN Docket No. 13-5 et al., Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, 9545 (2015) (Statement of Commissioner Ajit Pai) (*2015 Technology Transitions Order*).

<sup>84</sup> *2015 Technology Transitions Order*, 30 FCC Rcd 9372, 9383-9425, paras. 15-97.

<sup>85</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9387-90, 9396-97, & 9411-9413, paras. 24-25, 28-29, 39-40, & 70-71.

prevent unnecessary delay and capital expenditures on this legacy technology. First, we propose eliminating Section 51.332 entirely and returning to a more streamlined version of the pre-2015 *Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Act. Specifically, prior to the 2015 *Technology Transitions Order*, incumbent LEC copper retirement notices of less than six months were regulated under the more flexible Commission rule that applied to short-term network change notices.<sup>86</sup> We seek comment on our proposal to repeal Section 51.332 and whether to reinstate the prior copper retirement notice rules. Have the delays and increased burdens introduced by the revised rules hindered next-generation network investment?<sup>87</sup> What are their costs and benefits? Would adopting our pre-2015 rule, without modification, provide incumbent LECs with sufficient flexibility to facilitate their transition to next-generation networks?

56. The 2015 *Technology Transitions Order* eliminated the process by which competitive LECs can object to and seek to delay an incumbent LEC's planned copper retirement when it increased the "deemed approved" timeframe from 90 to 180 days.<sup>88</sup> If we return incumbent LEC copper retirements to the prior network notification process, should we nonetheless retain this change, and, if so, how should we incorporate it into our rules?

57. The 2015 *Technology Transitions Order* also adopted an expanded definition of copper retirement that added (1) the feeder portion of copper loops and subloops, previously excluded, and (2) "the failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removal or disabling"—i.e., *de facto* retirement.<sup>89</sup> Maintenance of existing copper facilities remains a concern when an incumbent LEC does not go through the copper retirement process. If we return incumbent LEC copper retirements to the prior network notification process, should we nonetheless retain this expanded definition?

58. The 2015 *Technology Transitions Order* also broadened the recipients of direct notice from "each telephone exchange service provider that directly interconnects with the incumbent LEC's network" to "each entity within the affected service area that directly interconnects with the incumbent LEC's network." It also added a notice requirement to the Secretary of Defense as well as the state public utility commission, Governor of the State, and any Tribal entity with authority over Tribal lands in which the copper retirement is proposed. Have these direct notice changes adopted by the Commission meaningfully promoted facilities investment or preserved competition in the provision of next-generation facilities, and what costs have the changes imposed? Our proposal to return to a version of our pre-2015 copper retirement rules would reduce the number of direct notice recipients from "each entity" to "each telephone exchange service provider," and eliminate the other expanded notice requirements from the 2015 *Technology Transitions Order*. We seek comments on the effects of this proposed change.

59. *Full Harmonization with General Network Change Notification Process.* Alternatively, we seek comment on eliminating all differences between copper retirement and other network change notice requirements, rendering copper retirement changes subject to the same long-term or, where applicable, short-term network change notice requirements as all other types of network changes subject to Section 251(c)(5). Even under the Commission's rules prior to the 2015 *Technology Transitions Order*, there were differences in the treatment of copper retirements and other short-term network change notices. Whereas short-term network change notices become effective ten days after Commission issuance of a public notice, copper retirement notices became effective ninety days thereafter.<sup>90</sup>

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<sup>86</sup> See 47 CFR § 51.333 (2015).

<sup>87</sup> See Frontier Communications Corp. Reply, WC Docket No. 16-132, at 16 (Jan. 3, 2017) (Frontier Biennial Reply).

<sup>88</sup> 47 CFR § 51.332(f).

<sup>89</sup> 47 CFR § 51.332(a).

<sup>90</sup> 47 CFR § 51.333(b)(1)-(2) (2015).

Moreover, an objection to a copper retirement notice was deemed denied 90 days after the Commission's public notice absent Commission action on the objection, while there is no "deemed denied" provision for other short-term network change objections.<sup>91</sup> Is there a basis to continue to have a different set of network change requirements for copper retirement? In this regard, we note that the transition from copper to fiber has been occurring for well more than a decade now.<sup>92</sup> We anticipate that interconnecting carriers are aware that copper retirements are inevitable and that they should be familiar by now with the implications of and processes involved in accommodating such changes. We seek comment on this expectation.

60. *Modification of Section 51.332.* A second alternative proposal to eliminating Section 51.332 entirely would be to retain but amend Section 51.332 to streamline the process, provide greater flexibility, and reduce burdensome requirements for incumbent LEC copper retirements. We seek comment on how we should change the rule to afford flexibility and maximize incentives to deploy next-generation facilities. We propose the following specific changes and seek comment on whether we should adopt additional or different changes than those specified:

- Requiring an incumbent LEC to serve its notice only to telephone exchange service providers that directly interconnect with the incumbent LEC's network, as was the case under the predecessor rules, rather than "each entity within the affected service area that directly interconnects with the incumbent LEC's network."
- Reducing the waiting period to 90 days from 180 days after the Commission releases its public notice before the incumbent LEC may implement the planned copper retirement.
- Providing greater flexibility regarding the time in which an incumbent LEC must file the requisite certification.
- Reducing the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area.
- Eliminating the requirement that the copper retirement notice include a description of any changes in prices, terms, or conditions that will accompany the planned changes.
- Eliminating the "good faith communication" requirement.

Should we adopt different timing thresholds than those specified above, and if so, what thresholds and why would different thresholds be better? Should we reduce the waiting period to one month and remove the notification requirements in emergency situations?<sup>93</sup> Should we modify the existing requirements for the content of the notice, and if so, how? Have competitive LECs availed themselves of the good faith communication requirement, and if so, has that requirement caused any difficulties? If we eliminate the good faith communication requirement, should we include an objection period, and what form should it take? Alternatively, should we retain the good faith communication requirement and not include an objection period?

61. If we modify Section 51.332, we also propose eliminating the requirement that incumbent LECs provide direct notice of planned copper retirements to retail customers, both residential and non-residential. Specifically, we propose eliminating Sections 51.332(b)(3), (c)(2), (d)(6)-(8), and (e)(3)-(4). The stated purpose of adding the direct notice requirement to retail customers was to reduce consumer confusion by ensuring access to information—but there was little evidence of consumer confusion before

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<sup>91</sup> 47 CFR § 51.333(e)-(f) (2015).

<sup>92</sup> See *Triennial Review Order*, 18 FCC Rcd at 16978; *Triennial Review Remand Order*, 20 FCC Rcd at 2541, para. 12.

<sup>93</sup> See *Frontier Biennial Reply* at 16.

the Commission adopted this requirement and we have seen little evidence that the requirement reduced any confusion that previously existed.<sup>94</sup> What would be the likely impact of eliminating such notice to consumers who have disabilities and senior citizens? How do the benefits of notification compare with the costs in terms of slower transitions to next-generation networks? Are there alternative ways in which the Commission can streamline these retail customer notice rules to make the process more flexible and less burdensome on carriers retiring their copper? Finally, how, if at all, should we modify the requirements for providing notice under current Section 51.332(b)(4) to the states, Tribal entities, and the Secretary of Defense?

62. *Additional Considerations.* We seek comment on additional methods by which we can provide further flexibility in the copper retirement process in conjunction with or separate from the proposals described above while still affording interconnecting entities the notice they need. For instance, should the Commission consider an even shorter waiting period in certain circumstances, and if so, in what circumstances and how much shorter? How, if at all, should that affect the timing for filing the required certification? Are there any other measures we could take to make the copper retirement process less burdensome on carriers? Are any technical changes to our rules necessary to accommodate reforming the copper retirement process? For example, we propose revising Section 51.329(c)(1) to eliminate the titles specific to copper retirement notices, which under the first-described proposal above would no longer be a defined term. We seek comment on this proposal.

## 2. Network Change Notifications Generally

63. Next, we seek comment on methods to reduce the burden of our network change notification processes generally. The Commission's network change notification process is the process by which incumbent LECs 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."<sup>95</sup> Aside from the copper retirement notice expansions adopted by the *2015 Technology Transitions Order*, we last revisited our general Section 251(c)(5) rules in 2004. Do changes to the telecommunications marketplace since that time warrant changes to these rules, more generally, and if so, what changes? We seek comment on two specific changes below and invite commenters to identify other possible reforms to our network change notification processes.

64. *Section 51.325(c).* We specifically propose eliminating Section 51.325(c) of our rules, which prohibits incumbent LECs from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.<sup>96</sup> We seek comment on this proposal. This prohibition appears to unnecessarily constrain the free flow of useful information that such entities may find particularly helpful in planning their own business operations. We seek comment on this view. Alternatively, we could revise Section 51.325(c) of our rules to permit disclosures to affiliated and unaffiliated entities, but only to the extent that the information disclosed is what the incumbent LEC would include in its required public notice under Section 51.327. A third possibility would be to revise Section 51.325(c) to allow such disclosure, but only to the extent the carrier makes such information available to all entities that would be entitled to direct notice of the network change in question. We seek comment on these proposals and any other alternative approaches. If we permit disclosure to affiliated or unaffiliated entities prior to public notice, should we specify any particular timeframe within which public notice must follow?

65. What are the potential advantages and disadvantages of eliminating or revising Section

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<sup>94</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9395-96, para. 39.

<sup>95</sup> 47 U.S.C. § 251(c)(5).

<sup>96</sup> *Cf.* BT Americas, Inc. Reply, WC Docket No. 16-132, at 5 (Jan. 3, 2016); Windstream Services, LLC Reply, WC Docket No. 16-132, at 10-11 (Jan. 3, 2016).

51.325(c)?<sup>97</sup> When this rule was first adopted, the goal was to prevent “preferential disclosure to selected entities.”<sup>98</sup> Are these concerns still warranted? We anticipate that providing incumbent LECs greater flexibility to disclose information and discuss contemplated changes before cementing definitive plans would benefit these carriers, interconnecting carriers, and any other interested entities to which disclosure may be useful by providing all such entities greater time to consider or respond to possible network changes. We seek comment on this expectation. To the extent that concerns about some entities receiving advanced notice remain warranted, do any of the specific revisions proposed above obviate such concerns, and if not, what approach can we adopt to address such concerns while still introducing additional flexibility?

66. *Objection Procedures.* Should we revise or eliminate the procedures set forth in Section 51.333(c) of the Commission’s rules by which a telecommunications service provider or information service provider that directly interconnects with the incumbent LEC’s network may object to the timing of short-term network changes?<sup>99</sup> What costs, if any, has the uncertainty introduced by this procedure imposed? Have competitive LECs made use of this procedure? Should we adopt a “deemed denied” timeframe with respect to objections for which the Commission has not acted within some specified timeframe? Should we revise the objection procedure in any other way?

### 3. Section 68.110(b)

67. We seek comment on eliminating Section 68.110(b) of our rules, which requires that “[i]f . . . changes [to a wireline telecommunications provider’s communications facilities, equipment, operations or procedures] can be reasonably expected to render any customer’s terminal equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.”<sup>100</sup> We seek comment on the benefits and costs of the current rule and whether the benefits outweigh the costs. How is such notice under that rule provided today, and specifically, how is it that a carrier would be able to know whether “any” terminal equipment would be affected? Do customers still rely on or benefit from the notice required by Section 68.110(b)? To what extent do individuals with disabilities still rely on TTYs or other specialized devices or services in an analog environment? To what extent have individuals with disabilities adopted alternative means of communications, whether using telecommunications relay services, texting, videophones, or other online communications? To what extent have such individuals relied on terminal-equipment-incompatibility notices in the past, and are alternative means available that would be more effective at targeting affected individuals with disabilities? We seek comment on the benefits and costs of the current rule and whether the benefits outweigh the costs. Alternatively, should the rule be retained but certain types of changes categorically exempted? The Commission’s current copper retirement rules require incumbent LECs to certify compliance with Section 68.110(b).<sup>101</sup> If we eliminate Section 68.110(b), we propose eliminating this certification requirement, and we seek comment on this proposal.

#### C. Streamlining the Section 214(a) Discontinuance Process

68. Section 214 is the “mother-may-I” of Title II of the Communications Act.<sup>102</sup> Among

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<sup>97</sup> See Verizon Comments, WC Docket No. 16-132, at 11 (Dec. 5, 2016) (noting that “the Commission’s new copper retirement rules and notification structure would still provide a fulsome and timely notification in connection with a provider’s actual filing”).

<sup>98</sup> See *Second Local Competition Order*, 11 FCC Rcd at 19494, para. 221.

<sup>99</sup> 47 CFR § 51.333(c).

<sup>100</sup> 47 CFR § 68.110(b).

<sup>101</sup> 47 CFR § 51.332(d)(8).

<sup>102</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9545 (Statement of Commissioner Ajit Pai).

other things, Section 214(a) requires carriers to obtain authorization from the Commission before discontinuing, reducing, or impairing<sup>103</sup> service to a community or part of a community.<sup>104</sup> With respect to Section 214(a)'s discontinuance provision, generally, and the Commission's implementing rules<sup>105</sup> specifically, carriers have asserted "that exit approval requirements are among the very most intrusive forms of regulation."<sup>106</sup> In this section, we propose targeted measures to shorten timeframes and eliminate unnecessary process encumbrances that force carriers to maintain legacy services they seek to discontinue even when more technologically advanced alternatives are available to consumers. The resulting diversion of limited capital from deploying next-generation infrastructure and services harms consumers and carriers alike, and we expect that the changes we propose will mitigate that harm to better meet our public interest obligations under Section 214.

69. We believe that streamlining discontinuance processing for legacy systems will facilitate carriers' ability to retire legacy network infrastructure and will accelerate the transition to next generation IP-based networks.<sup>107</sup> We seek comment on this view.

### 1. Applications That "Grandfather" Existing Customers

70. *Streamlining the Public Comment Period.* We propose to streamline the Section 214(a) discontinuance process for applications that seek authorization to "grandfather" low-speed legacy services for existing customers. "Grandfathering" a service in Section 214 parlance means that a carrier requests permission to stop accepting new customers for the service while maintaining service to existing customers.<sup>108</sup> We specifically propose to reduce the public comment period to a uniform 10 days for all applications seeking to grandfather legacy low-speed services regardless of whether the provider filing the application is a dominant or non-dominant carrier.<sup>109</sup> We seek comment on this proposal.

71. As a threshold matter, we seek comment on whether expediting the review and authorization of applications to grandfather low-speed services offers benefits to discontinuing carriers generally. Will reducing the regulatory burdens associated with grandfathering a particular service create greater regulatory parity for telecommunications carriers compared to other segments of the industry?

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<sup>103</sup> For convenience, in certain circumstances this item uses "discontinue" (or "discontinued" or "discontinuance," etc.) as shorthand that encompasses the statutory terms "discontinue, reduce, or impair" unless the context indicates otherwise.

<sup>104</sup> 47 U.S.C. § 214(a).

<sup>105</sup> 47 CFR § 63.17.

<sup>106</sup> CenturyLink Comments, PS Docket No. 14-174, GN Docket No. 13-5, WC Docket No. 05-25, RM-11358, RM-10593, at 6 (Feb. 5, 2015).

<sup>107</sup> See, e.g., USTelecom Comments, WC Docket No. 16-132, at 13-14 (Dec. 5, 2016) (USTelecom Biennial Comments) (stating that the "successful deployment of broadband technologies will rely in great part on the replacement of TDM-based switches and copper wire with fiber- and IP-based networks and other facilities and technologies that are better suited to handle the feature-rich services that consumers demand").

<sup>108</sup> See, e.g., *Comments Invited on Applications of AT&T Services, Inc. on Behalf of Bellsouth Telecommunications, LLC D/B/A AT&T Southeast to Discontinue Certain Domestic Business Telecommunications Services in Trial Wire Centers*, WC Docket Nos. 15-274 et al., Public Notice, 30 FCC Rcd 13319, 13319, para. 1 (2015) (stating that AT&T's plans to grandfather three domestic business telecommunications services would entail "continued service to existing customers and the offer of only next generation wireless and wireline Internet Protocol (IP)-based alternatives for new orders"); see also AT&T Proposal for Wire Center Trials, GN Docket Nos. 13-5 & 12-353, at 10-11 (filed Feb. 27, 2014), <https://ecfsapi.fcc.gov/file/7521090526.pdf>; Sean Buckley, Verizon to grandfather TDM-based voice, data services in Northeast wiring centers, FierceTelecom (Sept. 27, 2016), <http://www.fiercetelecom.com/telecom/verizon-to-grandfather-more-tdm-based-voice-data-services-multiple-northeast-wiring-centers>.

<sup>109</sup> See 47 CFR § 63.71(a)(5)(i) (non-dominant carriers); 47 CFR § 63.71(a)(5)(ii) (dominant carriers).



What sort of costs does such a requirement impose on carriers and customers relative to the benefits it imparts? We believe that Section 214 provides us ample authority to implement the streamlining measures we propose. We seek comment on this belief.

72. More specifically, we seek comment on the streamlined 10-day comment period we have proposed. Will this comment period allow adequate time for interested parties to review and consider discontinuance applications from carriers and to file comments on these applications, if necessary? Is there a different time period we should consider, e.g., some temporal interval that is either shorter or longer than the 10-day comment period we have proposed? Should we reduce the time period for reviewing and granting applications to grandfather higher-speed services as well, and if so, how? While we have proposed to subject applications from both dominant and non-dominant carriers to a uniform 10-day comment period, we seek comment on whether there is reason to maintain disparate comment periods for dominant versus non-dominant carriers in this context?

73. *Streamlining the Auto-Grant Period.* We propose that all applications seeking to grandfather low-speed legacy services be automatically granted on the 25th day after filing unless the Commission notifies the applicant that such a grant will not be automatically effective.<sup>110</sup> We seek comment on this proposal. Like our proposed uniform 10-day comment period for all applications to grandfather low-speed legacy services, we see no reason to maintain disparate auto-grant periods for such applications. Will this streamlined auto-grant period for carriers allow adequate time for the Commission to review their applications? Will the shorter auto-grant period incent providers to more rapidly resolve end-user concerns, if any?

74. Is there a different auto-grant period we should consider when reviewing applications to grandfather low-speed services, periods that are either shorter or longer than the 25-day interval we have proposed? Is there reason to maintain disparate auto-grant periods for dominant versus non-dominant carriers rather than subject both types of carriers to a uniform auto-grant period as we have proposed to do?

75. In addition to potentially reducing the auto-grant period for applications seeking to grandfather low-speed services, we seek comment on whether to adopt an even more abbreviated auto-grant period for grandfathered discontinuance applications that receive no comments during the specified comment period. In conjunction with our efforts to expedite the automatic granting of these applications, we seek comment on whether we should establish a “shot-clock” applicable to the time period within which the Commission receives applications to grandfather low-speed legacy services and when the Commission releases the Public Notice seeking comment on such applications. Have carriers filing Section 214 discontinuance applications experienced seemingly unreasonable delay between the time the Commission receives their applications and when they are placed on Public Notice?

76. *Eligibility of Grandfathered Services for Streamlined Processing.* We seek comment on the scope of services to which streamlined processing would apply. We propose, at a minimum, to apply any streamlined discontinuance process to grandfathered low-speed TDM services at DS1 speeds or lower (1.544 Mbps or less), as these are services that are rapidly being replaced with more advanced or higher-speed IP-based services. We seek comment on whether this is an appropriate speed threshold, or whether higher-speed grandfathered services—e.g., any legacy copper-based or other TDM services below 10 Mbps or 25 Mbps or even higher—should also qualify for this more streamlined processing. Should we consider making whatever streamlined timeframes we adopt available to *all* applications to grandfather services, regardless of speed, as long as the carrier certifies that other alternatives are available?

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<sup>110</sup> Under our current rules, an application by a domestic, dominant carrier will be automatically granted on the 60th day after its filing unless the Commission notifies the applicant that the grant will not be automatically effective, whereas an application by a domestic, non-dominant carrier will be automatically granted on the 31st day after its filing unless the Commission notifies the applicant that the grant will not be automatically effective. See 47 CFR § 63.71(f).

Conversely, should we limit our streamlined comment and auto-grant periods to a narrower set of circumstances than we propose? Are there other service characteristics we should consider besides speed in deciding which applications may qualify for streamlined comment and auto-grant periods?

77. *Additional Steps.* Beyond condensing the comment and auto-grant periods, we seek comment on any additional steps we might take to further streamline the review and approval process for applications to grandfather low-speed services. We specifically seek comment on whether there are certain circumstances under which applications to grandfather low-speed legacy services could be granted once the application is accepted for filing without any period of public comment or under which we should dispense with requiring applications entirely. Does the Commission have authority under Section 214(b) to permit grants without any period of public comment or to determine that an application is not necessary? Would limited forbearance from the requirements of Section 214 be necessary to dispense with requiring an application or to grant certain applications without any period of public comment, and if so, are the criteria for forbearance met in this instance? Would pursuing either of these options harm existing or potential customers, and if so, do those harms outweigh the benefits of streamlining?

78. If the Commission grants certain applications to grandfather low-speed services without a period of public comment, what criteria should applications satisfy in order to qualify for such a grant? For example, there may be cases in which the carrier has not sold the service to any new customer for a particular period of time and only a limited number of existing customers continue to take the service, and we seek comment on whether there is a particular period of time and/or number of customers that warrants automatic grant without a comment period. Should such grants be contingent on a baseline showing, attestation, or affirmative statement in a carrier's application that there are reasonable alternatives to the service that is to be grandfathered? If so, what type of certification or showing should be required?

79. *Government Users.* Finally, we seek comment on how we should take into account the needs of federal, state, local, and Tribal government users of legacy services in deciding whether and how best to streamline the process for reviewing Section 214 applications that seek to grandfather low-speed services. The National Telecommunications and Information Administration (NTIA) has stated that federal government agencies face particular challenges as customers of telecommunications services and are different from many other customers given the budget and procurement challenges they face and "the mission-critical activities they perform for the public benefit."<sup>111</sup> In its Petition, NTIA asserts that government agencies must make budgetary and technical plans far in advance to convert or adapt their networks, systems, and services to new infrastructure.<sup>112</sup> We agree with NTIA that transitions from the provision of old communications services to new "must not disrupt or hamper the performance of mission-critical activities, of which safety of life, emergency response, and national security are the most prominent examples."<sup>113</sup> To the extent these proposed rules accelerate retirement of systems for national security emergency preparedness (NS/EP) communication,<sup>114</sup> we seek comment on the impact to these

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<sup>111</sup> Petition for Reconsideration or Clarification of the National Telecommunications and Information Administration, GN Docket No. 13-5 et al., at 2 (filed Oct. 12, 2016) (NTIA Petition).

<sup>112</sup> See *id.* at 12.

<sup>113</sup> See *id.* at 3.

<sup>114</sup> Assignment of National Security and Emergency Preparedness Communications Functions, Exec. Order 13,618, 3 CFR § 273 (July 6, 2012), states the following as policy of the United States: "The Federal Government must have the ability to communicate at all times and under all circumstances to carry out its most critical and time sensitive missions. Survivable, resilient, enduring, and effective communications, both domestic and international, are essential to enable the executive branch to communicate within itself and with: the legislative and judicial branches; State, local, territorial, and tribal governments; private sector entities; and the public, allies, and other nations. Such communications must be possible under all circumstances to ensure national security, effectively

(continued....)

capabilities. In particular, what will be the impact to NS/EP priority services such as the Government Emergency Telecommunications Service (GETS) and the Telecommunications Service Priority (TSP) system? How will accelerating copper retirement impact these policy goals? Should Section 214 applications demonstrate how priority services will continue to be provisioned to government users? How will the transition from the provision of old services to new ones affect other national security interests?<sup>115</sup> How should we take into account the needs of potential government and Tribal customers when considering whether and how to streamline the comment and/or auto-grant periods for applications to grandfather legacy services? Should applications affecting government end users be eligible for any streamlined process we adopt? If we adopt special requirements in relation to applications that may affect government or Tribal users, how can we identify such applications, given that grandfathering affects only non-customers of the service at issue?

80. NTIA suggests that the Commission must ensure that carriers provide information to federal agencies, including the direction and pace of any network changes, so that agencies are able to plan and fund the service, equipment, and systems upgrades needed to maintain critical operations without interruption.<sup>116</sup> NTIA asks that the Commission require carriers to state in their Section 214 discontinuance applications: (1) whether and to what extent they have discussed the proposed network or service change with affected federal customers; and (2) what actions they have taken or what plans, if any, they have made to ensure the continuity of mission-critical agency communications networks, systems, and services.<sup>117</sup>

81. We seek comment on this proposal both in general and in the context of our Section 214 proposals herein. How would such requirements benefit federal customers, and would such requirements benefit others in the communications ecosystem? How could we measure compliance with any such requirements? Would such requirements prove unduly burdensome on carriers relative to any potential benefit for government users? We seek comment on whether the service agreements or contracts into which carriers enter with government entities could sufficiently include provisions that address the types of concerns NTIA raises generally. With respect to grandfathering, would prong (1) of NTIA's proposed certification have any relevance since it is addressed to present customers, and how could carriers undertake the consultation described in prong (2)? Are there specific concerns applicable to Tribal, state, or local government customers? If so, would the NTIA proposal address them? If not, what additional or alternative steps would?

## 2. Legacy Voice Applications Where Alternative Voice Service Is Available

82. *Streamlined Processing Generally.* Consumers are rapidly transitioning away from switched access voice services, and our rules must keep pace with their preferences.<sup>118</sup> As detailed below, we propose to streamline applications to discontinue legacy TDM-based voice services where alternative

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manage emergencies, and improve national resilience. The views of all levels of government, the private and nonprofit sectors, and the public must inform the development of national security and emergency preparedness (NS/EP) communications policies, programs, and capabilities.”

<sup>115</sup> See 47 U.S.C. § 151.

<sup>116</sup> NTIA Petition at 12.

<sup>117</sup> *Id.* at 13-14.

<sup>118</sup> According to the most recent statistics released by the Commission's Industry Analysis and Technology Division of the Wireline Competition Bureau, there were 65 million traditional “switched access” lines in service, 59 million interconnected VoIP subscriptions, and 335 million mobile subscriptions in the United States as of December 2015. FCC, Voice Telephone Services: Status as of December 31, 2015 at 2 (2016), [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-342357A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-342357A1.pdf). These figures represented a three-year compound annual growth rate of 12 percent for interconnected VoIP subscriptions and 3 percent for mobile voice subscriptions, while retail switched access lines declined at 12 percent per year over the same period. *Id.*

voice services are available to consumers in the affected service area. Specifically, we propose to make discontinuance applications for legacy voice services under Section 214(a) eligible for shorter comment and automatic grant time periods, provided that the discontinuing carrier is able to meet a two-part test demonstrating the availability of alternative voice services.

83. *Two-Part Test for Streamlined Treatment.* Under our proposed streamlined approach, any carrier discontinuing legacy voice service would be eligible for automatic grant of their application under Section 63.71 of our rules, provided it is able to demonstrate: (1) that it provides interconnected VoIP service throughout the affected service area, and (2) that at least one other alternative voice service is also available in the affected service area.

84. We anticipate that our proposed two-part test would replace the recent *2016 Technology Transitions Order*'s "adequate replacement" test for automatic grant of Section 214 applications that seek to discontinue a legacy TDM-based voice service as part of a transition to a new network technology.<sup>119</sup> We seek comment on our proposed two-part test, and whether the specific prongs we propose are the appropriate ones for us to consider. Would our proposed approach reduce unnecessary costs and burdens associated with the deployment of next generation network infrastructure? Would the information sought under our proposed two-part test be sufficient to allow the Commission to certify that the "public convenience and necessity" would not be adversely affected by the requested discontinuance, as Section 214(a) requires? If not, what is the minimum information we should require? We additionally seek comment on our legal authority under Section 214 to adopt these more streamlined requirements.

85. We seek comment on the best means to implement our proposed test. What type of showing should a carrier be required to make under each prong? Under the rules adopted in the *2016 Technology Transitions Order*, carriers are permitted to demonstrate eligibility for automatic grant through a certified statement offering the required information. We propose to require a similar certified statement from the discontinuing carrier, pursuant to Section 1.16 of our rules, indicating that it meets each prong of the two-part test. Is a certification such as this sufficient? If not, what other kind of showing or information would be necessary to include to satisfy this requirement? What types of voice services should we consider as sufficient alternatives to legacy TDM-based voice service that would satisfy the second prong? Are there specific characteristics that a voice service must have in order to qualify for satisfying the second prong? Should certain voice services, such as mobile switched voice, VoLTE, or managed IP-based voice services offered by cable or other wireline service providers automatically qualify as an acceptable alternative to legacy voice services to satisfy the second prong? Would a carrier need to satisfy both prongs of our proposed test in all cases? If there are no alternatives to satisfy the second prong, would some type of heightened showing under the first prong suffice in these instances to qualify for streamlined treatment? Alternatively, if the discontinuing carrier cannot meet the first prong, would a showing of the availability of third-party alternatives suffice in all cases or only certain cases?

86. Should we modify one or both prongs of our proposed test, and if so how? Should some other voice service be included in the first prong in addition to interconnected VoIP? Is the current

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<sup>119</sup> *Technology Transitions et al.*, GN Docket No. 13-5, WC Docket No. 13-3, RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283, 8305, para. 65 (2016) (*2016 Technology Transitions Order*); 47 CFR §§ 63.71(h), 63.602. These rules were adopted by the Commission on July 14, 2016, but they are pending approval by the Office of Management and Budget and are not currently in effect. According to the adopted rules, a demonstration that an "adequate replacement" service is available requires a three-part showing that "one or more replacement service(s) offers all of the following: (i) substantially similar levels of network infrastructure and service quality as the applicant service; (ii) compliance with existing federal and/or industry standards required to ensure that critical applications such as 911, network security, and applications for individuals with disabilities remain available; and (iii) interoperability and compatibility with an enumerated list of applications and functionalities determined to be key to consumers and competitors." *2016 Technology Transitions Order*, 31 FCC Rcd at 8305, para. 65.

definition of interconnected VoIP service in the Commission's rules appropriate for this purpose, or should it be modified?<sup>120</sup> Is the "affected service area" the appropriate coverage territory to consider in this context? When would the availability of only third-party alternatives be sufficient? We note that the *2016 Technology Transitions Order* required a demonstration related to the continued availability and functionality of 911 service in order for an application to be eligible for automatic grant.<sup>121</sup> Should carriers be required to address continuity of 911 service under our proposed two prong test? Should discontinuing carriers be required to make particular showings regarding 911 accessibility, location accuracy, or any other applicable emergency service requirements? We seek comment on other issues we have not raised that should inform our decision with respect to adopting a simpler, more genuinely streamlined, and more objective test for demonstrating the availability of alternative voice services.

87. *Shortening the Comment and Auto-Grant Timeframes.* For carriers that satisfy the proposed test, we propose to adopt a uniform public comment period of 10 days for all applications seeking to discontinue legacy voice services where alternative voice services are also available, regardless of whether the provider filing the application is a dominant or non-dominant carrier. Additionally, we propose that these applications be automatically granted on the 25th day after filing, unless the Commission notifies the applicant that such a grant will not be automatically effective.<sup>122</sup> These are the same timeframes we propose adopting for grandfathered services. We seek comment on these proposed timeframes and whether they provide sufficient time for public notice and comment on applications from affected carriers. Should we consider other timeframes for either dominant or non-dominant carriers to better streamline the processing of these kinds of legacy voice applications? Can we consider shortening the timeframes for non-dominant carriers even more, particularly if the second prong of the two-part test is met by alternative voice service from an incumbent LEC?

88. *Automatic Approval Upon Acceptance For Filing.* As an alternative to the streamlining mechanisms proposed above, we seek comment on whether we should also provide a means for automatic approval of certain legacy voice discontinuance applications upon acceptance for filing, without soliciting public comment. For example, under this type of approach, if a discontinuing carrier neither has any legacy voice customers nor has had any requests for that legacy voice service for some specified timeframe (e.g., 3 months) prior to the filing of the discontinuance application, we would consider an automatic approval upon acceptance for filing without any comment period. What benefits or burdens would this type of accelerated review process entail for carriers, consumers, and other stakeholders?

89. We note that the Commission has previously issued a certificate by rule for all extensions of new lines,<sup>123</sup> satisfying the requirement under section 214(a) that all carriers receive such a certificate before constructing or extending a new line.<sup>124</sup> We believe issuing a certificate by rule in these circumstances would be legally permissible as well. We seek comment on this analysis.

90. *Elimination of "Adequate Replacement" Test.* We seek comment on whether our proposed two-part test should replace the current three-part "adequate replacement" test adopted in the *2016 Technology Transitions Order*.<sup>125</sup> Carrier representatives have raised concerns regarding the burdens imposed by the 2016 rules, claiming they impede technology transitions by *adding* requirements

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<sup>120</sup> See 47 CFR § 9.3 (defining *interconnected VoIP service* as a service that "(1) [e]nables real-time, two-way voice communications; (2) [r]equires a broadband connection from the user's location; (3) [r]equires Internet protocol-compatible customer premises equipment (CPE); and (4) [p]ermits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network").

<sup>121</sup> See *2016 Technology Transitions Order*, 31 FCC Rcd at 8330-8333, paras. 127-135.

<sup>122</sup> See 47 CFR § 63.71(a)(5)(i) (non-dominant carriers); 47 CFR § 63.71(a)(5)(ii) (dominant carriers).

<sup>123</sup> 47 CFR § 63.01(a).

<sup>124</sup> 47 U.S.C. § 214(a).

<sup>125</sup> See *2016 Technology Transitions Order*, 31 FCC Rcd at 8305, para. 65; 47 CFR §§ 63.71(h), 63.602.

under the guise of adopting a “so-called, ‘streamlined’ process.”<sup>126</sup> Although these rules are not yet in effect, we seek comment on whether and how they may impede the transition to next generation broadband networks by limiting the circumstances in which automatic grant is available. Is the “adequate replacement” test necessary for the Commission to ensure that the “public convenience and necessity” is not detrimentally affected by the discontinuance of legacy voice services,<sup>127</sup> or are competitive market forces and increased carrier investment opportunities more likely to serve this goal? Regardless of whether or not the proposals discussed in this section are adopted, should we eliminate all or part of the “adequate replacement” test? What would be the impact of eliminating the requirement of that test for carriers to achieve compliance with standards governing the accessibility of applications for individuals with disabilities? Will other laws, such as Sections 255 and 617 of the Act,<sup>128</sup> be sufficient to ensure that the accessibility needs of this population are effectively addressed in the transition? Will these safeguards be sufficient to ensure that the replacement service offers accessibility levels at least as effective as those offered by the legacy voice service?<sup>129</sup> Should we eliminate or modify the related affordability and customer education requirements adopted in the *2016 Technology Transitions Order*?<sup>130</sup>

91. Additionally, we seek comment on the concerns raised by NASUCA in its petition for reconsideration, which argues that the testing methodology suggested for compliance with the *2016 Technology Transitions Order* was flawed.<sup>131</sup> If commenters agree that NASUCA’s concerns are valid, insofar as we retain some or all of the testing criteria in the *2016 Technology Transitions Order*, how can we address these issues?

92. *Government Users.* Like our other Section 214 streamlining proposals, we seek comment on how to take into account the needs of federal, state, local, and Tribal government users of legacy voice services in deciding whether and how best to streamline the process for reviewing Section 214 applications where other voice alternatives are available. As noted previously, these entities may face unique challenges in obtaining telecommunications service, and may merit special consideration due to the critical functions they perform. In light of this, how should the Commission account for the special needs of federal, state, local, and Tribal government users of legacy services when weighing proposals to streamline Section 214 applications to discontinue legacy voice services?

93. *Technical Rule Changes.* Finally, we seek comment on how best to reconcile any changes to our Part 63 rules that result from our adoption of some or all of our proposals to streamline legacy voice applications herein with the rules recently adopted by the Commission in the *2016 Technology Transitions Order*.<sup>132</sup> To the extent that we revise or eliminate the “adequate replacement” test established in the *2016 Technology Transitions Order*, should we eliminate the associated rule changes? Specifically, should we repeal new Sections 63.71(a)(6)-(7), 63.71(h), and 63.602, and should we repeal the additions to Section 63.71(f)? We note that the requirements of Section 63.505 would otherwise apply and appear to include all the same requirements as Section 63.602(a) except the certification required by Section 63.602(a)(4). Are there any other changes to our rules that are necessary to accommodate the streamlining of discontinuance applications for legacy voice services?

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<sup>126</sup> See USTelecom Biennial Comments at 14-15.

<sup>127</sup> See 47 U.S.C. § 214(a).

<sup>128</sup> 47 U.S.C. §§ 225, 617.

<sup>129</sup> See generally *2016 Technology Transitions Order*, 31 FCC Rcd at 8338-41.

<sup>130</sup> See *id.* at 8345-52, paras. 171, 174-77, 179-186.

<sup>131</sup> See Petition for Reconsideration of NASUCA et al. of Declaratory Ruling, Second Report and Order, and Order on Reconsideration, GN Docket No. 13-5, at 8-10 (filed Oct. 11, 2016).

<sup>132</sup> See *2016 Technology Transitions Order*, 31 FCC Rcd at 8303, para. 60.

### 3. Applications to Discontinue Previously Grandfathered Legacy Data Services

94. We propose to streamline the discontinuance process for any application seeking authorization to discontinue legacy data services that have previously been grandfathered for a period of no less than 180 days. We propose to adopt a streamlined uniform comment period of 10 days and an auto-grant period of 31 days for both dominant and non-dominant carriers. We seek comment on these proposals and on other potential alternatives. We believe that Section 214 provides us ample authority to streamline the process for reviewing and granting applications to discontinue legacy data services that have previously been grandfathered for a period of at least 180 days. Do commenters agree with this conclusion? Why or why not?

95. Should this proposed streamlined process be restricted to only previously grandfathered legacy data services below a certain speed? Should dominant and non-dominant carriers continue to be subject to different comment and auto-grant timeframes for discontinuing legacy data services that have previously been grandfathered, as is currently the case? If so, what should these timeframes be? We encourage commenters to advance specific alternative proposals they believe would better address the Commission's objective to accelerate the deployment of next-generation networks by eliminating unnecessary delays in the discontinuance process. To that end, are there other steps we could take, beyond condensing the comment and auto-grant periods, which would help streamline the review and authorization of applications to discontinue legacy data services that have previously been grandfathered? Please explain.

96. We propose to require carriers seeking this streamlined discontinuance processing for legacy data services to make a showing that they received Commission authority to grandfather such services at least 180 days previously. Is the 180-day grandfathering requirement too restrictive? Should we consider a shorter grandfathering timeframe? Should we require any additional showings to qualify for this streamlined treatment? For example, should we require a statement identifying one or more alternative comparable data services available from the discontinuing provider or a third party provider at the same or higher speeds as the service being discontinued? If so, how should we define "comparable" service? Should we require that any such "comparable" service be available throughout the entire affected service area?

97. We also propose to require only a statement from the discontinuing carrier demonstrating that it received Commission authority to grandfather the services at issue at least 180 days previously. Is a statement sufficient, or should some other showing be required? If commenters believe we should require more than a statement, what type of showing should a carrier be obligated to make? If we adopt a requirement that carriers must demonstrate the availability of one or more alternative comparable data services from the discontinuing provider or a third party, would a statement identifying such alternative services be sufficient to satisfy this requirement? For carriers seeking to rely on a third-party service, what type of showing would be necessary to demonstrate the existence of alternative data services? Would such a statement suffice for this purpose?

98. Finally, we seek comment on whether special consideration should be given to applications seeking to discontinue previously grandfathered legacy data services to federal, state, local, and Tribal government users for the same reasons we address this question in considering streamlining grandfathered and legacy voice service discontinuance applications.<sup>133</sup> Should providers be required to make some additional showing beyond what we have proposed when seeking to discontinue previously grandfathered legacy data services to government users? If so, with what additional conditions should they be required to comply and why?

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<sup>133</sup> See NTIA Petition at 2-3, 12-14.

#### 4. Clarifying Treatment Under Section 214(a) of Carrier-Customers' End Users

99. We propose to reverse the Commission's 2015 "clarification" of Section 214(a) that substantially expanded the scope of end users that a carrier must consider in determining whether it is required to obtain Section 214 discontinuance authority.<sup>134</sup> In the *2015 Technology Transitions Order*, the Commission "provided guidance and clarification" that Section 214(a) of the Act applies not only to a carrier's own retail customers, but also to the retail end-user customers of that carrier's wholesale carrier-customers.<sup>135</sup> We seek comment on our proposal to reverse the 2015 interpretation and, going forward, interpret Section 214(a) to require a carrier to take into account only its own retail end users when evaluating whether the carrier will "discontinue, reduce, or impair service to a community, or part of a community."<sup>136</sup>

100. We seek comment on the practical effect of the 2015 interpretation. Does it make sense to maintain a regulatory obligation that requires a carrier, most often an incumbent LEC, to obtain information about third parties, i.e., its carrier-customer's retail end users, with whom it generally has no relationship, before it can execute its own business plans to discontinue its service?<sup>137</sup> Can the upstream carrier be expected to know who the end-user customers of its carrier-customers are and how the discontinuance will affect them? Does the current application of the requirement impose undue compliance costs and burdens on a discontinuing carrier that harm the public by delaying the transition to newer, more technologically advanced services? Have there been other effects on the market for legacy services and on the transition to IP services that we should consider?

101. We also seek comment on how carrier-customers' discontinuance obligations should inform our interpretation. What weight should we give to the fact that a carrier-customer is itself obligated to file a discontinuance application under Section 214(a) and Section 63.71 of the Commission's rules<sup>138</sup> if it discontinues, reduces, or impairs service as a result of the loss of a wholesale input from an upstream carrier? Can we find that the objectives of Section 214(a) are met because the carrier-customer itself is subject to Section 214(a)'s requirement to obtain Commission approval if a change in the inputs relied on by the carrier-customer results in a discontinuance, reduction, or impairment of services to the carrier-customer's retail end users?<sup>139</sup> Do the contractual and business relationships between upstream carriers and their carrier-customers provide additional safeguards to retail end users?

102. We also seek comment on the relationship between Section 214(a) and Section 251(c)(5) of the Act. When Section 214(a) was enacted during World War II, "one of Congress's main concerns was that [domestic telegraph] mergers might result in a loss or impairment of service during this war time period."<sup>140</sup> By contrast, 53 years later, Congress revised the Act "to promote competition and reduce regulation . . . and encourage the rapid deployment of new telecommunications technologies."<sup>141</sup>

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<sup>134</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9428, para. 102.

<sup>135</sup> *Id.*

<sup>136</sup> 47 U.S.C. § 214(a).

<sup>137</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9438, para. 121.

<sup>138</sup> 47 CFR § 63.71.

<sup>139</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9438, para. 120 n.421 ("[C]arrier-customers that discontinue, reduce, or impair service to retail end users as a result of the elimination of a wholesale input must also comply with section 214(a) of the Act and the Commission's implementing rules.").

<sup>140</sup> *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 n.4 (1979) (*Western Union*).

<sup>141</sup> See Title, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.



Congress enacted Section 251(c)(5) of the Act to require incumbent LECs 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.”<sup>142</sup> The Commission’s regulations implementing Section 251(c)(5), require, among other things, that an incumbent LEC “must provide public notice regarding any network change that [w]ill affect a competing service provider’s performance or ability to provide service.”<sup>143</sup> In enacting Section 251(c)(5), did Congress signal its intent that incumbent LECs need only provide notice, not obtain approval, when making changes to wholesale inputs relied upon by competing carriers? At the time of the 1996 Act, the Commission interpreted its Section 214(a) discontinuance authority not to apply to wholesale customers.<sup>144</sup> Did that interpretation have any bearing on Congress’s intent when enacting Section 251(c)(5)? How should we reconcile the Congressional mandates in Section 214(a) and Section 251(c)(5) to best eliminate regulatory barriers to the deployment of next-generation networks and services, avoid unnecessary capital expenditure on legacy services, and protect the public interest?

103. Finally, we seek comment on whether the Commission correctly interpreted the precedent upon which it relied to support its expansive 2015 clarification. Prior to the *2015 Technology Transitions Order*, it appears that the Commission had consistently held that discontinuances to wholesale purchasers were not cognizable under Section 214(a).<sup>145</sup> The *2015 Technology Transitions Order* acknowledges that distinction, stating in a footnote that “[t]he Commission will . . . continue to distinguish discontinuance of service that will affect service to retail customers from discontinuances that affect only the carrier-customer itself.”<sup>146</sup> Relying heavily on *BellSouth Telephone*,<sup>147</sup> however, the Commission arguably changed course, adopting the view that upstream carriers have responsibility for carrier-customers’ end-user customers under Section 214(a). Did the Commission correctly interpret *BellSouth Telephone*, particularly in light of the facts of that case, where the carrier’s decision to discontinue a service meant that the service would not be available to *any end user* in the community *from any provider*?<sup>148</sup> Did the Commission incorrectly read *BellSouth Telephone* to protect the business models of certain downstream retail carriers, regardless of the availability of the same or comparable alternatives in the community? All of the other cases cited in the *2015 Technology Transitions Order* found that Section 214(a) did not apply.<sup>149</sup> Accordingly, did the Commission properly interpret and rely on those cases? Considering that

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<sup>142</sup> 47 U.S.C. § 251(c)(5).

<sup>143</sup> 47 CFR § 51.325(a).

<sup>144</sup> See *Lincoln County Tel. Sys., Inc. v. Mountain States Tel. and Tel. Co.*, File No. TS-39, Memorandum Opinion and Order, 81 FCC 2d 328, 332 (1980) (“[F]or Section 214(a) purposes, we must distinguish those situations in which changes in a carrier’s reconfiguration of plant will result in an actual discontinuance, reduction or impairment to the latter carriers’ customers as opposed to a discontinuance, reduction or impairment of interconnection to only the carrier itself.”) (*Lincoln County*); *Western Union*, 74 FCC 2d at 296 (“[W]e believe that there are some important differences between [a carrier-to-carrier] relationship and the more usual type involving a carrier and its non-carrier customer. In determining the need for prior authority to discontinue, reduce or impair service under Section 214(a), the primary focus should be on the end service provided by a carrier to a community or part of a community, *i.e.*, the using public.”).

<sup>145</sup> See *Graphnet, Inc. v. AT&T Corp.*, File No. E-94-41, Memorandum Opinion and Order, 17 FCC Rcd 1131, 1140 (2002) (“[I]n situations where one carrier attempts to invoke Section 214(a) against another carrier, concern should be had for the ultimate impact on the community served rather than on any technical or financial impact on the carrier itself.”) (*Graphnet*); *Lincoln County*, 81 FCC 2d at 332; *Western Union*, 74 FCC 2d at 296.

<sup>146</sup> *2015 Technology Transitions Order*, 30 FCC Rcd at 9434, para. 114 n.407.

<sup>147</sup> *BellSouth Telephone Companies Revisions to Tariff FCC No. 4*, Transmittal No. 435, Memorandum Opinion and Order, 7 FCC Rcd 6322 (1992) (*BellSouth Telephone*).

<sup>148</sup> *Id.* at 6322-23.

<sup>149</sup> *Graphnet*, 17 FCC Rcd at 1140-41; *Lincoln County*, 81 FCC 2d at 335; *Western Union*, 74 FCC 2d at 296-98.

all but one of the cases predated the adoption of the 1996 Act and its specific protections for wholesale customers, including Section 251(c)(5), what continuing probative value do the cases have? Indeed, the only Commission precedent cited in the *2015 Technology Transitions Order* that postdated the 1996 Act did not consider the applicability of Section 251(c)(5).<sup>150</sup> Did the Commission grant to carrier-customers in 2015 rights beyond Congress's intent in the 1996 Act in an attempt to protect carrier-customers' end users, even though those end users have the benefit of the Section 214(a) discontinuance process from their own provider?

## 5. Other Part 63 Proposals

104. *Further Streamlining of 214(a) Discontinuances.* In addition to the proposals discussed above, we seek comment on methods to streamline Section 214(a) applications more generally. Specifically, we seek comment on whether it would be appropriate for the Commission to conclude that Section 214(a) discontinuances will not adversely affect the present or future public convenience and necessity, provided that fiber, IP-based, or wireless services are available to the affected community. What type of showing would be required on the part of discontinuing carriers to demonstrate the existence of alternative services? What types of fiber, IP-based, or wireless services would constitute acceptable alternatives, and under what circumstances? Would a demonstration regarding the availability of third-party services satisfy this kind of test, or would only services offered by the discontinuing carrier suffice?

105. We also seek comment on the best approach for granting streamlined treatment to these types of discontinuances. In circumstances where a discontinuing carrier's service overlaps with an alternative fiber, IP-based, or wireless service, should we require a Section 214 discontinuance application? If not, should we either grant limited blanket discontinuance authority or forbear on a limited basis from Section 214? If we require an application, would a grant of the Section 214 application upon acceptance for filing be appropriate or would allowing for public notice and comment be necessary to satisfy the requirements of Section 214(a)? If we maintain a comment period, should we reduce the comment and automatic grant timeframe? As another alternative, should we instead require carriers to file only a notice of discontinuance accompanied by proof that fiber, IP-based, or wireless alternatives are available to the affected community, in lieu of a full application for approval? If so, what proof would suffice, and how should the Commission review that filing?

106. *Section 63.71(g) Applications to Discontinue Service With No Customers.* We specifically propose to maintain the provision adopted in the *2016 Technology Transitions Order* for streamlined treatment of Section 214 discontinuance applications for all services that have not had customers for a period of six months prior to submission of the application.<sup>151</sup> Under this rule, which was based on a proposal submitted to the Commission by AT&T, carriers may certify to the Commission that the service to be discontinued is "a service for which the requesting carrier has had no customers or reasonable requests for service during the 180-day period immediately preceding submission of the application," and the application will be granted automatically on the 31st day after filing, unless the Commission has notified the applicant that the grant will not be automatically effective.<sup>152</sup> We note that at least one carrier representative has recently endorsed this provision of the rules adopted in the *2016 Technology Transitions Order* as an effective tool for reducing barriers to next generation infrastructure deployment.<sup>153</sup> We seek comment on retaining this rule and on any additions or amendments to the rule, such as shortening the time in which the application is automatically granted, that may further our goal of

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<sup>150</sup> See *Graphnet*, 17 FCC Rcd at 1140-41.

<sup>151</sup> 47 CFR § 63.71(g).

<sup>152</sup> 47 CFR § 63.71(g); see also *2016 Technology Transitions Order*, 31 FCC Rcd at 8309, para. 77; Letter from David L. Talbott, Assistant Vice President, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, Attach. 1 at 1 (filed May 31, 2016).

<sup>153</sup> See USTelecom Biennial Comments at 14 n.34.

removing regulatory barriers to broadband investment.

107. *Section 63.71(i) Auto-grants for Competitive LECs Upon Copper Retirement.* We propose to revise Section 63.71(i), which was adopted in the *2016 Technology Transitions Order* to provide for automatic discontinuance authority, subject to certain conditions, for competitive LECs that must discontinue service on a date certain due to an incumbent LEC's effective copper retirement.<sup>154</sup> Specifically, we propose revising that rule to include as a condition that the relevant network change notice provides no more than six months' notice. We seek comment on this proposal, and how, if at all, we should modify Section 63.71(i) to further harmonize it with any revisions we adopt herein to the incumbent LEC copper retirement process under Part 51 of our rules. We seek to ensure our rules take into account situations, where, through no fault of its own, a competitive LEC is unable to comply with our Section 214(a) discontinuance requirements as a result of an incumbent LEC's transition to a next generation network. To the extent we reduce the waiting period for implementing planned copper retirements, would this eliminate the need for or necessitate any changes to Section 63.71(i)?

108. *2016 Technology Transitions Order Revisions to Sections 63.71(a)-(b).* We seek comment on whether we should retain, modify, or eliminate the changes made by the *2016 Technology Transitions Order* to Section 63.71(a) and the introduction of new Section 63.71(b). The *2016 Technology Transitions Order* modified Section 63.71(a) by requiring carriers to provide notice of discontinuance applications to any federally-recognized Tribal Nations with authority over the Tribal lands in which the discontinuance, reduction, or impairment of service is proposed.<sup>155</sup> It also modified Section 63.71(a) to clearly permit carriers to provide e-mail notice to customers of discontinuance applications, and it established requirements in Section 63.71(b) that carriers must meet when using e-mail to satisfy the written notice requirements.

### III. NOTICE OF INQUIRY

#### A. Prohibiting State and Local Laws Inhibiting Broadband Deployment

109. We seek comment on whether we should enact rules, consistent with our authority under Section 253 of the Act, to promote the deployment of broadband infrastructure by preempting state and local laws that inhibit broadband deployment. Section 253(a), which generally prohibits state and local regulations that "may prohibit or have the effective of prohibiting" the provisioning of interstate or intrastate telecommunications services,<sup>156</sup> provides the Commission with "a rule of preemption" that "articulates a reasonably broad limitation on state and local governments' authority to regulate telecommunications providers."<sup>157</sup> Section 253(b), provides exceptions for state and local legal requirements that are competitively neutral, consistent with Section 254 of the Act, and necessary to preserve and advance universal service.<sup>158</sup> Section 253(c) provides another exception described by the Eighth Circuit as a "safe harbor functioning as an affirmative defense" which "limits the ability of state and local governments to regulate their rights-of-way or charge 'fair and reasonable compensation.'"<sup>159</sup> Under Section 253(d), Congress directed the FCC to preempt the enforcement of any legal requirement which violates 253(a) or 253(b) "after notice and an opportunity for public comment."<sup>160</sup>

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<sup>154</sup> See 47 CFR § 63.71(i); see also *2016 Technology Transitions Order*, 31 FCC Rcd at 8358, para. 202.

<sup>155</sup> See 47 CFR § 63.71(a); *2016 Technology Transitions Order*, 31 FCC Rcd at 8353-54, paras. 189-91.

<sup>156</sup> 47 U.S.C. § 253(a).

<sup>157</sup> *Level 3 Commc'ns L.L.C. v. City of St. Louis, Mo.*, 477 F.3d 528, 531-32 (8th Cir 2007) (*Level 3*).

<sup>158</sup> 47 U.S.C. § 253(b); see also *Western Wireless Corp. Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, File No. CWD 98-90, Memorandum Opinion and Order, 15 FCC Rcd 16227, 16231-32, para. 9 (2000).

<sup>159</sup> 47 U.S.C. § 253(c); *Level 3*, 477 F.3d at 532.

<sup>160</sup> 47 U.S.C. § 253(d).

110. While we recognize that not all state and local regulation poses a barrier to broadband development, we seek comment below on a number of specific areas where we could utilize our authority under Section 253 to enact rules to prevent states and localities from enforcing laws that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>161</sup> In our preliminary view, restrictions on broadband deployment may effectively prohibit the provision of telecommunications service, and we seek comment on this view. What telecommunications services are effectively prohibited by restrictions on broadband deployment? In each case described below, we seek comment on whether the laws in question are inconsistent with Section 253(a)’s prohibition on local laws that inhibit provision of telecommunications service.<sup>162</sup>

111. *Deployment Moratoria.* First, we seek comment on adopting rules prohibiting state or local moratoria on market entry or the deployment of telecommunications facilities. We also seek comment on the types of conduct such rules should prevent. We invite commenters to identify examples of moratoria that states and localities have adopted. How do state and local moratoria interfere with facilities deployment or service provision? What types of delays result from local moratoria (e.g., application processing, construction)? How do moratoria affect the cost of deployment and providing service, and is this cost passed down to the consumer? Are there any types of moratoria that help advance the goals of the Act? If we adopt the proposal to prohibit moratoria, should we provide an exception for certain moratoria, such as those that are limited to exigent circumstances or that have certain sharply restricted time limits? If so, what time limits should be permissible?

112. *Rights-of-Way Negotiation and Approval Process Delays.* Second, we seek comment on adopting rules to eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services. We invite commenters to identify examples of excessive delays. How can the Commission streamline the negotiation and approval process? For instance, should the Commission adopt a mandatory negotiation and/or approval time period, and if so, what would be an appropriate amount of time for negotiations? For purposes of evaluating the timeliness of negotiations, when should the Commission consider the negotiations as having started and having stopped? For example, the Commission adopted rules placing time limits on applicants for cable franchises.<sup>163</sup> We seek comment on similar rules for telecommunications rights-of-way applicants. How have slow negotiation or approval processes inhibited the provision of telecommunications service? Are there any examples of delays that jeopardized investors or deployment in general? How can local governments expedite rights-of-way negotiations and approvals? Are there any examples of successful expedited processes? How should regulations placing time limits on negotiations address or recognize delays in processing applications or negotiations that result from local moratoria? For example, in 2014, the Commission clarified that the shot clock timeframe for wireless siting applications runs regardless of any moratorium.<sup>164</sup> Are stalled negotiations and approvals ever justified, and if so how could new rules take these situations into account?

113. *Excessive Fees and Other Excessive Costs.* Third, we seek comment on adopting rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service. We invite commenters to identify examples of fees adopted by states and localities that commenters consider excessive. For example, we note that many states and localities charge rights-of-way fees. Our preliminary view is that Section 253 applies to fees other than cable

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<sup>161</sup> 47 U.S.C. § 253(a), (d).

<sup>162</sup> Berin Szoka, Matthew Starr, and Jon Henke, “Don’t Blame Big Cable. It’s Local Governments that Choke Broadband Competition,” *Wired* (July 16, 2013), available at <https://www.wired.com/2013/07/we-need-to-stop-focusing-on-just-cable-companies-and-blame-local-government-for-dismal-broadband-competition/>.

<sup>163</sup> 47 CFR § 76.41(d)-(g).

<sup>164</sup> *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies et al.*, WT Docket Nos. 13-238, 11-59, and 13-32, Report and Order, 29 FCC Rcd 12865, 12971, para. 265 (2014).

franchise fees as defined by Section 622(g) of the Act and we seek comment on this view.<sup>165</sup> By “rights-of-way fees,” we refer to those fees including, but not limited to, fees that states or local authorities impose for access to rights-of-way, permitting, construction, licensure, providing a telecommunications service, or any other fees that relate to the provision of telecommunications service. We recognize Section 622 of the Act governs the administration of cable franchise fees,<sup>166</sup> and that Section 622(i) limits the Commission’s authority to “regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees,” except as otherwise permitted elsewhere in Section 622.<sup>167</sup> Our preliminary view is that Section 622(i) would prevent the Commission from enacting rules pursuant to Section 253 to address “excessive” cable franchise fees and we seek comment on this view. Also, we seek comment on whether there are different types of state or local fees, authorized under the provisions of the Act other than 622, for which application of Section 253 would not be appropriate.

114. We recognize that states and localities have many legitimate reasons for adopting fees, and thus our focus is directed only on truly excessive fees that have the effect of cutting off competition. We seek comment on how the Commission should define what constitutes “excessive” fees. For example, should rights-of-way fees be capped at a certain percentage of a provider’s gross revenues in the permitted area? If so, at what percentage? For example, Section 622 of the Act provides that for any twelve-month period, the franchise fees paid by a cable operator with respect to a cable system shall not exceed 5 percent of the cable operator’s gross revenues derived from a cable service.<sup>168</sup> More broadly, are fees tied to a provider’s gross revenues “fair and reasonable” if divorced from the costs to the state or locality of allowing access? If we look at costs in assessing fees, should we focus on the incremental costs of each new attacher? Should attachers be required to contribute to joint and common costs? And if so, should we look holistically at whether a state or locality recovers more than the total cost of providing access to the right of way from all attaching entities? We seek comment on evaluating other fees in a similar manner. Are states and localities imposing fees that are not “fair and reasonable” for access to local rights-of-way?<sup>169</sup> How do these fees compare to construction costs? Should fees be capped to only cover costs incurred by the locality to maintain and manage the rights-of-way? Should we require that application fees not exceed the costs reasonably associated with the administrative costs to review and process an application? Should any increase in fees be capped or controlled? For example, should fees increases be capped at 10 percent a year? What types of fees should we consider within the scope of any rule we adopt? How do excessive fees impact consumers?

115. *Unreasonable Conditions.* Fourth, we seek comment on adopting rules prohibiting unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services. For example, we seek comment on rights-of-way conditions that inhibit the deployment of broadband by forcing broadband providers to expend resources on costs not related to rights-of-way management. Do these conditions

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<sup>165</sup> 47 U.S.C. § 542(g).

<sup>166</sup> See 47 U.S.C. § 542; see also *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5144-5151, paras. 94-109 (2007) (*Cable Services Order*); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report and Order, 22 FCC Rcd 19633, 19637-8, paras. 10-11 (2007); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Order on Reconsideration, 30 FCC Rcd 810, 814-816, paras. 11-13 (2015).

<sup>167</sup> See 47 U.S.C. § 542(i).

<sup>168</sup> 47 U.S.C. § 542(b).

<sup>169</sup> 47 U.S.C. § 253(c).

make the playing field uneven for smaller broadband providers and potential new entrants? If the Commission were to adopt such rules, how should the Commission define what constitutes an “unreasonable” rights-of-way condition? We seek comment from both providers and local governments on conditions that they consider are reasonable and unreasonable. Should the Commission place limitations on requirements that compel the telecommunications service provider to furnish service or products to the right-of-way or franchise authority for free or at a discount such as building out service where it is not demanded by consumers, donating equipment, or delivering free broadband to government buildings? Should non-network related costs be factored into any kind of a fee cap? For instance, the Commission determined that non-incident franchise-related costs and in-kind payments unrelated to the provision of cable service required by local franchise authorities for cable franchises count toward the 5 percent cable franchise fee cap.<sup>170</sup> We seek comment on whether the Commission should adopt similar rules for telecommunication rights-of-way agreements.

116. *Bad Faith Negotiation Conduct.* Fifth, we seek comment on whether the Commission should adopt rules banning bad faith conduct in the context of deployment, rights-of-way, permitting, construction, or licensure negotiations and processes. We seek comment on what types of bad faith conduct such rules should prohibit and examples of such conduct. Should the Commission ban bad faith conduct generally, specific forms of bad faith conduct, or both? Should the Commission establish specific objective criteria that define the meaning of “bad faith” insofar as the Commission prohibits “bad faith” conduct generally? If so, we seek comment on proposed criteria. What types of negotiation conduct have directly affected the provision of telecommunications service? Would a streamlined process for responding to bad faith complaints help negate such behavior? What would that process look like?

117. *Other Prohibitive State and Local Laws.* Finally, we seek comment regarding any other instances where the Commission could adopt rules to preempt state or local legal requirements or practices that prohibit the provision of telecommunications service. For instance, should the Commission adopt rules regarding the transparency of local and state application processes? Are there any other local ordinances that erect barriers to the provision of telecommunications service especially as applied to new entrants? Are there any other specific rights-of-way management practices that frustrate, delay or inhibit the provision of telecommunications service? The Commission has described Section 253(a) as preempting conduct by a locality that materially inhibits or limits the ability of a provider “to compete in a fair and balanced legal and regulatory environment.”<sup>171</sup> Is this the legal standard that should apply here? We seek comment on identifying particular practices, regulations and requirements that would be deemed to violate Section 253 in order to provide localities and industry with greater predictability and certainty.

118. *Authority to Adopt Rules.* The Commission has historically used its Section 253 authority to respond to preemption petitions that involve competition issues and relationships among the federal, state and local levels of government.<sup>172</sup> We seek comment on our authority under Section 253 to adopt

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<sup>170</sup> *Cable Services Order*, 22 FCC Rcd at 5147-49, paras. 99-105.

<sup>171</sup> *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol. 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191, 14209, para. 38 (1997) (*California Payphone*); see also *TCG N.Y., Inc., v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002) (agreeing with the precedent set forth in *California Payphone*); *Illinois Bell Tel. Co. v. Vill. of Itasca*, 503 F. Supp. 2d 928, 940 (N.D. Ill. 2007) (citing *California Payphone* for the proposition that “the FCC considers ‘whether the Ordinance materially inhibits or limits the ability of any competition or potential competitor to compete in a fair and balanced legal and regulatory environment’” in order to show a violation of Section 253(a)) (citations omitted).

<sup>172</sup> See *Suggested Guidelines for Petitions for Ruling under Section 253 of the Communications Act*, FCC 98-295, Public Notice, 13 FCC Rcd 22970 (1998) (stating that to date the Commission received over 25 petitions seeking preemption under Section 253 and that the petitions primarily involved issues regarding competition and the

rules that prospectively prohibit the enforcement of local laws that would otherwise prevent or hinder the provision of telecommunications service. Our view is that under Section 201(b)<sup>173</sup> and Section 253, the Commission has the authority to engage in a rulemaking to adopt rules that further define when a state or local legal requirement or practice constitutes an effective barrier to the provision of telecommunications service under Section 253(a).<sup>174</sup> We seek comment on this approach. We also recognize that state and local governments have authority, pursuant to Sections 253(b) and (c) to, among other things, regulate telecommunications services to protect the public safety and welfare, provide universal service, and to manage public rights-of-way on a non-discriminatory basis. How can we ensure that any rules we adopt comport with Sections 253(b) and (c)? Should we adopt the text of Sections 253(b) and (c), to the extent relevant, as explicit carve-outs from any rules that we adopt? Could we include the substance of Sections 253(b) and (c) in rules without an explicit, verbatim carve-out? Would enacting rules conflict with Section 253(b) or (c)?

119. Would adopting rules to interpret or implement Section 253(a) be consistent with Section 253(d), which directs the Commission to preempt the enforcement of particular State or local statutes, regulations, or legal requirements “to the extent necessary to correct such violation or inconsistency”?<sup>175</sup> Subsection (d) directs the Commission to preempt such particular requirements “after notice and an opportunity for public comment.” Does this preclude the adoption of general rules? Would notice, comment, and adjudicatory action in a Commission proceeding to take enforcement action following a rule violation satisfy these procedural specifications? Can we read Section 253(d) as setting forth a non-mandatory procedural vehicle that is not implicated when adopting rules pursuant to Sections 253(a)-(c)? If the Commission were to adopt rules pursuant to Section 253, we seek comment on whether Section 622 of the Act limits the Commission’s authority to enact rules with respect to non-cable franchise fee rights-of-way practices that might apply to cable operators in their capacities as telecommunications providers.<sup>176</sup>

## **B. Preemption of State Laws Governing Copper Retirement**

120. We seek comment on whether there are state laws governing the maintenance or retirement of copper facilities that serve as a barrier to deploying next-generation technologies and services that the Commission might seek to preempt. Every dollar an incumbent LEC must put towards maintaining its aging copper facilities is a dollar it cannot spend on something else, such as fiber

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relationship between different federal, local and state levels of government); *see also Amigo.Net for Declaratory Ruling Regarding the Effect of Sections 253 and 257 of the Telecommunications Act of 1996 on an Agreement for Multi-Use Network: Infrastructure Development, Statewide Telecommunications Service Aggregation, and Network Management*, CC Docket No. 00-220, Memorandum Opinion and Order, 17 FCC Rcd 10964 (WCB 2002) (finding no Section 253 issue in response to petition involving contract between the State of Colorado and US West for the provision of advanced telecommunications services); *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, CCB Pol. 97-1, Memorandum Opinion and Order, 12 FCC Rcd 15639 (1997) (granting Section 253 preemption petition regarding a Wyoming commission order to deny a local exchange service).

<sup>173</sup> 47 U.S.C. § 201(b) (“The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”); *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 380 (1999) (“Section 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies.”).

<sup>174</sup> 47 U.S.C. § 253(a); *Acceleration of Broadband Deployment: Expanding the Reach and Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting*, WC Docket No. 11-59, Notice of Inquiry, 26 FCC Rcd 5384, 5400, para. 57 (2011).

<sup>175</sup> 47 U.S.C. § 253(d) (emphasis added).

<sup>176</sup> 47 U.S.C. § 542.

deployment.<sup>177</sup> For example, certain states require utilities or specific carriers to maintain adequate equipment and facilities.<sup>178</sup> Other states empower public utilities commissions, either acting on their own authority or in response to a complaint, to require utilities or specific carriers to maintain, repair, or improve facilities or equipment or to have in place a written preventative maintenance program.<sup>179</sup> First, we seek comment on the impact of state legacy service quality and copper facilities maintenance regulations. Next, we seek comment on the impact of state laws restricting the retirement of copper facilities. In each case, how common are these regulations, and in how many states do they exist? How burdensome are such regulations, and what benefits do they provide? Are incumbent LECs or other carriers less likely to deploy fiber in states that continue to impose service quality and facilities maintenance requirements than in those states that have chosen to deregulate?

121. We seek comment on whether Section 253 of the Act provides the Commission with authority to preempt state laws and regulations governing service quality, facilities maintenance, or copper retirement that are impeding fiber deployment.<sup>180</sup> Do any such laws “have the effect of prohibiting the ability of [those incumbent LECs] to provide any interstate or intrastate telecommunications service?”<sup>181</sup> Are such laws either not “competitively neutral” or not “necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers,” such that state authority is not preserved from preemption under Section 253(b)?<sup>182</sup> Commenters arguing in favor of preemption should identify specific state laws they believe to be at issue. Would preemption allow the Commission to develop a uniform nationwide copper retirement policy for facilitating deployment of next-generation technologies? Are there other sources of authority for Commission preemption of the state laws being discussed that we should consider using?

#### IV. REQUEST FOR COMMENT

##### A. Reversing the “Functional Test” Standard

122. In November 2014, without first seeking comment, the Commission adopted a *sua sponte* Declaratory Ruling determining that when analyzing whether network changes contemplated by a carrier constitute a discontinuance, reduction, or impairment of service for purposes of determining whether Section 214(a) discontinuance authority is required, the Commission applies a “functional test.”<sup>183</sup> We propose reversing the Commission’s 2014 Declaratory Ruling and subsequent 2015 Order on

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<sup>177</sup> 2015 *Technology Transitions Order*, 30 FCC Rcd at 9544-45 (Statement of Commissioner Ajit Pai) (“It’s an iron law of economics that you can’t spend a dollar twice, so diverting scarce capital from new networks to old will only slow next-generation deployment and deepen the digital divide.”); see also Federal Communications Commission, *Connecting America: The National Broadband Plan* at 59 (2010); USTelecom Biennial Comments at iv; AT&T Services, Inc., Comments, GN Docket No. 13-5 et al., at 26 (Feb. 5, 2015); Information Tech. and Innovation Found., Reply Comments, GN Docket No. 13-5 et al., at 4 (Mar. 9, 2015).

<sup>178</sup> See, e.g., Ark. Code Ann. § 23-3-113; Cal. Pub. Utils. Code § 451; Colo. Rev. Stat. Ann. § 40-3-101(2); Idaho Code § 40-3-101; Ill. Compiled Stat. Ann. § 5/8-101; Ind. Code Ann. § 8-1-2-4; N.D. Century Code Ann. § 49-04-01; N.J. Stat. Ann. § 48:2-23; 66 Pa. Cons. Stat. Ann. § 1501; 27 L.P.R. Ann. § 1201; Utah Code Ann. 1953 § 54-3-1.

<sup>179</sup> See, e.g., Ark. Admin. Code § 126.03.9-8.01; Ky. Admin. Regs. 5:061 § 23; Miss. Admin. Code § 39-1-2:4; N.C. Gen. Stat. Ann. § 62-42; 807.

<sup>180</sup> 47 U.S.C. § 253.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> See *Technology Transitions et al.*, GN Docket No. 13-5 et al., Notice of Proposed Rulemaking and Declaratory Ruling, 29 FCC Rcd 14968, 15015-16, para. 115 (2014) (*2014 Technology Transitions NPRM and Declaratory Ruling*).



Reconsideration expanding what constitutes a “service” for purposes of Section 214(a) discontinuance review, and we request comment on this proposed declaratory ruling.<sup>184</sup> Specifically, we seek comment on disavowing “the functional test,” an interpretation of Section 214(a) that obligates the Commission to look beyond the terms of a carrier’s tariff and instead consider the totality of the circumstances from the perspective of the relevant community when analyzing whether a service is discontinued, reduced, or impaired under Section 214.<sup>185</sup>

123. We propose determining that a carrier’s description in its tariff—or customer service agreement in the absence of a tariff—should be dispositive as to what comprises the “service” within the meaning of the Section 214(a) discontinuance requirement, and we seek comment on this proposal. We anticipate that our proposed approach will allow all parties to determine clearly when a discontinuance occurs based on objective criteria, and we seek comment on this proposed conclusion. How will our proposed interpretation impact investment in next-generation services and consumers?

124. Does what the carrier describes and holds itself out as offering determine the scope of the service offering in question? Is this interpretation more consistent with principles of contract and the filed rate doctrine than the prior interpretation?<sup>186</sup> Under the filed rate doctrine, carriers are specifically prohibited from “extend[ing] to any person any privileges” with respect to a tariffed service except as specified in the tariff.<sup>187</sup> Thus, under this doctrine, no person or community can enforce or rely on any aspect of a tariffed service that is not described in the tariff.<sup>188</sup> Under traditional principles of contract law, the terms of a carrier’s service agreement with a customer, whatever form it may take, define its obligations to that customer and vice versa.<sup>189</sup> Does our proposal lead to a more consistent reading of Sections 203 and 214 than the “functional test”?

125. Beyond the filed rate doctrine and traditional principles of contract law, we seek comment on whether our proposed determination of “service” is more consistent with Commission

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<sup>184</sup> See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15015-18, paras. 114-119; *2015 Technology Transitions Order*, 30 FCC Rcd at 9471-78, paras. 181-201; see also 47 CFR § 1.2. We distinguish this proposal and the proposal below as a “Request for Comment” because they would be adjudicatory in nature, unlike the proposals in the *Notice of Proposed Rulemaking*.

<sup>185</sup> See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15018, para. 117. In response to a petition for reconsideration filed by USTelecom, the Commission reaffirmed this Declaratory Ruling in the *2015 Technology Transitions Order*. See *2015 Technology Transitions Order*, 30 FCC Rcd at 9471-78, paras. 181-201. USTelecom appealed to the U.S. Court of Appeals for the D.C. Circuit, and the case remains pending. See generally Brief for Petitioner USTelecom, *United States Telecom Ass’n v. FCC*, No. 15-1414 (D.C. Cir. June 14, 2016) (USTelecom Brief).

<sup>186</sup> The filed rate doctrine is intended to prevent price discrimination against end users by guaranteeing providers offer similarly situated customers equivalent terms and conditions. See *2015 Technology Transitions Order*, 30 FCC Rcd at 9474, para. 191. For a general description of the filed rate doctrine, see, e.g., *Qwest Commc’ns Corp. v. Farmers & Merch. Mut. Tel. Co.*, 24 FCC Rcd 14801, 14810, para. 21 (2009); *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998); *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

<sup>187</sup> 47 U.S.C. § 203(c); see also *2015 Technology Transitions Order*, 30 FCC Rcd at 9545, para. 8 n.7 (Statement of Commissioner Ajit Pai).

<sup>188</sup> See *2015 Technology Transitions Order*, 30 FCC Rcd at 9545, para. 8 n.7 (Statement of Commissioner Ajit Pai); *AT&T Co.*, 524 U.S. at 221-24 (explaining that the doctrine applies not just to rates because rates “have meaning only when one knows the services to which they are attached”).

<sup>189</sup> See *Tanadgusix Corp. v. Huber*, 404 F.3d 1201, 1205 (9th Cir. 2005) (stating that the “terms of the contract control, regardless of the parties’ subjective intentions shown by extrinsic evidence”); *Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 150-51 (2009) (recognizing that “it is black-letter law that the terms of an unambiguous private contract must be enforced irrespective of the parties’ subjective intent” (citing 11 Williston on Contracts § 30:4 (4th ed. 1999))); Restatement (Second) of Contracts § 29 cmt. (1981).

precedent than the current “functional test” approach. Proponents of defining service from the perspective of tariffs or contracts claim this to be the Commission’s long-held view.<sup>190</sup> Do commenters agree or disagree with this assertion? For example, USTelecom points out that *Carterfone* held that customers could attach third-party devices to the telephone service they purchased, while noting that if the underlying telephone network technology and standards changed, the device must be “rebuilt to comply with the revised standards” or the customer would have to “discontinue its use.”<sup>191</sup> The Commission went on to explain that such is “the risk inherent in the private ownership of any equipment to be used in connection with the telephone system.”<sup>192</sup> Similarly, during the era when telephone exchanges operated for only limited hours during the day, USTelecom reminds us that the Commission’s rules allowed carriers to adjust the particular hours of telephone exchange operation without Commission approval, so long as the total number of hours remained constant.<sup>193</sup> We seek comment on how this precedent should influence our interpretation. Are there other sources of law, including Commission rules or actions, that should inform our interpretation?

126. As an alternative to the proposal above, we propose determining that the “functional test” is erroneous because it is too vague and prohibitively broad for carriers and consumers trying to determine what services do and do not trigger the requirement to obtain Section 214(a) discontinuance authority, and we seek comment on this proposed determination. We note that despite issuing a Declaratory Ruling and Order on Reconsideration, in neither case did the Commission articulate clear, objective criteria by which a carrier may determine whether an application is necessary. Does it make sense to require carriers to seek permission before discontinuing almost “every [network] feature no matter how little-used or old-fashioned”?<sup>194</sup> USTelecom has claimed that the “functional test” results in unnecessary and costly Section 214 discontinuance filings and creates additional burdens on carriers, delaying the transition to new networks and technologies.<sup>195</sup> Do commenters agree or disagree, and why?

127. We seek comment on the validity of several legal arguments that have been raised in support of the functional test. Is there a reason to conclude, as the Commission did in its 2014 Declaratory Ruling, that the right to attach devices established in *Carterfone* should be relevant to our interpretation of Section 214(a)?<sup>196</sup> We seek comment on whether the existence of de-tariffed services counsels against our proposal to treat a tariff or customer service agreement as dispositive as the “service” being offered for purposes of Section 214(a). Does the Supreme Court’s finding in *National Cable & Telecommunications Association v. Brand X Internet Services* require a conclusion contrary to the one we propose? In that case, the Court held that it was reasonable for the Commission to consider “the consumer’s point of view” in determining whether cable modem service included an “offering” of telecommunications because that question “turn[ed] on the nature of the functions the *end user* is offered.”<sup>197</sup>

128. As a further alternative to the discussion above, is there a different interpretation of “service” beyond our proposed approach or the “functional test” that we should consider for determining

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<sup>190</sup> USTelecom Brief at 15.

<sup>191</sup> *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968) (*Carterfone*).

<sup>192</sup> *Carterfone*, 13 F.C.C.2d at 424.

<sup>193</sup> USTelecom Brief at 15; *Extension of Lines and Discontinuance of Service by Carriers*, 28 Fed. Reg. 13229, 13232 (Dec. 5, 1963) (codified at 47 CFR § 63.60).

<sup>194</sup> *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15018, para. 118.

<sup>195</sup> See USTelecom Biennial Comments at 15.

<sup>196</sup> See *2014 Technology Transitions NPRM and Declaratory Ruling*, 29 FCC Rcd at 15017, para. 117.

<sup>197</sup> *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 988 (2005) (internal quotation marks omitted).

what constitutes a discontinuance, reduction, or impairment of service under Section 214(a)? If so, describe and explain how any such interpretation would better comport with Section 214(a) and serve the objectives of this proceeding.

129. Finally, we propose concluding that a Declaratory Ruling is again warranted to “terminat[e] a controversy or remov[e] uncertainty.”<sup>198</sup> In this case, we believe that controversy and uncertainty remains as to what comprises the “service” being offered for purposes of determining the applicability of, and need for, Section 214(a) discontinuance authority. Due to the ambiguity of the current “functional test,” its amorphous standard, and the lack of clear guiding principles, we believe that neither carriers nor consumers have regulatory certainty when carriers decide to no longer make particular offerings available. Further, there is continued disagreement as to whether this “functional test” is the correct lens through which to examine this issue.<sup>199</sup> Given this ongoing uncertainty, and our intent and desire to provide maximum clarity and regulatory certainty to the industry, we believe a Declaratory Ruling appears to be the appropriate and most expedient vehicle for resolving this controversy. We seek comment on this proposed conclusion.

### **B. Determining Whether “Service” Goes Beyond a Single Offering or Product**

130. We seek comment on interpreting “service” within the meaning of Section 214’s discontinuance requirement as encompassing the entire range of offerings that are available to a community, or part of a community. Historically, the Commission has interpreted “service” to refer to each individual tariffed or contracted-for offering that a carrier makes available.<sup>200</sup> As a result, carriers must seek discontinuance authority separately for numerous “services,” even when those offerings are related or similar and readily replaced with other offerings on the market.<sup>201</sup> In contrast, under this interpretation, a carrier that decides to cease providing any particular offering to customers would be permitted to do so without the need to first seek Commission authority so long as the overall “service” that a community receives is not discontinued, reduced, or impaired. In other words, no application would be required so long as a service offering of a similar type and quality is available in the affected area. We seek comment on this interpretation and whether it is supported by the text of Section 214(a). Does the proviso in section 214(a) stating that no authorization is required where a carrier’s action “will not impair the adequacy or quality of service provided” support this interpretation? We further seek comment on whether this interpretation is supported by the legislative history of Section 214(a)’s discontinuance provision.<sup>202</sup> In potentially implementing this interpretation, how might we ensure that a “similar type and quality” of service would be available? If we adopt this interpretation, how would it impact the proposals we advance herein for streamlining grandfathered and legacy voice and data services? We seek comment on whether a Declaratory Ruling is warranted to terminate a controversy or

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<sup>198</sup> 47 CFR § 1.2(a).

<sup>199</sup> See generally USTelecom Brief at 29.

<sup>200</sup> The Commission has construed Section 214(a) to require Commission approval before a carrier can discontinue, reduce, or impair “the end service provided by a carrier to a community or part of a community.” Brief for Respondents FCC, *United States Telecom Ass’n v. FCC*, No. 15-1414, at 5 (D.C. Cir. June 14, 2016) (FCC Brief) (citing *Western Union Tel. Co.*, 74 FCC 2d 293, 296, para. 7 (1979)).

<sup>201</sup> See, e.g., *Comments Invited on Application of City of Brookings Municipal Telephone Department to Discontinue Domestic Telecommunications Services*, WC Docket No. 15-293, Public Notice, 30 FCC Rcd 13639 (2015); *Comments Invited on Application of Progressive Rural Telephone Cooperative to Discontinue Domestic Telecommunications Services*, WC Docket No. 15-272, Public Notice, 30 FCC Rcd 13281 (2015).

<sup>202</sup> See 89 Cong. Rec. 786 (1943) (indicating that Congress intended to ensure that not *all* service to a community was terminated or abandoned without Commission review); see also *id.* (containing the following Conference-Committee manager quote: “I do not believe that the Congress or the country is interested in whether the telegraph company should abandon or take out a certain insulator or pole or even close down one office, if the community is adequately served by another office.”); H.R. Rep. No. 78-69, at 2, 10.

remove uncertainty regarding (a) the fidelity of the Commission's prior approach with the Act and (b) the question of when an application is required.

### C. Comment Timeframes

131. For administrative convenience and to provide commenters with additional time to consider the issues raised herein, we adopt a simultaneous comment deadline for this *Request for Comment* as for the remainder of this item, notwithstanding that Federal Register publication is not required to trigger the computation of time for this *Request for Comment*.<sup>203</sup> Thus, comments on this *Request for Comment* will be due 30 days after the *Notice of Proposed Rulemaking* and *Notice of Inquiry* are published in the Federal Register, and reply comments on this *Request for Comments* will be due 60 days after the *Notice of Proposed Rulemaking* and *Notice of Inquiry* are published in the Federal Register.

## V. PROCEDURAL MATTERS

### A. Ex Parte Rules

132. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.<sup>204</sup> Persons making *ex parte* presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the *ex parte* presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter's written comments, memoranda or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during *ex parte* meetings are deemed to be written *ex parte* presentations and must be filed consistent with Rule 1.1206(b). In proceedings governed by Rule 1.49(f) or for which the Commission has made available a method of electronic filing, written *ex parte* presentations and memoranda summarizing oral *ex parte* presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (*e.g.*, .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission's *ex parte* rules.

### B. Initial Regulatory Flexibility Analysis

133. Pursuant to the Regulatory Flexibility Act (RFA),<sup>205</sup> the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities of the policies and actions considered in this NPRM. The text of the IRFA is set forth in Appendix B. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM. The Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, will send a copy of the NPRM, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration.<sup>206</sup>

### C. Paperwork Reduction Act

134. This document contains proposed new and modified information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public

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<sup>203</sup> 47 CFR § 1.4(b)(2).

<sup>204</sup> 47 CFR § 1.1200 *et seq.*

<sup>205</sup> *See* 5 U.S.C. § 603.

<sup>206</sup> *See* 5 U.S.C. § 603(a).

and the Office of Management and Budget to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.<sup>207</sup>

#### **D. Filing of Comments and Reply Comments**

135. Pursuant to Sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS). *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <https://www.fcc.gov/ecfs/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.
  - All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12<sup>th</sup> St., SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of *before* entering the building.
  - Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
  - U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12<sup>th</sup> Street, SW, Washington DC 20554.

#### **E. Accessible Formats**

136. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

#### **F. Contact Person**

137. For further information about this proceeding, please contact Michele Berlove, FCC Wireline Competition Bureau, Competition Policy Division, Room 5-C313, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-1477, [Michele.Berlove@fcc.gov](mailto:Michele.Berlove@fcc.gov), or Michael Ray, FCC Wireline Competition Bureau, Competition Policy Division, Room 5-C235, 445 12th Street, S.W., Washington, D.C. 20554, (202) 418-0357, [Michael.Ray@fcc.gov](mailto:Michael.Ray@fcc.gov).

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<sup>207</sup> *See* 44 U.S.C. § 3506(c)(4).

**VI. ORDERING CLAUSES**

138. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 1-4, 201, 202, 214, 224, 251, 253 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201, 202, 214, 224, 251, 253, 303(r), this Notice of Proposed Rulemaking IS ADOPTED.

139. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1, 4(i), 4(j), and 403 of the Communications Act of 1934, as amended, 47 U.S.C §§ 151, 154(i), 154(j), and 403, this Notice of Inquiry IS ADOPTED.

140. IT IS FURTHER ORDERED that, pursuant to the authority contained in Sections 1-4, 201-203, 214, and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-154, 201-203, 214, 403, this Request for Comment IS ADOPTED and SHALL BE EFFECTIVE upon release.

141. IT IS FURTHER ORDERED that the Commission's Consumer & Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

## APPENDIX A

## Draft Proposed Rules for Public Comment

**For the reasons set forth above**, Parts 1, 51, and 63 of Title 47 of the Code of Federal Regulations are amended as follows:

**PART 1 – PRACTICE AND PROCEDURE**

1. The authority for part 1 continues to read as follows:

AUTHORITY: 15 U.S.C. 79 et seq., 47 U.S.C. 151, 154(i) and (j), 155, 157, 160, 201, 224, 225, 227, 303, 309, 301, 332, 1403, 1404, 1451, 1452, and 1455.

## SUBPART J – POLE ATTACHMENT COMPLAINT PROCEDURES

2. Amend section 1403 by revising paragraphs (a) and (b) to read as follows:

**§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.**

(a) A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. A utility that is a local exchange carrier shall provide any incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it. Notwithstanding either of the foregoing obligations, a utility may deny a cable television system or any telecommunications carrier, and a utility that is a local exchange carrier may deny an incumbent local exchange carrier, access to its poles, ducts, conduits, or rights-of-way, on a non-discriminatory basis where there is insufficient capacity or for reasons of safety, reliability and generally applicable engineering purposes.

(b) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 15 days of the request for access, the utility must confirm the denial in writing by the 15th day (or within the timelines set forth in section 1.1420(g)). The utility's denial of access shall be specific, shall include all relevant evidence and information supporting its denial, and shall explain how such evidence and information relate to a denial of access for reasons of lack of capacity, safety, reliability or engineering standards.

\* \* \* \* \*

3. Amend section 1404 by revising paragraph (k) to read as follows:

**§ 1.1404 Complaint.**

\* \* \* \* \*

(k) The complaint shall include:

(1) A certification that the complainant has, in good faith, engaged or attempted to engage in executive-level discussions with the respondent to resolve the pole attachment dispute. Executive-level discussions are discussions among representatives of the parties who have sufficient

authority to make binding decisions on behalf of the company they represent regarding the subject matter of the discussions. Such certification shall include a statement that, prior to the filing of the complaint, the complainant mailed a certified letter to the respondent outlining the allegations that form the basis of the complaint it anticipated filing with the Commission, inviting a response within a reasonable period of time, and offering to hold executive-level discussions regarding the dispute; and

(2) A certification that the complainant and respondent have, in good faith, engaged in discussions to resolve procedural issues and deadlines associated with the pole attachment complaint process. Such certification shall include a statement that the complainant has contacted the Commission to disclose the results of the pre-complaint discussions with respondent.

(3) A refusal by a respondent to engage in the discussions contemplated in this paragraph shall constitute an unreasonable practice under section 224 of the Act.

\* \* \* \* \*

4. Amend section 1409 by revising paragraph (c) to read as follows:

**§ 1.1409 Commission consideration of the complaint.**

\* \* \* \* \*

(c) The Commission shall determine whether the rate, term or condition complained of is just and reasonable. For the purposes of this paragraph, a rate is just and reasonable if it assures a utility the recovery of not less than the additional costs of providing pole attachments, nor more than an amount determined by multiplying the percentage of the total usable space, or the percentage of the total duct or conduit capacity, which is occupied by the pole attachment by the sum of the operating expenses and actual capital costs of the utility attributable to the entire pole, duct, conduit, or right-of-way. The Commission shall exclude from actual capital costs those reimbursements received by the utility from cable operators and telecommunications carriers for non-recurring costs as set forth in sections 1.1404(g)(1)(xiii) and 1.1404(h)(1)(ix).

\* \* \* \* \*

5. Amend section 1416 by revising the heading and paragraphs (b) and (c), and adding paragraph (d) to read as follows:

**§ 1.1416 Imputation of rates; make-ready costs.**

\* \* \* \* \*

(b) The cable television system operator or telecommunications carrier requesting attachment shall be responsible only for the actual costs of make-ready made necessary solely as a result of its new attachments.

(c) The costs of modifying a facility shall be borne by all attachers and utilities that obtain access to the facility as a result of the modification and by all attachers and utilities that directly benefit from the modification. Each party described in the preceding sentence shall share proportionately in the cost of the modification. An attacher or a utility with a preexisting attachment to the modified facility shall be



deemed to directly benefit from a modification if, after receiving notification of such modification as provided in subpart J of this part, it adds to or modifies its attachment. Notwithstanding the foregoing, an attacher or utility with a preexisting attachment to a pole, conduit, duct or right-of-way shall not be required to bear any of the costs of rearranging or replacing its attachment if such rearrangement or replacement is necessitated solely as a result of an additional attachment or the modification of an existing attachment sought by another party. If an attacher or utility makes an attachment to the facility after the completion of the modification, such party shall share proportionately in the cost of the modification if such modification rendered possible the added attachment.

(d) If a utility performs make-ready, the utility shall make available to the cable television system operator or telecommunications carrier requesting attachment a schedule of its common make-ready charges that the new attacher may be charged.

6. Amend section 1420 by revising paragraphs (c) through (e), (g), and (i) to read as follows:

**§ 1.1420 Timeline for access to poles, ducts, conduits, and rights of way.**

\* \* \* \* \*

(c) *Survey.* A utility shall respond as described in §1.1403(b) to a cable television system operator or telecommunications carrier within 15 days of receipt of a complete application to attach facilities to its utility poles (or within the timelines set forth in paragraph (g) of this section). This response may be a notification that the utility has completed a survey of poles for which access has been requested. A complete application is an application that provides the utility with the information necessary under its procedures to begin to survey the poles.

(d) *Estimate.* Where a request for access is not denied, a utility shall present to a cable television system operator or telecommunications carrier an estimate of charges to perform all necessary make-ready work within 7 days of providing the response required by §1.1420(c), or in the case where a prospective attacher's contractor has performed a survey, within 7 days of receipt by the utility of such survey.

(1) A utility may withdraw an outstanding estimate of charges to perform make-ready work beginning 7 days after the estimate is presented.

(2) A cable television system operator or telecommunications carrier may accept a valid estimate and make payment anytime after receipt of an estimate but before the estimate is withdrawn.

(e) \* \* \*

(1) \* \* \*

(ii) Set a date for completion of make-ready that is no later than 30 days after notification is sent (or 75 days in the case of larger orders as described in paragraph (g) of this section).

\* \* \* \* \*

(g) \* \* \*

(3) A utility may add 30 days to the survey period described in paragraph (c) of this section to pole attachment orders larger than the lesser of (i) 3000 poles or (ii) 5 percent of the utility’s poles in a state.

(4) A utility may add 45 days to the make-ready periods described in paragraph (e) of this section to larger orders up to the lesser of 3000 poles or 5 percent of the utility’s poles in a state.

\* \* \* \* \*

7. Amend section 1422 by revising the heading and paragraphs (a) and (c) to read as follows:

**§ 1.1422 Contractors for survey and make-ready.**

(a) A utility shall make available and keep up-to-date a reasonably sufficient list of contractors it authorizes to perform surveys and make-ready in the communications space on its utility poles. A utility shall separately identify on that list the contractors it authorizes to perform make-ready above the communications space on its utility poles.

\* \* \* \* \*

(c) A cable television system operator or telecommunications carrier that hires a contractor for survey or make-ready work shall provide a utility and existing attachers with a reasonable opportunity for their representatives to accompany and consult with the authorized contractor and the cable television system operator or telecommunications carrier requesting attachment.

\* \* \* \* \*

8. Amend section 1424 by revising to read as follows:

**§ 1.1424 Complaints by incumbent local exchange carriers.**

Complaints by an incumbent local exchange carrier (as defined in 47 U.S.C. 251(h)) or an association of incumbent local exchange carriers alleging that a rate, term, or condition for a pole attachment is not just and reasonable shall follow the same complaint procedures specified for other pole attachment complaints in this part, as relevant. In complaint proceedings, there will be a rebuttable presumption that an incumbent local exchange carrier (or an association of incumbent local exchange carriers) is similarly situated to an attacher that is a telecommunications carrier (as defined in 47 U.S.C. 251(a)(5)) or a cable television system for purposes of obtaining comparable rates, terms or conditions. In pole attachment rate complaint proceedings, it is presumed that incumbent local exchange carriers (or an association of incumbent local exchange carriers) may be charged no higher than the rate determined in accordance with section 1.1409(e)(2), unless a utility can rebut the presumption by demonstrating that this maximum rate presumption should not apply.

8. Add new section 1425 to subpart J to read as follows:

**§ 1.1425 Review Period for Pole Access Complaints.**

(a) Except in extraordinary circumstances, final action on a complaint where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit, or

right-of-way owned or controlled by a utility should be expected no later than 180 days from the date the complaint is filed with the Commission.

(b) The Commission shall have the discretion to pause the 180-day review period in situations where actions outside the Commission’s control are responsible for unreasonably delaying Commission review of an access complaint.

**PART 51 – INTERCONNECTION**

1. The authority for part 51 continues to read as follows:

AUTHORITY: 47 U.S.C. 151–55, 201–05, 207–09, 218, 220, 225–27, 251–54, 256, 271, 303(r), 332, 1302.

**SUBPART D – ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS**

2. Amend section 51.325 by revising paragraph (a)(4), removing paragraphs (c) and (e), and redesignating paragraph (d) as (c), to read as follows:

**§ 51.325 Notice of network changes: Public notice requirement.**

(a) \* \* \*

(4) Will result in the retirement of copper loops or copper subloops, and the replacement of such loops with fiber-to-the-home loops or fiber-to-the-curb loops, as those terms are defined in § 51.319(a)(3).

\* \* \* \* \*

3. Amend section 51.329 by revising paragraph (c)(1) to read as follows:

**§ 51.329 Notice of network changes: Methods for providing notice.**

\* \* \* \* \*

(c) \* \* \*

(1) The public notice or certification must be labeled with one of the following titles, as appropriate: “Public Notice of Network Change Under Rule 51.329(a),” “Certification of Public Notice of Network Change Under Rule 51.329(a),” “Short Term Public Notice Under Rule 51.333(a),” or “Certification of Short Term Public Notice Under Rule 51.333(a).”

\* \* \* \* \*

4. Amend section 51.331 by adding paragraph (c) to read as follows:

**§ 51.331 Notice of network changes: Timing of notice.**

\* \* \* \* \*

(c) Competing service providers may object to incumbent LEC notice of retirement of copper loops or copper subloops and replacement with fiber-to-the-home loops or fiber-to-the-curb loops in the manner set forth in §51.333(c).

5. Remove section 51.332 in its entirety.

**§ 51.332 [Removed].**

6. Amend section 51.333(a) by revising the heading and paragraphs (b) and (c), and adding paragraph (f), to read as follows:

**§ 51.333 Notice of network changes: Short term notice, objections thereto and objections to retirement of copper loops or copper subloops.**

\* \* \* \* \*

(b) *Implementation date.* The Commission will release a public notice of filings of such short term notices or notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops. The effective date of the network changes referenced in those filings shall be subject to the following requirements:

(1) *Short term notice.* Short term notices shall be deemed final on the tenth business day after the release of the Commission's public notice, unless an objection is filed pursuant to paragraph (c) of this section.

(2) *Replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* Notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be deemed approved on the 90th day after the release of the Commission's public notice of the filing, unless an objection is filed pursuant to paragraph (c) of this section. Incumbent LEC notice of intent to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be subject to the short term notice provisions of this section, but under no circumstances may an incumbent LEC provide less than 90 days' notice of such a change.

(c) *Objection procedures for short term notice and notices of replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* An objection to an incumbent LEC's short term notice or to its notice that it intends to retire copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loop may be filed by an information service provider or telecommunications service provider that directly interconnects with the incumbent LEC's network. Such objections must be filed with the Commission, and served on the incumbent LEC, no later than the ninth business day following the release of the Commission's public notice. All objections filed under this section must:

\* \* \* \* \*

(f) *Resolution of objections to replacement of copper loops or copper subloops with fiber-to-the-home loops or fiber-to-the-curb loops.* An objection to a notice that an incumbent LEC intends to retire any copper loops or copper subloops and replace such loops or subloops with fiber-to-the-home loops or fiber-to-the-curb loops shall be deemed denied 90 days after the date on which the Commission releases

public notice of the incumbent LEC filing, unless the Commission rules otherwise within that time. Until the Commission has either ruled on an objection or the 90-day period for the Commission’s consideration has expired, an incumbent LEC may not retire those copper loops or copper subloops at issue for replacement with fiber-to-the-home loops or fiber-to-the-curb loops.

**PART 63 – EXTENSION OF LINES, NEW LINES, AND DISCONTINUANCE, REDUCTION, OUTAGE AND IMPAIRMENT OF SERVICE BY COMMON CARRIERS; AND GRANTS OF RECOGNIZED PRIVATE OPERATING AGENCY STATUS**

1. The authority for part 63 continues to read as follows:

AUTHORITY: Sections 1, 4(i), 4(j), 10, 11, 201–205, 214, 218, 403 and 651 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i), 154(j), 160, 201–205, 214, 218, 403, and 571, unless otherwise noted.

2. Amend section 63.19 by revising paragraph (a), to read as follows:

**§ 63.19 Special procedures for discontinuances of international services.**

(a) With the exception of those international carriers described in paragraphs (b) and (c) of this section, any international carrier that seeks to discontinue, reduce or impair service, including the retiring of international facilities, dismantling or removing of international trunk lines, shall be subject to the following procedures in lieu of those specified in §§63.61 through 63.601:

\* \* \* \* \*

3. Amend section 63.60 by deleting paragraph (h), redesignating paragraph (d) as (e), redesignating paragraphs (e) through (g) as (g) through (i), and adding new paragraphs (d) and (f), to read as follows:

**§ 63.60 Definitions**

\* \* \* \* \*

(d) *Grandfather* means to maintain the provision of a service to existing customers while ceasing to offer that service to new customers.

\* \* \* \* \*

(f) *Legacy voice service* means any wireline TDM-based voice service.

\* \* \* \* \*

4. Amend section 63.71 by deleting paragraphs (d) and (h), redesignating paragraphs (e) through (g) and (i) through (j) as (d) through (h), and revising paragraph (a) and redesignated paragraphs (c), (e), (f), and (g), to read as follows:

**§ 63.71 Procedures for discontinuance, reduction or impairment of service by domestic carriers.**

(a) \* \* \*

(5) \* \* \*

(iii) Notwithstanding paragraphs (a)(5)(i) and (ii) above, if any carrier, dominant or non-dominant, seeks to: (1) grandfather legacy service operating at 1.544 Mbps or less; (2) discontinue, reduce, or impair legacy voice service in areas where alternative voice service is available consistent with the criteria established in paragraph (a)(6) below; or (3) discontinue, reduce, or impair legacy data service that has been grandfathered for a period of no less than 180 days consistent with the criteria established in paragraph (a)(7) below, the notice shall state: The FCC will normally authorize this proposed discontinuance of service (or reduction or impairment) unless it is shown that customers would be unable to receive service or a reasonable substitute from another carrier or that the public convenience and necessity is otherwise adversely affected. If you wish to object, you should file your comments as soon as possible, but no later than 10 days after the Commission releases public notice of the proposed discontinuance. You may file your comments electronically through the FCC's Electronic Comment Filing System using the docket number established in the Commission's public notice for this proceeding, or you may address them to the Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, Washington, DC 20554, and include in your comments a reference to the § 63.71 Application of (carrier's name). Comments should include specific information about the impact of this proposed discontinuance (or reduction or impairment) upon you or your company, including any inability to acquire reasonable substitute service.

(6) For applications to discontinue, reduce, or impair an existing legacy voice service, as defined in § 63.60(f) of this part, in order to be eligible for automatic grant under paragraph (e) of this section, an applicant must demonstrate by certifying in its application that:

(i) The discontinuing carrier provides interconnected VoIP service throughout the affected service area; and

(ii) At least one other alternative voice service is also available in the affected service area.

(7) For applications to discontinue, reduce, or impair legacy data service that has been grandfathered for a period of no less than 180 days, in order to be eligible for automatic grant under paragraph (f) of this section, an applicant must include in its application a statement confirming that they received Commission authority to grandfather the service at issue at least 180 days prior to filing the current application.

\* \* \* \* \*

(c) The carrier shall file with this Commission, on or after the date on which notice has been given to all affected customers, an application which shall contain the following:

(1) Caption - "Section 63.71 Application";

(2) Information listed in § 63.71(a) (1) through (4) above;

(3) Information listed in § 63.71(a) (6) and/or (7) above, if applicable;

- (4) Brief description of the dates and methods of notice to all affected customers;
- (5) Whether the carrier is considered dominant or non-dominant with respect to the service to be discontinued, reduced or impaired; and
- (6) Any other information the Commission may require.

\* \* \* \* \*

(e) The application to discontinue, reduce, or impair service, if filed by a domestic, non-dominant carrier, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. The application to discontinue, reduce or impair service, if filed by a domestic, dominant carrier, shall be automatically granted on the 60th day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. Notwithstanding the above, an application filed by any carrier seeking to: 1) grandfather legacy service operating at 1.544 Mbps or less for existing customers; or 2) discontinue, reduce, or impair legacy voice service in areas where alternative voice service is available, shall be automatically granted on the 25th day after its filing with the Commission without any Commission notification to the applicant unless the Commission has notified the applicant that the grant will not be automatically effective. For purposes of this section, an application will be deemed filed on the date the Commission releases public notice of the filing.

(f) An application seeking to: 1) discontinue, reduce, or impair a service for which the requesting carrier has had no customers or reasonable requests for service during the 180-day period immediately preceding the filing of the application; or 2) discontinue, reduce, or impair a legacy data service that has been grandfathered for no less than the 180-day period immediately preceding the filing of the application, shall be automatically granted on the 31st day after its filing with the Commission without any Commission notification to the applicant, unless the Commission has notified the applicant that the grant will not be automatically effective.

(g) An application to discontinue, reduce, or impair a service filed by a competitive local exchange carrier in response to a public notice of network change filed pursuant to § 51.325(a)(4) of this chapter shall be automatically granted on the effective date of the copper retirement; provided that: (1) the public notice of network change filed pursuant to § 51.325(a)(4) provides no more than six months' notice; (2) the competitive local exchange carrier submits the application to the Commission for filing at least 40 days prior to the copper retirement effective date; and (3) the application includes a certification, executed by an officer or other authorized representative of the applicant and meeting the requirements of § 1.16 of this chapter, that the copper retirement is the basis for the application.

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5. Remove section 63.602 in its entirety.

**§ 63.602 [Removed]**

## APPENDIX B

### Initial Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act (RFA),<sup>208</sup> the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this Notice of Proposed Rule Making (Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments provided in paragraph 133 of this Notice. The Commission will send a copy of this Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).<sup>209</sup> In addition, the Notice and IRFA (or summaries thereof) will be published in the Federal Register.<sup>210</sup>

#### A. Need for, and Objectives of, the Proposed Rules

2. The Notice proposes new steps designed to accelerate the deployment of next-generation networks and services by removing barriers to infrastructure investment. Access to high speed broadband creates economic opportunity, enabling entrepreneurs to create businesses, immediately reach customers throughout the world and revolutionize entire industries. This proceeding aims to better enable broadband providers to build, maintain, and upgrade their networks, which will spur job growth and ultimately lead to more affordable and accessible Internet access and other broadband services for all Americans. Today's action proposes to remove regulatory barriers to infrastructure at the state and local level, proposes changes to speed the transition from copper networks and legacy services to next-generation networks and services dependent on fiber, and proposes to reform Commission regulations that are raising costs and slowing broadband deployment rather than facilitating it. Thus, the Commission seeks comment on a variety of issues in the following areas.

3. First, the Notice proposes and seeks comment on changes to the Commission's pole attachment rules that would: (1) adopt a streamlined timeframe for gaining access to utility poles; (2) reduce charges paid by attachers to utilities for work done to make a pole ready for new attachments; (3) codify the elimination of certain capital costs from the formulas used to confirm the reasonableness of rates charged by utilities for pole attachments by telecommunications and cable providers; (4) establish a 180-day shot clock for Commission consideration of pole attachment complaints; (5) adopt a formula for computing the maximum pole attachment rate that may be imposed on an incumbent LEC, and (6) adopt rules that would interpret the interconnection rules for telecommunications carriers in Section 251 of the Act and the pole attachment rules of Section 224 in a manner that allows for competitive LECs to demand access to incumbent LEC poles and *vice versa*.<sup>211</sup>

4. Second, the Notice seeks comment on proposals to revise the Commission's Part 51 copper retirement rules to expedite the copper retirement process and reduce associated regulatory burdens to facilitate more rapid deployment of next-generation networks, as well as to streamline and/or eliminate provisions of the more generally applicable network change notification rules.<sup>212</sup>

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<sup>208</sup> See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

<sup>209</sup> See 5 U.S.C. § 603(a).

<sup>210</sup> See *id.*

<sup>211</sup> See Notice Section II.A.

<sup>212</sup> See Notice Section II.B.



5. Third, the Notice seeks comment on proposals to streamline the Section 214(a) discontinuance process by reducing the comment and automatic-grant timeframes for three specific categories of discontinuance applications: “grandfathered” low-speed legacy services for existing customers; legacy voice applications where alternative voice service is available; and, legacy data services that have been grandfathered for a period of no less than 180 days.<sup>213</sup>

6. Fourth, the Notice seeks comment on reversing the Commission’s 2015 “carrier-customer’s retail end user” interpretation of the scope of Section 214(a) discontinuance authority.<sup>214</sup>

7. Fifth, the Notice seeks comment on other Section 63.71 proposals, including specifically, Sections 63.71(g) and (i) to further streamline the Section 214 (a) discontinuance process for carriers.<sup>215</sup>

8. Finally, the Notice seeks comment on proposals to adopt rules that prospectively prohibit the enforcement of local laws that inhibit broadband deployment, including by addressing deployment moratoria, excessive fees and costs, rights-of-way negotiation and approval process delays, unreasonable conditions, and bad faith negotiation conduct.<sup>216</sup>

## **B. Legal Basis**

9. The proposed action is authorized under Sections 1, 2, 4(i), 214, 224, 251, and 253 of the Communications Act of 1934, as amended; 47 U.S.C. Sections 151, 152, 154(i), 214, 224, 251, 253.

## **C. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply**

10. The RFA directs agencies to provide a description and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.<sup>217</sup> The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”<sup>218</sup> In addition, the term “small business” has the same meaning as the term “small-business concern” under the Small Business Act.<sup>219</sup> A “small-business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.<sup>220</sup>

11. The majority of our proposals in the Notice will affect obligations on incumbent LECs and, in some cases, competitive LECs. Certain pole attachment proposals also would affect obligations on utilities that own poles, telecommunications carriers and cable television systems that seek to attach equipment to utility poles, and other LECs that own poles.<sup>221</sup> Our actions, over time, may affect small entities that are not easily categorized at present. Other entities, however, that choose to object to

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<sup>213</sup> See Notice Sections II.C.1.-3.

<sup>214</sup> See Notice Section II.C.4.

<sup>215</sup> See Notice Section II.C.5.

<sup>216</sup> See Notice Section II.D.

<sup>217</sup> See 5 U.S.C. § 603(b)(3).

<sup>218</sup> See 5 U.S.C. § 601(6).

<sup>219</sup> See 5 U.S.C. § 601(3) (incorporating by reference the definition of “small-business concern” in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register.”

<sup>220</sup> See 15 U.S.C. § 632.

<sup>221</sup> The definitions of utility and telecommunications carrier for purposes of our pole attachment rules are found in 47 U.S.C. § 224(a)(1) and (a)(5), respectively.

network change notifications for copper retirement under our new proposed rules and Section 214 discontinuance applications may be economically impacted by the proposals in this Notice.

12. **Small Businesses, Small Organizations, and Small Governmental Jurisdictions.** Our action may, over time, affect small entities that are not easily categorized at present. We therefore describe here, at the outset, three comprehensive, statutory small entity size standards that encompass entities that could be directly affected by the new and revised rules adopted today. According to the most currently available SBA data, there are 28.8 million small businesses in the U.S., which represent 99.9% of all businesses in the United States.<sup>222</sup> Additionally, a “small organization” is generally “any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.”<sup>223</sup> Nationwide, as of 2007, there were approximately 1,621, 215 small organizations.<sup>224</sup> Finally, the term “small governmental jurisdiction” is defined generally as “governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.”<sup>225</sup> Census Bureau data for 2012 indicate that there were 89,476 governmental jurisdictions in the United States.<sup>226</sup> We estimate that, of this total, as many as 88,718 entities may qualify as “small governmental jurisdictions.”<sup>227</sup> Thus, we estimate that most governmental jurisdictions are small.

13. **Wired Telecommunications Carriers.** The U.S. Census Bureau defines this industry as “establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired communications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services, wired (cable) audio and video programming distribution, and wired broadband internet services. By exception, establishments providing satellite television distribution services using facilities and infrastructure that they operate are included in this industry.”<sup>228</sup> The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.<sup>229</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>230</sup> Thus, under this size

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<sup>222</sup> See Small Business Administration, Office of Advocacy, “Frequently Asked Questions,” [https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016\\_WEB.pdf](https://www.sba.gov/sites/default/files/advocacy/SB-FAQ-2016_WEB.pdf) (last visited Mar. 15, 2017).

<sup>223</sup> 5 U.S.C. § 601(4).

<sup>224</sup> Independent Sector, *The New Nonprofit Almanac & Desk Reference* (2010).

<sup>225</sup> 5 U.S.C. § 601(5).

<sup>226</sup> U.S. Census Bureau, *Statistical Abstract of the United States: 2012* at 267, Table 429 (Effective Oct 2011), <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/2012-statab.pdf> (citing data from 2007).

<sup>227</sup> The 2012 U.S. Census data for small governmental organizations are not presented based on the size of the population in each organization. There were 89,476 local governmental organizations in the Census Bureau data for 2012, which is based on 2007 data. As a basis of estimating how many of these 89,476 local government organizations were small, we note that there were a total of 758 cities and towns (incorporated places and minor civil divisions) with populations over 50,000 in 2015. See U.S. Census Bureau, *Annual Estimates of the Resident Population for Incorporated Places of 50,000 or More, Ranked by July 1, 2015 Population: April 1, 2010 to July 1, 2015*, <https://www.census.gov/data/tables/2015/demo/popest/total-cities-and-towns.html> (last visited Mar. 14, 2017). If we subtract the 758 cities and towns that meet or exceed the 50,000 population threshold, we conclude that approximately 88,718 are small.

<sup>228</sup> U.S. Census Bureau, 2012 NAICS Definitions, “517110 Wired Telecommunications Categories,” <http://www.census.gov/cgi-bin/sssd/naics/naicsrch>.

<sup>229</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>230</sup> 2012 U.S. Economic Census, NAICS Code 517110, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodT](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodT)

standard, the majority of firms in this industry can be considered small.

14. **Local Exchange Carriers (LECs).** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>231</sup> Census data for 2012 show that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>232</sup> The Commission therefore estimates that most providers of local exchange carrier service are small entities that may be affected by the rules adopted.

15. **Incumbent Local Exchange Carriers (incumbent LECs).** Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The closest applicable NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>233</sup> According to Commission data, 3,117 firms operated in that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>234</sup> Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the rules and policies adopted. One thousand three hundred and seven (1,307) Incumbent Local Exchange Carriers reported that they were incumbent local exchange service providers.<sup>235</sup> Of this total, an estimated 1,006 have 1,500 or fewer employees.<sup>236</sup>

16. **Competitive Local Exchange Carriers (competitive LECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers.** Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate NAICS Code category is Wired Telecommunications Carriers, as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees. U.S. Census data for 2012 indicate that 3,117 firms operated during that year. Of that number, 3,083 operated with fewer than 1,000 employees.<sup>237</sup> Based on this data, the Commission concludes that the majority of Competitive LECs, CAPs, Shared-Tenant Service Providers, and Other Local Service Providers are small entities. According to Commission data, 1,442 carriers reported that they were engaged in the provision of either competitive local exchange services or competitive access provider services.<sup>238</sup> Of these 1,442 carriers, an estimated 1,256 have 1,500 or fewer employees. In addition, 17 carriers have reported that they are Shared-Tenant Service Providers, and all 17 are estimated to have 1,500 or fewer employees.<sup>239</sup>

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<sup>231</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>232</sup> 2012 U.S. Economic Census, NAICS Code 517110, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>233</sup> See 13 CFR § 120.201, NAICS Code 517110.

<sup>234</sup> 2012 U.S. Economic Census, NAICS Code 517110, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ2&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ2&prodType=table).

<sup>235</sup> See *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division at Table 5.3 (Sept. 2010) (*Trends in Telephone Service*).

<sup>236</sup> *Id.*

<sup>237</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ5&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table).

<sup>238</sup> See *Trends in Telephone Service*, at tbl. 5.3.

<sup>239</sup> *Id.*

In addition, 72 carriers have reported that they are Other Local Service Providers.<sup>240</sup> Of this total, 70 have 1,500 or fewer employees.<sup>241</sup> Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, Shared-Tenant Service Providers, and Other Local Service Providers are small entities that may be affected by the adopted rules.

17. **Interexchange Carriers (IXCs).** Neither the Commission nor the SBA has developed a definition for Interexchange Carriers. The closest NAICS Code category is Wired Telecommunications Carriers as defined in paragraph 12 of this IRFA. The applicable size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees.<sup>242</sup> According to Commission data, 359 companies reported that their primary telecommunications service activity was the provision of interexchange services.<sup>243</sup> Of this total, an estimated 317 have 1,500 or fewer employees and 42 have more than 1,500 employees.<sup>244</sup> Consequently, the Commission estimates that the majority of interexchange service providers are small entities that may be affected by rules adopted.

18. **Other Toll Carriers.** Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to Other Toll Carriers. This category includes toll carriers that do not fall within the categories of interexchange carriers, operator service providers, prepaid calling card providers, satellite service carriers, or toll resellers. The closest applicable NAICS Code category is for Wired Telecommunications Carriers, as defined in paragraph 12 of this IRFA. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>245</sup> Census data for 2012 shows that there were 3,117 firms that operated that year. Of this total, 3,083 operated with fewer than 1,000 employees.<sup>246</sup> Thus, under this category and the associated small business size standard, the majority of Other Toll Carriers can be considered small. According to Commission data, 284 companies reported that their primary telecommunications service activity was the provision of other toll carriage.<sup>247</sup> Of these, an estimated 279 have 1,500 or fewer employees.<sup>248</sup> Consequently, the Commission estimates that most Other Toll Carriers that may be affected by our rules are small.

19. **Wireless Telecommunications Carriers (except Satellite).** This industry comprises establishments engaged in operating and maintaining switching and transmission facilities to provide communications via the airwaves, such as cellular services, paging services, wireless internet access, and wireless video services.<sup>249</sup> The appropriate size standard under SBA rules is that such a business is small if it has 1,500 or fewer employees. For this industry, Census data for 2012 show that there were 967 firms that operated for the entire year. Of this total, 955 firms had fewer than 1,000 employees.<sup>250</sup> Thus under this category and the associated size standard, the Commission estimates that the majority of wireless telecommunications carriers (except satellite) are small entities. Similarly, according to

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<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> 13 CFR § 121.201, NAICS code 517110.

<sup>243</sup> *See Trends in Telephone Service*, at tbl. 5.3.

<sup>244</sup> *Id.*

<sup>245</sup> 13 CFR § 121.201, NAICS code 517110.

<sup>246</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ5&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table).

<sup>247</sup> *See Trends in Telephone Service*, at tbl. 5.3.

<sup>248</sup> *Id.*

<sup>249</sup> NAICS Code 517210. *See* <https://www.census.gov/econ/isp/sampler.php?naicscode=517210&naicslevel=6#>.

<sup>250</sup> [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ5&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ5&prodType=table).

internally developed Commission data, 413 carriers reported that they were engaged in the provision of wireless telephony, including cellular service, Personal Communications Service (PCS), and Specialized Mobile Radio (SMR) services.<sup>251</sup> Of this total, an estimated 261 have 1,500 or fewer employees.<sup>252</sup> Consequently, the Commission estimates that approximately half of these firms can be considered small. Thus, using available data, we estimate that the majority of wireless firms can be considered small.

20. **Cable Companies and Systems.** The Commission has developed its own small business size standards for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers nationwide.<sup>253</sup> Industry data shows that there were are currently 660 cable operators.<sup>253</sup> Of this total, all but ten cable operators nationwide are small under this size standard.<sup>254</sup> In addition, under the Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers.<sup>255</sup> Current Commission records show 4,421 cable systems nationwide.<sup>256</sup> Of this total, 3,936 cable systems have less than 20,000 subscribers, and 485 systems have 20,000 or more subscribers, based on the same records. Thus, under this standard, we estimate that most cable systems are small entities.

21. **Cable System Operators (Telecom Act Standard).** The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000 are approximately 52,403,705 cable video subscribers in the United States today.<sup>257</sup> Accordingly, an operator serving fewer than 524,037 subscribers shall be deemed a small operator if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>258</sup> Based on available data, we find that all but nine incumbent cable operators are small entities under this size standard.<sup>259</sup> We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million.<sup>260</sup> Although it seems certain that some of these cable system

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<sup>251</sup> See *Trends in Telephone Service*, at tbl. 5.3.

<sup>252</sup> *Id.*

<sup>253</sup> NCTA, Industry Data, Number of Cable Operators and Systems, <http://www.ncta.com/Statistics.aspx> (visited Oct. 20, 2016). Depending upon the number of homes and the size of the geographic area served, cable operators use one or more cable systems to provide video service. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, MB Docket No. 12-203, Fifteenth Report, 28 FCC Rcd 10496, 10505-06, para. 24 (2013) (*15th Annual Competition Report*).

<sup>254</sup> *Revisions to Public Inspection File Requirements Broadcaster Correspondence File and Cable Principal Headend Location*, Report and Order, 2017 WL444215, FCC 17-3, Appendix C para. 10 (2017) (citing SNL Kagan, "Top Cable MSOs – 12/12 Q," <http://www.snl.com/InteractiveX/TopCableMSOs.aspx?period=2012Q4&sortcol=subscribersbasic&sortorder=desc> (subscription required)).

<sup>255</sup> 47 CFR § 76.901(c).

<sup>256</sup> The number of active, registered cable systems comes from the Commission's Cable Operations and Licensing System (COALS) database on Oct. 20, 2016. A cable system is a physical system integrated to a principal headend.

<sup>257</sup> *Assessment and Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016) (citing Office of Management and Budget (OMB) Memorandum M-10-06, Open Government Directive, Dec. 8, 2009).

<sup>258</sup> 47 CFR § 76.901(f).

<sup>259</sup> *Assessment & Collection of Regulatory Fees for Fiscal Year 2016, Notice of Proposed Rulemaking*, 31 FCC Rcd 5757, Appendix E para. 23 (2016).

<sup>260</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local

(continued....)

operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

22. **All Other Telecommunications.** “All Other Telecommunications” is defined as follows: “This U.S. industry is comprised of establishments that are primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems. Establishments providing Internet services or voice over Internet protocol (VoIP) services via client supplied telecommunications connections are also included in this industry.”<sup>261</sup> The SBA has developed a small business size standard for “All Other Telecommunications,” which consists of all such firms with gross annual receipts of \$32.5 million or less.<sup>262</sup> For this category, Census Bureau data for 2012 show that there were 1,442 firms that operated for the entire year. Of those firms, a total of 1,400 had annual receipts less than \$25 million.<sup>263</sup> Consequently, we conclude that the majority of All Other Telecommunications firms can be considered small.

23. **Electric Power Generation, Transmission and Distribution.** The Census Bureau defines this category as follows: “This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer.”<sup>264</sup> This category includes electric power distribution, hydroelectric power generation, fossil fuel power generation, nuclear electric power generation, solar power generation, and wind power generation. The SBA has developed a small business size standard for firms in this category based on the number of employees working in a given business.<sup>265</sup> According to Census Bureau data for 2012, there were 1,742 firms in this category that operated for the entire year.<sup>266</sup>

24. **Natural Gas Distribution.** This economic census category comprises: “(1) establishments primarily engaged in operating gas distribution systems (e.g., mains, meters); (2)

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franchise authority's finding that the operator does not qualify as a small cable operator pursuant to Section 76.901(f) of the Commission's rules. See 47 CFR § 76.901(f).

<sup>261</sup><https://www.census.gov/econ/isp/sampler.php?naicscode=517919&naicslevel=6>.

<sup>262</sup> 13 CFR § 121.201; NAICS Code 517919.

<sup>263</sup> U.S. Census Bureau, *2012 Economic Census of the United States*, Table EC0751SSSZ1, Information: Subject Series - Establishment and Firm Size: Receipts Size of Firms for the United States: 2012 NAICS Code 517919, [http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN\\_2012\\_US\\_51SSSZ1&prodType=table](http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2012_US_51SSSZ1&prodType=table).

<sup>264</sup> U.S. Census Bureau, 2017 NAICS Definitions, “2211 Electric Power Generation, Transmission and Distribution,” [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf).

<sup>265</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>266</sup> U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS codes 221111, 221112, 221113, 221114, 221115, 221116, 221117, 221118, 22112, 221121, (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers.”<sup>267</sup> The SBA has developed a small business size standard for this industry, which is all such firms having 1,000 or fewer employees.<sup>268</sup> According to Census Bureau data for 2012, there were 422 firms in this category that operated for the entire year.<sup>269</sup> Of this total, 399 firms had employment of fewer than 1,000 employees, 23 firms had employment of 1,000 employees or more, and 37 firms were not operational.<sup>270</sup> Thus, the majority of firms in this category can be considered small.

25. **Water Supply and Irrigation Systems.** This economic census category “comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems. The water supply system may include pumping stations, aqueducts, and/or distribution mains. The water may be used for drinking, irrigation, or other uses.”<sup>271</sup> The SBA has developed a small business size standard for this industry, which is all such firms having \$27.5 million or less in annual receipts.<sup>272</sup> According to Census Bureau data for 2012, there were 3,261 firms in this category that operated for the entire year.<sup>273</sup> Of this total, 3,035 firms had annual sales of less than \$25 million<sup>274</sup> Thus, the majority of firms in this category can be considered small.

#### **D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements**

26. The Notice proposes a number of rule changes that will affect reporting, recordkeeping, and other compliance requirements. We expect the rule revisions proposed in the Notice to reduce reporting, recordkeeping, and other compliance requirements. The rule revisions taken as a whole should have a beneficial reporting, recordkeeping, or compliance impact on small entities because all carriers will be subject to fewer such burdens. Each of these changes is described below.

27. The Notice proposes the following changes to the current pole attachment timeline: (1) requiring utilities to make a decision on completed pole attachment applications within 15 days of receipt (allowing an additional 30 days for a large number of pole attachment requests); (2) requiring utilities to provide an estimate of make-ready costs to new attachers within 7 days of a utility’s grant of a pole

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<sup>267</sup> U.S. Census Bureau, 2017 NAICS Definitions, “221210 Natural Gas Distribution,” [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf).

<sup>268</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>269</sup> U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 2212 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

<sup>270</sup> *Id.*

<sup>271</sup> U.S. Census Bureau, 2017 NAICS Definitions, “221310 Water Supply and Irrigation Systems,” [https://www.census.gov/eos/www/naics/2017NAICS/2017\\_NAICS\\_Manual.pdf](https://www.census.gov/eos/www/naics/2017NAICS/2017_NAICS_Manual.pdf).

<sup>272</sup> U.S. Small Business Administration, Table of Small Business Size Standards Matched to North American Classification System Codes, “Sector 22 - Utilities” at 5 (2016), [https://www.sba.gov/sites/default/files/files/Size\\_Standards\\_Table.pdf](https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf).

<sup>273</sup> U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Employment Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

<sup>274</sup> U.S. Census Bureau, 2012 Economic Census, Subject Series: Utilities, “Establishment and Firm Size: Summary Statistics by Revenue Size of Firms for the U.S.: 2012,” NAICS code 221310 (issued March 2016), <https://www.census.gov/data/tables/2012/econ/census/utilities.html>.

attachment application (or, if the new attacher performs a pole survey, within 7 days of a utility's receipt of that survey); (3) allowing a utility to withdraw its make-ready cost estimate within 7 days after providing it to a new attacher; and (4) establishing a 30-day period for existing attachers to complete make-ready work to their attachments in the communications space of a pole (allowing an additional 45 days in the case of large requests). The *Notice* also proposes to limit a new attacher's liability for make-ready costs to those costs actually caused by the new attachment, to require utilities to proportionately share in the cost of a new attachment for which they receive a direct benefit, and to require utilities that perform make-ready work to make available to new attachers a schedule of common make-ready charges. With regard to pole attachment rates, the *Notice* proposes to codify the elimination from the telecommunications and cable rate formulas those capital costs that already have been paid to the utility via make-ready charges, to establish a rebuttable presumption that incumbent LECs are similarly situated to other attachers on a pole, and to establish a rebuttable pole attachment formula for computing the maximum pole attachment rate to be charged to incumbent LECs. Further, the *Notice* proposes a 180-day shot clock for Commission resolution of pole access complaints, which would include a mandatory pre-complaint meeting between the parties in order to resolve procedural issues and deadlines. Finally, the *Notice* proposes to allow incumbent LECs to request nondiscriminatory pole access from other LECs that own or control utility poles. Should the Commission adopt any of these proposals, such actions could result in increased, reduced, or otherwise altered reporting, recordkeeping, or other compliance requirements for utilities and attaching entities. The *Notice* also proposes to eliminate some or all of the changes to the copper retirement process adopted by the Commission in the *2015 Technology Transitions Order*, the rules that doubled the time period during which an incumbent LEC must wait to implement the planned copper retirement after the Commission's publication of public notice from 90 days to 180 days, required direct notice to retail customers, and expanded the types of information that must be disclosed. The *Notice* also proposes eliminating the rule preventing incumbent LECs from disclosing information about planned network changes with certain entities until public notice has been given of those planned changes. In addition, the *Notice* proposes to take targeted measures to shorten timeframes and eliminate unnecessary regulatory process encumbrances that force carriers to maintain legacy services they seek to discontinue even when more technologically advanced alternatives are available to consumers.

#### **E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered**

28. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>275</sup>

29. The Commission proposes to adopt specific changes to its pole attachment timeline that would provide a predictable, timely process for parties to obtain pole attachments, while maintaining the interests of utilities and existing attachers in preserving safety, reliability, and sound engineering. In consideration of the new timeline, the Commission seeks comments on alternatives that might help smaller utilities and attachers: (1) whether a longer timeframe than 15 days is reasonable for utilities to make a decision on completed pole attachment applications and whether it is reasonable to cap at 45 days a utility's review of pole attachment applications that are larger than the lesser of 3,000 poles or five percent of a utility's poles in a state; (2) whether it is reasonable to combine the survey, estimate, and acceptance stages of the current Commission pole attachment timeline into one step with a condensed timeframe; and (3) whether 30 days is long enough for existing attachers to complete routine make-ready work. The Commission also seeks alternatives to its current make-ready process in the areas of: (1) the

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<sup>275</sup> See 5 U.S.C. § 603(c).



expanded use of utility-approved contractors to perform make-ready work; (2) allowing existing attachers to observe the make-ready work being performed by new attachers and their contractors; (3) requiring utilities and attachers to agree on the specific contractors to perform make-ready work on their equipment; (4) allowing new attachers to perform routine make-ready work on all pole equipment without involving existing attachers; and (5) establishing pole attachment processes modeled after “one-touch, make-ready” approaches and “right-touch, make-ready” approaches. The Commission also seeks alternatives to its current complaint process as the best way to keep make-ready costs just and reasonable, asks whether a bonus payment or multiplier could be used to incent existing attachers to meet their make-ready timelines, asks about ways to incent private negotiations between new and existing attachers to govern the make-ready process (e.g., allowing a new attacher to select a default contractor to perform make-ready, penalizing existing attachers that fail to meet make-ready deadlines), asks whether a flat per-pole make-ready fee would be preferable to the current method of allocating make-ready costs, asks whether utilities should be required to reimburse attachers for the costs of new attachments that subsequently benefit utilities (which might benefit new entrants, especially small entities with limited resources), asks whether the Commission should eliminate all capital costs from its pole attachment rate formulas, asks about the appropriate pole attachment rate for attachers providing commingled cable and telecommunications services, and asks whether we should adopt a shot clock for all pole attachment complaints (not just those related to pole access).

30. The proposals also discuss the need to revise the requirements of our network change disclosure rules applicable to copper retirements to reduce barriers to investment in next-generation technologies and promote broadband deployment. To that end, the Notice proposes to eliminate Section 51.332 in its entirety and return to a more streamlined version of the pre-2015 *Technology Transitions Order* requirements for handling copper retirements subject to Section 251(c)(5) of the Act. Specifically, the Notice proposes reinstating the less burdensome requirements under Section 51.333(c) of the Commission’s rules applicable to copper retirements prior to adoption of the 2015 *Technology Transitions Order*. In the alternative, the Notice proposes eliminating all differences between copper retirement and other network change notice requirements, rendering copper retirement changes subject to the same long-term or, where applicable, short-term network change notice requirements as all other types of network changes subject to Section 251(c)(5). As a third alternative, the Notice proposes to retain but amend Section 51.332 to streamline the process. Specifically, Section 51.332 would be revised to: (1) require an incumbent LECs to serve its notice only to telephone exchange service providers that directly interconnect with the incumbent LEC’s network, rather than “each entity within the affected service area that directly interconnects with the incumbent LEC’s network”; (2) reduce the waiting period to 90 days from 180 days after the Commission releases its public notice before the incumbent LEC may implement the planned copper retirement; (3) provide greater flexibility regarding the time in which an incumbent LEC must file the requisite certification; (4) reduce the waiting period to 30 days where the copper facilities being retired are no longer being used to serve any customers in the affected service area; (5) eliminate the requirement that the copper retirement notice include a description of any changes in prices, terms, or conditions that will accompany the planned changes; and (6) eliminate the “good faith communication” requirement and potentially reinstate the objection procedures applicable under the rules in place prior to the 2015 *Technology Transitions Order*. The Notice also proposes to eliminate the prohibition on incumbent LECs disclosing information about planned network changes prior to giving public notice of those planned changes.

31. The proposals also seek to streamline the Section 214(a) discontinuance process for applications that seek authorization to “grandfather” low-speed legacy services, such as TDM services at DS1 speeds or lower (1.544 Mbps or less), for existing customers. Specifically, the proposals seek to reduce the public comment period to 10 days for applications from both dominant and non-dominant carriers seeking to grandfather legacy low-speed services. The proposals also seek to revise the Commission’s discontinuance rules to provide for automatic grant of applications by both dominant and non-dominant carriers to grandfather low-speed legacy services on the 25th day after filing unless the Commission notifies the applicant that such a grant will not be automatically effective.

32. The proposals also seek to streamline applications to discontinue legacy voice service where alternative voice services are available to consumers in the affected service area, replacing the *2016 Technology Transitions Order*'s "adequate replacement" test for automatic grant of Section 214 applications that seek to discontinue a legacy TDM-based voice service as part of a transition to a new network technology. Specifically, the proposals seek to make discontinuance applications for legacy voice services under Section 214(a) eligible for shorter comment and automatic grant time periods, provided that the discontinuing carrier is able to demonstrate: 1) that it provides interconnected VoIP service throughout the affected service area; and 2) that at least one other alternative voice service is also available in the affected service area. The proposals seek to adopt a uniform public comment period of 10 days for all applications seeking to discontinue legacy voice services where alternative voice services are also available, regardless of whether the provider filing the application is a dominant or non-dominant carrier. Additionally, the proposals seek to provide for automatic grant of these applications on the 25th day after filing, unless the Commission notifies the applicant that such a grant will not be automatically effective.

33. The proposals also seek to streamline the discontinuance process for any application seeking authorization to discontinue legacy data services that have been grandfathered for a period of no less than 180 days prior to the filing of the application. The proposals seek to adopt a uniform public comment period of 10 days for all applications seeking to discontinue legacy data services that have previously been grandfathered, regardless of whether the carrier filing the application is a dominant or non-dominant carrier. Additionally, the proposals seek to provide for automatic grant of these applications on the 31st day after filing, unless the Commission notifies the applicant that such a grant will not be automatically effective.

34. The proposals also seek to revise the discontinuance rule pertaining to discontinuance applications filed in response to a copper retirement notice to reflect the proposed changes to the copper retirement rules.

35. The proposals also seek to reverse the Commission's 2015 "clarification" of Section 214(a) that substantially expanded the scope of end users that a carrier must consider in determining whether it is required to obtain Section 214 discontinuance authority, and, going forward, interpret Section 214(a) to require a carrier to take into account only its own end users when evaluating whether the carrier will "discontinue, reduce, or impair service to a community, or part of a community."

36. Finally, the proposals seek to adopt rules prohibiting state or local moratoria on market entry or the deployment of telecommunications facilities. In addition, the proposals seek to adopt rules prohibiting excessive fees and other costs that may have the effect of prohibiting the provision of telecommunications service. The proposals also seek to adopt rules to eliminate excessive delays in negotiations and approvals for rights-of-way agreements and permitting for telecommunications services. We invite commenters to identify examples of excessive delays. And the proposals seek to adopt rules prohibiting unreasonable conditions or requirements in the context of granting access to rights-of-way, permitting, construction, or licensure related to the provision of telecommunications services. In addition, the proposals seek to adopt rules banning bad faith conduct in the context of deployment, rights-of-way, permitting, construction, or licensure negotiations and processes.

37. The Commission believes that its proposals will benefit all carriers, regardless of size. The proposals would further the goal of reducing regulatory burdens, thus facilitating investment in next-generation networks and promoting broadband deployment. We anticipate that a more modernized regulatory scheme will encourage carriers to invest in and deploy even more advanced technologies as they evolve.

**F. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule**

38. None.