



## Summary of the FCC's August 2015 IP Transition Order

On August 7, 2015 the Federal Communications Commission (FCC or Commission) released an Order and Further Notice of Proposed Rulemaking addressing incumbent local exchange carriers' (ILECs) transition from legacy copper-based networks to networks consisting of emerging, all-IP technologies.<sup>1</sup> The Order adopts new rules requiring carriers to notify interconnecting carriers and customers when they plan to retire their copper networks. The Order also creates an interim rule by which ILECs, in order to receive discontinuance authority, must provide competing carriers with access to wholesale services at rates, term, and conditions reasonably comparable to those provided prior to discontinuance. Along with the Order, the FCC released a Further Notice of Proposed Rulemaking seeking comment on the criteria to be used to evaluate replacement services and the standards to be used during the section 214 discontinuance process.

### I. Report and Order

#### A. Revision of Copper Retirement Processes: Copper Retirement Notice Process

##### 1. Expansion of Notice Requirements to Promote Competition

The FCC requires ILECs planning copper retirements to notify the FCC as well as to provide direct notice to entities that interconnect with their networks. (¶ 16) ILECs will not need to obtain the Commission's approval for retirements. (¶ 18)

*Scope and Form.* The FCC requires ILECs to provide public notice of copper retirement by the means currently permitted under section 51.329(a) of its rules (which prescribes the basic filing methods and requirements for network change notices). The Commission also requires ILECs to notify "each entity" within the affected service area that directly interconnects with the ILEC's network. The Commission found that this requirement will ensure that "all entities potentially affected by a planned copper retirement, be they telephone exchange service providers, information service providers, or other types of providers that may or may not yet have been classified by the Commission," will be properly notified. (¶ 20) The rule also requires notice to the Commission, which notice will initiate the copper retirement process. (¶ 23) Although the ILEC is not required to provide written public notice through industry fora, industry publications, or the carrier's publicly accessible website, it is encouraged to do so.

*Content of Notice.* The FCC requires ILECs to include in their public notices of copper retirement the information required by section 51.327(a) of the Commission's rules (*i.e.*, implementation date, implementation location,

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<sup>1</sup> See *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Service, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, GN Docket No. 13-5, WC Docket No. 05-25, FCC 15-97 (rel. Aug. 7, 2015).

description of the change and the reasonably foreseeable impact, etc.) and “a description of any changes in prices, terms, or conditions that will accompany the planned changes.”<sup>2</sup> (¶ 25)

*Notice Period.* The FCC requires ILECs to provide interconnecting entities with at least 180 days’ advanced notice of copper retirements. (¶ 28) Such notice must be provided no later than the same date on which the ILEC notifies the Commission of the retirement. After the Commission receives notice, it will issue a public notice starting the 180-day “countdown.” (¶ 29) The Commission adopted a shorter notice period of at least 90 days for facilities that no longer serve customers. (¶ 30)

The FCC eliminated its objection procedures as they apply to copper retirement. (¶ 31) Instead, the Commission adopted a good faith communication requirement in the notice rule. Under the good faith communication requirement, an entity that directly interconnects with an ILEC’s network may request that the ILEC provide additional information where necessary to allow the interconnecting entity to accommodate the ILEC’s changes with no disruption of service to the interconnecting entity’s end user customers, and the ILEC must work in good faith to provide that additional information. The Commission warned that it will not hesitate to take enforcement action to enforce the good faith communication requirement.<sup>3</sup> (¶ 32)

## 2. Notice to Retail Customers

The FCC requires ILECs to provide direct notice of planned copper retirements to retail customers. (¶ 39) ILECs must provide one neutral statement to affected consumers of available service options and will be subject to no additional consumer notice obligations. (¶ 40)

*Recipients.* The FCC requires ILECs to provide direct notice of planned copper retirements to all of their retail customers within an affected service area, but only where the copper to the customer’s premises is to be retired (*e.g.*, where an ILEC replaces copper-to-the-premises with fiber-to-the-premises regardless of the customer’s preference). (¶ 44) ILECs need not determine whether particular customers need new or modified CPE or whether particular customers will be negatively impacted. Notice will not be required in instances where operational copper remains in place. This rule applies to businesses and anchor institutions, as well as to consumers. (¶ 45)

*Content.* The FCC requires retirement notices to “provide sufficient information to enable the retail customer to make an informed decision as to whether to continue subscribing to the service to be affected by the planned network changes.” (¶ 46) Notices must be made in a “clear and conspicuous” manner, which means that the

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<sup>2</sup> The Commission declined to require (1) that descriptions of the potential impact of the planned changes be specific to each interconnecting carrier; and (2) that notices include information regarding impacted circuits and wholesale alternatives. (¶ 26) The Commission also declined to require a particular format for notices. (¶ 27)

<sup>3</sup> The FCC rejected the following proposals: (1) that, for a network change to qualify as a retirement as opposed to a discontinuance, a carrier must present the same interface to the end user as it did when it used copper (¶ 35); (2) that ILECs should provide competitive providers with an annual forecast of copper retirements (¶ 36); and (3) that ILECs maintain a database of their copper plant or of where copper retirements have occurred. (¶ 37)

information is “disclosed in such size, color, contrast, and/or location that it is readily noticeable, readable, and understandable.”<sup>4</sup> (48)

*Neutral Statement.* The FCC requires ILECs to include in their copper retirement notices to retail customers a neutral statement of the various service options that they make available to customers affected by the retirement. Notices must be free of any statement encouraging a customer to purchase a service other than the service to which the customer currently subscribes. This prohibition applies only to the retirement notices, not to any other communications with customers. The Commission also will require providers to include in the notice a toll-free phone number and URL for customers to seek more information. (¶ 50)

*Form.* The FCC allows ILECs to provide written or electronic notice to retail customers of a planned copper retirement. (¶ 60) ILECs are not required to allow customers to reply directly to email notices. Notice must be available to persons with disabilities. (¶ 61)

*Notice Period for Retail Customers.* The FCC requires ILECs to provide retail customers with 90 days’ notice of planned copper retirements. Non-residential retail customers, including businesses and anchor institutions, must receive 180 days’ notice. ILECs need not provide notice of retirement to retail customers where the facilities to be retired are not in use.<sup>5</sup> (¶ 59)

### 3. Ability to Comment

The FCC declined to provide the opportunity for public comment on planned network changes. Instead, interested parties may comment through the Commission’s Electronic Comment Filing System, on which carriers must file network change disclosures. (¶ 68)

### 4. Notice to States, Tribal Governments, and the Department of Defense

The FCC requires ILECs to provide notice of planned copper retirements directly to state authorities, the Department of Defense, and federally recognized Tribal Nations. The notice must be provided at the same time as interconnecting entities and the Commission are notified. (¶ 70)

### 5. Certificate of Service

The FCC requires ILECs to file a certificate of service with the Commission at least 90 days before retirement. Certifications must be signed by an officer of the company and include (1) a statement of the proposed changes; (2) a statement that notice has been given; (3) a statement that each affected entity has been served with notice; (4) the name and address of each entity served; (5) a statement that each governmental and tribal entity has been notified; (6) a statement that customer notice has been timely served; (7) a copy of the written notice; (8) a statement of compliance with Commission Rule 68.110(b), if applicable; (9) a statement of

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<sup>4</sup> Notices need not include (1) the information required by section 52.327(a)(5) of the Commission’s rules; (2) a statement regarding the customer’s right to comment on the planned network change; and (3) a statement that the notice will become effective a certain number of days after the Commission releases public notice of the planned change. (¶ 48)

<sup>5</sup> The FCC declined to adopt any additional customer education initiatives at this time, but indicated the agency may revisit the issue if there is evidence of consumer confusion and concerns following copper retirements. (¶ 63) The FCC also rejected (1) an exemption for rural or small LECs; (¶ 65) (2) different notice requirements for different network changes; (¶ 66) and (3) a requirement that ILECs obtain proof of notice acknowledged by individual customers. (¶ 67)

compliance with the good faith communication requirement; and (10) the docket number and NCD number assigned by the Commission. (¶ 73)

#### **B. Revision of Copper Retirement Processes: Definition of “Copper Retirement”**

##### 1. Copper Facilities to Be Included

The FCC defines “copper retirement” to include not only “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,” but also the feeder portion of loop. (¶ 82)

##### 2. Defining “Retirement”, “Removal” and “Disabling”

The FCC defines (1) “retirement” as “the removal or disabling of covered copper facilities, i.e., copper loops, subloops, or the feeder portion of such loops or subloops”; (2) “disabling” as “rendering the copper facilities inoperable (through acts of commission or omission)”; and “removal” as “physical removal.” (¶ 84)

The FCC clarified that “disabling” only refers to long term or permanent periods of time. By contrast, instances where facilities are temporarily inoperable due to a catastrophe or for repair do not constitute “disabling.” However, sufficiently long disabling of facilities, even if ostensibly temporary, may constitute retirement. The Commission declined to adopt bright-line time limits and will resolve each issue on a case-by-case basis. (¶ 86)

##### 3. *De Facto* Retirement

The FCC requires ILECs to undergo the network change notification requirements in cases of *de facto* retirement, which is the practice of deliberately allowing copper networks to deteriorate. Accordingly, the definition of “retirement” includes any “failure to maintain copper loops, subloops, or the feeder portion of such loops or subloops that is the functional equivalent of removing or disabling.” (¶ 90)

##### 4. Scope of New Rules

The notice requirements will not apply in situations where a carrier migrates an individual customer from its copper to its fiber network to resolve service issues raised to the carrier by the customer, provided that the retirement does not result in a change in the nature of the services being provided to the affected customers. (¶ 93) The Commission also emphasized that it preserves individual states’ authority with respect to requirements for copper retirement. (¶ 94)

#### **C. Revision of Copper Retirement Processes: Sale of Copper Facilities That Would Otherwise Be Retired**

The FCC encourages ILECs to sell copper that they retire. (¶ 98) However, the Commission did not mandate the sale of copper or establish for itself a supervisory role in the sale process. (¶ 99)

#### **D. Updating and Clarifying Commission Section 214 Discontinuance Policy: Scope of Section 214(a) Discontinuance Authority and Wholesale Services**

The FCC clarified that “a carrier must obtain Commission approval before discontinuing, reducing, or impairing a service used as a wholesale input when the carrier’s actions will discontinue, reduce, or impair service to end users, including a carrier-customer’s retail end users.” The Commission also clarified that a carrier may only

discontinue such service if it either (1) obtains Commission approval via the section 214 process; or (2) determines that there will be no discontinuance, reduction, or impairment of service to end users. (¶ 102)

*Required Evaluation.* The FCC clarified that carriers must evaluate the impact of actions that will discontinue, reduce, or impair services used as wholesale inputs on end users. This “meaningful evaluation” must include consultation directly with carrier-customers to evaluate the impact on the carrier-customers’ end users. Commission approval for a planned discontinuance will be required when actions will discontinue service to end users; Commission approval will not be required (1) when the action will not discontinue, reduce, or impair service; or (2) for any installation, replacement, or other change in plant, operation, or equipment, other than new construction, which will not impair quality of the service provided. (¶ 114)

The FCC’s framework above distinguishes between discontinuances that affect a community or part of a community and discontinuances that affect only carrier-customers. When a carrier can determine with “reasonable certainty” that there will be no impact on the community or part of the community (*i.e.*, end users), Commission approval is not required. (¶ 115) When assessing whether a carrier’s actions will affect a carrier-customer’s retail end users, a carrier may consider whether replacement services are available to the carrier-customer. If such services are available, retail users may not necessarily experience a discontinuance. However, the presence of other carriers and services in the market does not eliminate the obligation to seek Commission approval and provide notice. (¶ 116) Prior Commission approval also may be required if the increased cost to the carrier-customer due to the loss of a service input causes the carrier-customer to exit the market or negatively alter its services. (¶ 117)

Carriers must use all available information to determine whether a section 214 application is required, including making reasonable efforts to ascertain the impact on retail end users. But when a carrier cannot determine the impact of its actions on a carrier-customer’s customers after exercise of a reasonable effort, the carrier may permissibly conclude that its actions do not constitute a discontinuance with respect to those customers.<sup>6</sup> (¶ 119)

#### **E. Updating and Clarifying Commission Section 214 Discontinuance Policy: Preserving the Benefits of Competition by Maintaining Reasonably Comparable Wholesale Access to Last-Mile Services**

*Reasonably Comparable Wholesale Access Rule.* The FCC adopted the following interim rule: prior to the resolution of the special access proceeding, ILECs seeking section 214 authority to discontinue, reduce, or impair a TDM-based special access service or commercial wholesale platform service that is being used as a wholesale input by competitive carriers must provide those carriers with “reasonably comparable” wholesale access on “reasonably comparable” rates, terms, and conditions.<sup>7</sup> (¶ 132) The condition applies only when an ILEC *discontinues* a TDM special access or commercial wholesale platform service used as a wholesale input (as opposed to when it offers that service alongside new IP-based services). (¶ 143) This interim rule will last until

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<sup>6</sup> The FCC declined to adopt an irrebuttable presumption that discontinuance of a wholesale service results in a discontinuance, reduction, or impairment. (¶ 125) The Commission also declined proposals to (1) adopt a safe harbor to limit liability if a carrier concludes that its action would not impact its own retail end users; (¶ 129) and (2) interpret the phrase “community, or part of a community” in section 214 to include CLECs. (¶ 130)

<sup>7</sup> The FCC declined to adopt an “equivalent” wholesale access requirement, rather than “reasonably comparable” wholesale access, out of concern that it would impose unnecessarily high costs on ILECs. (¶ 138)

the Commission adopts a permanent set of rules and policies. Compliance with the interim rule is a condition to grant of a discontinuance application. (¶ 132)

*Scope of Service Covered.* The interim rule applies only to special access services at or above the DS1 level. (¶ 146) But while special access DSOs are excluded from the rule, commercial wholesale platform services are included. Accordingly, if an ILEC discontinues a TDM-based wholesale voice arrangement that includes DS0 local loops, switching, and transport in a commercial unbundled network element platform replacement arrangement, it must offer the replacement service at reasonably comparable rates, terms, and conditions. (¶ 147) The Commission also clarified that section 214(a) requires carriers to obtain authority to discontinue service without respect to whether the service was initially provided voluntarily. (¶ 149)

*Timing.* The FCC declined to set a concrete date by which the interim rule will sunset. (¶ 151) The Commission seeks comment about whether the rule should be extended beyond the special access proceeding to the extent it applies to the commercial wholesale platform service. (¶ 152)

*Enforcement.* CLECs that believe an ILEC has violated the interim rule may seek enforcement action. To facilitate enforcement, ILECs must not preclude their wholesale customers that receive an IP replacement service from disclosing the rates, terms, and conditions of that service to a regulator in the context of an enforcement action. These enforcement actions will include formal complaints, informal complaints, and mediation processes. (¶ 158)

#### 1. Totality of the Circumstances Evaluation for Reasonably Comparable Wholesale Access

The FCC adopted a “totality of the circumstances” test for evaluating compliance with the interim rule. Under the test, the Commission will consider the following questions, as well as any other relevant evidence:

- *Will price per Mbps increase?* Will the price per Mbps of the IP replacement product exceed the price per Mbps of the TDM product that otherwise would have been used to provide comparable special access service at 50 Mbps or below?
- *Will a provider's wholesale rates exceed its retail rates?* Will an incumbent's wholesale charges for the replacement product exceed its retail rates for the corresponding offering?
- *Will reasonably comparable basic wholesale voice and data services be available?* Will the price of wholesale voice services purchased under a commercial wholesale platform service be higher than the price of the existing TDM wholesale voice service it replaces, and the price for the lowest capacity level of special access service at or above the capacity of a DS1 increase?
- *Will bandwidth options be reduced?* Will wholesale bandwidth options include the same services retail business service customers receive from the ILEC?
- *Will service delivery or quality be impaired?* Will service functionality and quality, OSS efficiency, and other elements affecting service quality be equivalent or superior compared to what is provided for TDM inputs today? Will installation intervals and other elements affecting service delivery be equivalent or superior compared to what the incumbent delivers for its own or its affiliates' operations? (¶ 159)

The FCC warned ILECs against using improper workarounds to evade the rule, and reminded carriers that it may evaluate apparent attempts at evasion as a part of its totality of the circumstances inquiry. (¶ 178) The Commission declined to adopt a rate publication requirement or a certification requirement. (¶¶ 179-180)

## **II. Further Notice of Proposed Rulemaking**

Comments on the FNPRM are due October 26, 2015, with reply comments due November 24, 2015.

### **A. Establishing Clear Standards to Streamline Transitions to an All-IP Environment**

The FCC seeks comment on proposals for criteria that would measure “what would constitute an adequate substitute for retail services when a carrier seeks to discontinue, reduce, or impair a connection with a technology transition (e.g., TDM to IP, wireline to wireless).” (¶ 202) The Commission will evaluate the availability of alternate services from sources other than the carrier seeking discontinuance authority. (¶ 206)

#### **1. Proposed Criteria**

The FCC tentatively concludes that a carrier seeking to replace a service must demonstrate that any substitute service meets the following criteria in order for its section 214 application to be automatically granted: (1) network capacity and reliability; (2) service quality; (3) device and service interoperability, including interoperability with vital third-party services (through existing or new devices); (4) service for individuals with disabilities, including compatibility with assistive technologies; (5) PSAP and 9-1-1 service; (6) cybersecurity; (7) service functionality; and (8) coverage. (¶ 208) The Commission seeks comment on when any criteria it adopts should apply, as well as many other questions specific to each of the criteria. (¶ 209)

The FCC also tentatively concludes that, if a carrier certifies that it satisfies all of these criteria, its application will be eligible for an automatic grant. Conversely, if a carrier cannot certify to the criteria, its application would not be eligible for an automatic grant. Instead, the carrier would be required to submit information demonstrating the degree to which it meets or does not meet each factor. (¶ 210) The Commission asks commenters, to the extent they believe a different approach is preferable, to describe with specificity their alternative. (¶ 211)

The FCC tentatively concludes that, in each case in which a carrier must demonstrate the existence of a substitute service, the qualifying service can be a service the carrier offers or an existing service offered by third parties. The Commission proposes that either type of qualifying service be treated equally in its evaluation. (¶ 213) The Commission would prefer to evaluate services based on bright-line, objective criteria that can be applied on a national basis, and it urges all interested parties to provide these criteria to the extent possible. (¶ 214) The Commission also seeks to develop the record on whether the criteria should vary according to the natures of the legacy service and the newer service. (¶ 215)

The FCC makes a number of proposals about the criteria to be included in an adequate substitute service test:

*Network Capacity and Reliability.* The FCC tentatively concludes that the test should evaluate whether the replacement service: (a) will afford the same or greater capacity as the existing service; and (b) will afford the same reliability as the existing service even when large numbers of communications take place simultaneously, and when large numbers of connections are initiated in or terminated at a hub. (¶ 216) The Commission asks

whether it should adopt a 100 millisecond latency metric to judge whether a service meets its requirements. (¶ 217)

*Service Quality.* The FCC tentatively concludes that the test should evaluate whether the replacement service meets the standards set by the governing state commission. (¶ 218)

*Device and Service Interoperability.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service allows for as much or more interoperability of both voice and non-voice devices, or newer equivalent devices, as the service to be retired. (¶ 219) The Commission seeks comment on how to measure the level of interoperability. (¶ 221)

*Service for Individuals with Disabilities.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service allows at least the same accessibility, usability, and compatibility with assistive technologies as the service being discontinued. (¶ 222) The Commission also seeks comment on whether it should require (1) the implementation of real time text over IP networks (and whether it should set an end date for the termination of TTY text services); (¶ 223) and (2) providers of IP networks to include HD voice as a feature for users with disabilities. (¶ 224)

*PSAP and 9-1-1 Service.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service complies with the applicable state, Tribal, and federal 9-1-1 service functionality regulations. (¶ 225)

*Communications Security.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service offers comparably effective protection from network security risks. (¶ 227)

*Service Functionality.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service permits similar service functionalities as the service being discontinued. (¶ 229) The Commission seeks comment on how to define “service functionality.” (¶ 230)

*Coverage.* The FCC tentatively concludes that the test should require a carrier to demonstrate that the replacement service will remain available to the persons in the affected service area to whom discontinued service previously had been available. The Commission asks if it should adopt a *de minimis* threshold for which loss of coverage is tolerable. (¶ 231)

## 2. Consumer Education

The FCC proposes to include as part of its evaluation of a carrier's section 214 application whether the carrier has an adequate customer education and outreach plan. (¶ 233)

## 3. Other Issues

The FCC tentatively concludes that its test should not include the following criteria: (1) operability during emergencies, including power outages; (2) adequate transmission capability; (3) affordability; and (4) connection persistence. (¶ 234) The Commission also seeks comment on (1) whether it should include an exemption from some or all of the criteria for rural LECs; (¶ 235) and (2) whether it should use a market power analysis to help inform an evaluation of whether adequate substitute services exist. (¶ 236)

### **B. Section 214(a) Discontinuance Process**

The FCC seeks further comment on whether it should update section 64.71 of its rules, which establishes the procedures that carriers must follow to obtain section 214(a) approval for discontinuances, specifically with respect to the notice period. (¶¶ 237-38) The Commission asks whether it should update the earliest date by which it may grant approval, and whether it should align timing for notices of discontinuance with notices of copper retirement. (¶ 238) The Commission also seeks comment on whether it should amend its rules to explicitly allow for email-based consent or other forms of electronic notice of discontinuance to customers. (¶ 239)

**C. Section 214(a) Discontinuance Notice to Tribal Governments**

The FCC seeks comment on including notice to Tribal governments as part of its section 214 application process. The Commission tentatively decides to include a notice to Tribal Nations located in the relevant state proposed regardless of the reason for the discontinuance application. (¶ 240)

**D. Copper Retirement Process – Good Faith Communication Requirement**

The FCC seeks comment on whether it should provide objective criteria to evaluate the good faith communication requirement, discussed above, and on what recourse should be available to an interconnecting entity who believes that an ILEC is not acting in good faith. (¶ 241)

**E. Termination of Interim Reasonably Comparable Wholesale Access Condition**

The FCC seeks comment on how to facilitate continuation of commercial wholesale platform services. The Commission seeks comment on the underlying assumptions and on the incentives of incumbents to enter into IP-based wholesale arrangements for voice service. (¶ 243) The Commission asks if, to the extent it finds that wholesale arrangements for voice services are unlikely to occur on a marketplace basis, it would be appropriate for the Commission to require reasonably comparable wholesale access for commercial wholesale platform services for an interim period beyond completion of the special access proceeding. (¶ 244)