

State of California

Public Utilities Commission  
San Francisco

MEMORANDUM

**Date** : June 9, 2017

**To** : The Commission  
(Meeting of June 15, 2017)

**From** : Helen Mickiewicz  
Assistant General Counsel, Legal Division

Chris Witteman  
Public Utilities Counsel IV, Legal Division

Jonathan Koltz  
Public Utilities Counsel III, Legal Division

Karen Eckersley  
Program and Project Supervisor, Communications Division

**Subject:** Filing of Consolidated Comments in Response to Two FCC Dockets: *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, and In the Matter of Accelerating Wireless Broadband Deployment by Removing barriers to Infrastructure Investment*

**RECOMMENDATION:** The California Public Utilities Commission (CPUC) should file comments in response to the two *Notices of Proposed Rulemaking (NPRMs)* released by the Federal Communications Commission (FCC) on April 21, 2017.<sup>1</sup> The two *NPRMs* are parallel in that they raise a number of similar issues, with one focusing on the wireline network while the other addresses the wireless network. In the wireline *NPRM*, the FCC proposes to rescind rules it adopted in August 2016 pertaining to the transition from a traditional copper wire or time-division multiplex (TDM) network to an all-Internet protocol (IP) network. Those rules addressed a variety of topics, including copper retirement, associated notice to end-user customers as well as to competitors of the TDM-to-IP transition, and access to poles and to rights-of-way more generally.

---

<sup>1</sup> *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment; In the matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, WC Docket No. 17-84, FCC 17-37, Released: April 21, 2017; and *Notice of Proposed Rulemaking and Notice of Inquiry; In the Matter of Accelerating Wireless Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79, Released: April 21, 2017. For ease of reference, this memo discusses primarily the wireline *NPRM*, and all paragraph references are to that *NPRM*, unless stated otherwise.

In proposing to modify or eliminate the 2016 rules, the FCC casts its new approach as a better way to “enable broadband providers to build, maintain and upgrade their networks,” and describes its effort as a review of ways to remove barriers to infrastructure investment. Of critical importance to the CPUC is the FCC’s *Notice of Inquiry*, in which it seeks comment on whether it should preempt state and local laws that “inhibit” broadband deployment, such as those pertaining to any negotiation or approval process for access to rights-of-way, excessive fees or costs, and unreasonable conditions.

In the wireline and wireless *NPRMs*, the FCC is proposing to adopt rules for pole access that it deems pro-competitive and would be intended to promote deployment of infrastructure. In order to accomplish those goals, the FCC asks whether it should preempt the states.

Comment dates for the two *NPRMs* have been consolidated and comments are due June 15, 2015. In the event that staff cannot prepare comments to be filed the day of the CPUC’s June 15<sup>th</sup> public meeting, staff would file with the FCC a companion Motion for Leave to Submit Late-Filed Comments.

### **BACKGROUND:**

On February 26, 2015, the CPUC submitted comments to the FCC in response to a *Notice of Proposed Rulemaking* the FCC had issued in which it sought comment on back-up power requirements and rules for copper retirement, among other issues. Subsequently, on August 7, 2015, the FCC issued a *Report and Order*, and a *Further Notice of Proposed Rulemaking (2015 Order)* in its *Technology Transitions* docket.<sup>2</sup> In the 2015 *Order*, the FCC adopted rules for the transition from TDM to IP, including copper retirement, back-up power, and pole access issues. The FCC’s 2015 *Order* focused specifically on § 214(a) of the Communications Act of 1934 regarding notice to customers of service termination.

No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby.

In the 2015 *FNPRM*, the FCC sought comment on proposed standards to streamline the transition to an all-IP environment. The CPUC submitted comments in response to that *FNPRM* on October 30, 2015. There, the CPUC supported many of the rules the FCC had adopted, and advocated that the FCC adopt a number of its proposed standards.

On July 15, 2016, the FCC issued a *Declaratory Ruling, Second Report and Order, and Order on Reconsideration (2016 Order)* in this same docket, where it established additional standards for implementing the rules adopted in the 2015 *Order*.

---

<sup>2</sup> *In the Matter of 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 Services; Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*; GN Docket No. 13-5; RM-11358; WC Docket No. 05-25; RM-10593 (FCC 15-97); rel. August 7, 2015. (*FNPRM*) The CPUC had submitted comments in this docket on February 15, 2015.

On April 21, 2017, the FCC issued a new *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* (2017 *NPRM*) in which it proposes to modify substantially or eliminate many of the rules adopted in the 2015 *Order*, and refined in the 2016 *Order*. It is worth noting here that the FCC’s 2016 *Order* has been in effect for less than a year.

## **DISCUSSION AND RECOMMENDATIONS:**

### **I. Notice of Rulemaking**

The 2017 *NPRM* appears to posit that retiring copper is *de facto* a laudable goal and that rules requiring notice to customers or competitors that copper facilities will be taken out of service are burdensome and undermine the need to deploy “next-generation networks” as quickly as possible. Leaving aside the fact that the industry itself acknowledges that 5G (fifth generation) wireless technology will not roll out until 2020, the FCC seeks comment on “eliminating some or all of the changes to the copper retirement process adopted” in the 2015 *Order*.<sup>3</sup> (The CPUC supported many of those changes.) In taking this approach, the FCC seems to ignore the fact that some functions or services still depend on copper, and cannot yet transition to IP. In addition, in California, mandates such as Carrier of Last Resort (COLR) as well as provision of the elements of basic service and reporting on service quality are all keyed to TDM service.<sup>4</sup>

#### **A. Copper Retirement Issues**

##### **1. Notice to Customers**

In its February 2015 Comments, the CPUC supported FCC proposals regarding notice to retail customers. Specifically, the CPUC recommended that “[t]he notice requirement should apply to all customers whose premises are connected to a copper loop planned for retirement.”<sup>5</sup> The CPUC supported the FCC’s proposed rule that notices to customer affected by copper retirements must state clearly and prominently what service options would be available to customers.<sup>6</sup> The CPUC also recommended that the FCC require service providers to notify customers in the same language in which it marketed service to the customer, and that such notices include special materials for the disabled.<sup>7</sup> And, the CPUC recommended that the FCC “set a notice period of 6 months for customer affected by a planned copper retirement.”<sup>8</sup> In its 2015 *Order*, the FCC adopted Rule 51.332, which addressed many topics, and specifically mandated that ILECs provide notice of copper retirement to all of their retail customers.<sup>9</sup> The FCC required that ILECs must give residential retail customers 90-days’ notice of a copper

---

<sup>3</sup> *FNPRM*, ¶ 57.

<sup>4</sup> The CPUC’s ability to impose some or all of these requirements on IP-based services is, at a minimum, in doubt because of Public Utilities (PU Code) § 710, which severely limits the CPUC’s authority over IP-based services, including Voice-over-Internet Protocol service.

<sup>5</sup> CPUC’s Comments, filed February 26, 2015, p. 14.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*, p. 15

<sup>8</sup> *Id.*, p. 17

<sup>9</sup> FCC 2015 *Order*, ¶ 45; *see* 47 CFR § 51.332.

retirement.<sup>10</sup> The FCC also required that customer notices provide sufficient information to enable the retail customer to make an informed choice about whether to continue or terminate service.<sup>11</sup>

In the 2017 *NPRM*, the FCC proposes to either eliminate altogether Rule 51.332, or to substantially modify it.<sup>12</sup> In so doing, the FCC would be eliminating a path providers must follow to get from here to there, that is, to navigate the change from a TDM to IP based network. In particular, the FCC asks what would be the impact of eliminating direct notice of planned copper retirements to retail customers, “including consumers who have disabilities and senior citizens?”<sup>13</sup>

*Recommendation:* Staff recommends that the CPUC submit comments consistent with the positions set forth in both its February 2015 and October 2015 comments addressing customer notices, including the content of those notices, the need for specialized information in notices to the disabled, and who should receive the notices. In addition, consistent with the CPUC’s 2015 comments, these comments should urge the FCC not to preempt state requirements for notice to customers,

## 2. Notice to Public Officials

In the 2015 *Order*, the FCC broadened the list of entities that must receive direct notice of proposed copper retirement to include “each entity within the affected service area that directly interconnects with the incumbent LEC’s [Local Exchange Carrier’s] network.”<sup>14</sup> In addition, the FCC required notice to the Secretary of Defense as well as state commissions, Governors, and Tribal entities. In the 2017 *NPRM*, the FCC asks whether these “direct notice changes meaningfully promote[] understanding and awareness of copper retirements and their impacts...”<sup>15</sup> The FCC now proposes, instead, to return to the requirement in place before the 2015 *Order*, which mandated notice only to “each telephone exchange service provider.” State PUCs and Governors would not be informed of the change from TDM to IP service.

In its February 2015 comments, the CPUC supported “requiring ILECs to notify state officials and the Secretary of Defense” about planned copper retirements.<sup>16</sup>

---

<sup>10</sup> *Id.*, ¶ 59.

<sup>11</sup> *Id.*, ¶ 46.

<sup>12</sup> In proposing to eliminate all of Rule 51.332, the FCC’s current *NPRM* does not actually delineate each part that would be vacated; it simply proposes to repeal the entire rule, which includes a number or requirements, some of which the FCC discusses in the text of the *NPRM*, and some of which are not mentioned.

<sup>13</sup> FCC 2017 *NPRM*, ¶ 64.

<sup>14</sup> *FNPRM*, ¶ 61.

<sup>15</sup> *Id.*

<sup>16</sup> CPUC February 2015 Comments, p. 21.

*Recommendation:* Staff recommends that the CPUC oppose a diminishment in the number of entities receiving notice of the change from copper to IP service. Further, since TDM service includes a separate source of electricity that generally does not fail in the event of a power outage, while IP-enabled services do not have that independent power source, there is a valid reason to inform other entities besides just the telephone service provider.

### **3. Filing of a Certificate to Eliminate Service**

Federal law requires that a service provider seeking to eliminate service to a community must file an application with the FCC to obtain a “certificate” authorizing the termination of service.<sup>17</sup>

In its February 2015 comments, the CPUC supported the FCC’s proposals

to require ILECs to notify competitors of planned changes and retirements, to prepare annual forecasts, and to submit certification to the FCC that such notice has been provided. These requirements will better enable competitors to take steps appropriate to their business models and to forewarn their customers of impending service changes.<sup>18</sup>

The CPUC also recommended that the FCC require a 6-month notice of copper retirement to wholesale as well as retail customers.<sup>19</sup>

In its 2015 *Order*, the FCC extended from 90 days to 180 days the period of time following the filing of a request for a certificate to discontinue service that a provider must wait for objections or to negotiate with other providers the terms of a transition (the “waiting period”).

Here, the FCC is proposing to return to the 90-day waiting period, or even to reduce the waiting period to one month and remove the “certificate requirement” in the event of an emergency. The FCC also is proposing here to eliminate a rule which prohibits ILECs “from disclosing any information about planned network changes to affiliated or unaffiliated entities prior to providing public notice.”<sup>20</sup>

*Recommendation:* Consistent with its earlier position, staff here recommends that the CPUC oppose reducing the waiting period for a certificate. Further, the CPUC should oppose the notion that an “emergency” could allow for only a 30-day waiting period and no need to apply for a certificate, as that proposal appears to conflict with the plain language of § 214(a). Further, staff recommends advocating to the FCC that it retain the rule prohibiting disclosure of information about planned network changes until after public notice is provided. Absent this rule an ILEC planning to retire copper could notify an affiliate which could lay fiber where a competitor already has a wholesale agreement, potentially putting that competitor out of business.

---

<sup>17</sup> See 47 U.S.C. § 214(a), quoted above, in the “Background” section.

<sup>18</sup> CPUC’s February 2015 Comments, p. 12.

<sup>19</sup> *Id.*, p. 13.

<sup>20</sup> FCC 2017 *NPRM*, ¶ 67.

#### 4. Impact on Disabled Customers

In its October 2015 comments, the CPUC discussed at length its concerns about the effect of the TDM-to-IP transition on the disabled, specifically those who rely on specialized equipment.

It is critically important that consumers with disabilities who rely on specialized equipment to communicate effectively over the public telecommunications network will continue to be able to communicate just as effectively after the transition to newer technologies.<sup>21</sup>

The CPUC went on to encourage the FCC to adopt rules to ensure that any new service works with the equipment of the disabled subscriber, or if the technologies are not compatible, the service provider should offer new compatible equipment at no additional charge, or should give financial assistance and information for the subscriber to purchase new equipment.<sup>22</sup>

In its 2017 *NPRM*, the FCC asks whether it should eliminate rule 68.110(b), which requires the following:

[if] ... 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>23</sup>

*Recommendation:* Staff recommends that, consistent with the position set forth in the CPUC's October 2015 comments, the CPUC advocate that the FCC not eliminate this rule when doing so would pose the potential to render inoperable equipment that disabled subscribers use to connect with the telecommunications network. Any modifications to the rule should include protections for disabled customers who depend on their specialized equipment to obtain services and to maintain contact with family and friends.

#### 5. Standards for Withdrawal of and Substitutes for Legacy Services

In its October 2015 Comments, the CPUC advocated for certain standards pertaining to withdrawal of legacy services and the offering of substitute services. In those comments, the CPUC cited to its own rules regarding withdrawal of service for Carriers of Last Resort (COLRs).<sup>24</sup> For example, the CPUC commented on California's nine elements of basic voice service, which include the ability to make and receive calls, free access to 911, as well as access

---

<sup>21</sup> CPUC October 30, 2015 Comments, p. 11.

<sup>22</sup> *Id.*

<sup>23</sup> FCC 2017 *NPRM*, ¶ 70.

<sup>24</sup> CPUC's October 2015 Comments, pp. 9-17.

to other services such as directory and telecommunications relay services. The CPUC also apprised the FCC of its five service quality measures.

In its 2016 *Order*, the FCC, relying on the mandate in § 214(a) of the Communications Act, adopted standards discontinuance of legacy services and for the replacement services providers would be offering their customers. The FCC did not preempt state requirements for provision of or withdrawal of service. The standards the FCC adopted just 10 months ago covered a number of issues including service quality and availability, interoperability and functionality, 911 and emergency services, and services for individuals with disabilities.

In its 2017 *NPRM*, the FCC seeks comment on its proposal that “modifying our discontinuance processing for legacy systems to reduce burdens and protect customers will facilitate carriers’ ability to retire legacy network infrastructure and will accelerate the transition to next generation IP-based networks.”<sup>25</sup> The FCC has not proposed new rules, just the elimination of the 2016 rules, so the future world the FCC envisions is unclear.

*Recommendation:* Staff seeks authority to submit comments consistent with the extensive comments the CPUC submitted previously in support of the standards the FCC now seeks to eliminate. Should the FCC eliminate its 2016 standards, service providers could have the freedom to withdraw legacy services, including the attendant California nine basic voice service elements, and substitute a service that would fail to meet California’s standards. Customers might lose free access to 911, or service functionality or coverage, or access to relay service. If the substitute is wireless service, and the customer lives in a rural area, the customer could lose service altogether if the service provider has poor coverage in that area. Plus, wireless service is charged on a per-minute basis for both incoming and outgoing calls.<sup>26</sup> Finally, some services, such as closed captioning and alarm systems, are dependent on copper wire; their continued viability may be threatened if the FCC does not maintain appropriate rules.

## 6. New Rules for Pole Attachments

In its 2017 *NPRMs*, the FCC poses a number of questions and aimed at reforming its rules for pole attachments. The FCC’s list of pole issues includes the following:

- reasonable timelines for pole owners to respond to attachment requests (§§ 6-9)
- means for expediting pole surveys and cost estimates (§§ 10, 27)
- different strategies for streamlining the “make-ready” process (§§ 11, 24-19, 21-26)
- details for make-ready (§§ 20, 32-36)
- improved access to conduits and conduit data (§ 31)
- expediting resolution of pole attachment disputes (§§ 47-51)
- reciprocal access to poles owned by competitive carriers (§§ 52-55)

*Recommendation:* Staff seeks authority to submit comments on these issues consistent with CPUC precedent, including its reverse preemption of FCC rights-of-way authority. Further, staff would apprise the FCC of the CPUC’s ongoing and planned pole and conduit proceedings, and inform the FCC of the scope of those activities.

---

<sup>25</sup> FCC 2017 *NPRM*, ¶ 72.

<sup>26</sup> Of course, many wireless providers offer large buckets of minutes or even unlimited calling. Those options may not be available uniformly throughout the nation or the state.

## II. *Notice of Inquiry* – Wireline Docket

The FCC opens its *Notice of Inquiry* (NOI) as follows:

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.<sup>27</sup>

The FCC goes on to cite to § 253(a) of the Communications Act, which “generally provides that no state and local legal requirements ‘may prohibit or have the effect of prohibiting’ the provisioning of interstate or intrastate telecommunications services.”<sup>28</sup> The FCC acknowledges that § 253(b) contains a certain exceptions to the broad preemption in § 253(a), and then notes that “Congress directed the FCC to preempt the enforcement of any legal requirement which violates 253(a) or 253(b) ‘after notice and the opportunity for public comment’.”<sup>29</sup> The FCC goes on to list types of local statutes or rules on which it seeks public comment: deployment moratoria; rights-of-way negotiation and approval process delays, excessive fees or other excessive costs, unreasonable conditions, bad faith negotiation conduct, and other prohibitive state and local laws.<sup>30</sup> The FCC also seeks comment on its authority to adopt rules pursuant to § 253.<sup>31</sup>

*Recommendation:* Staff seeks authority to comment on the FCC’s legal authority and its legal analysis. For example, in staff’s view, the FCC is reading its authority more broadly than the statutory language warrants. The plain language of § 253(d) does *not* give the FCC the power to promulgate rules to preempt state and local regulations. Section 253(d) provides: “[i]f, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement” that has the effect of prohibiting service, that is not competitively neutral, or that violates the universal service rules, “the Commission shall preempt the *enforcement* of such statute, regulation, or legal requirement *to the extent necessary to correct such violation or inconsistency.*” That language necessarily requires the FCC to examine the specific state or local requirement at issue, and to craft relief that is narrowly tailored to suit the problem. In other words, the FCC must act through case-by-case adjudication, not a blanket preemptory rulemaking. There may well be, for example, state or local deployment moratoria that violate § 253 and should therefore be preempted. But to get there, the FCC would have to identify a specific moratorium, determine whether it was inconsistent with § 253, and craft a narrow remedy. It could not promulgate a rule declaring, “all state and local deployment moratoria are hereby preempted.”

---

<sup>27</sup> FCC 2017 NPRM, ¶ 100.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, ¶¶ 102-108.

<sup>31</sup> *Id.*, ¶ 109.



The approach staff outline here is, as the FCC itself notes, its historical practice.<sup>32</sup> Staff sees no reason to depart from history, particularly where state jurisdiction is at issue, and thus requests authority to say so.

---

<sup>32</sup> *Id.*, ¶ 109 (“The Commission has historically used its Section 253 authority to respond to preemption petitions . . .”).