Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF THE GREENLINING INSTITUTE ON NOTICE OF PROPOSED RULEMAKING, NOTICE OF INQUIRY, AND REQUEST FOR COMMENT

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In accordance with the Commission's April 21, 2017 Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment ("NPRM") The Greenlining Institute ("Greenlining") files these Opening Comments.

I. SUMMARY

As Greenlining and other parties have previously noted, the issues raised by the NPRM are complex and require careful consideration.[1] Greenlining anticipates that the comments in this proceeding will represent many diverse interests and points of view, and will consequently contain many different recommendations. When considering any changes, the Commission should adopt policies that accelerate broadband deployment to unserved and underserved communities, including communities of color. To accomplish this goal, and to meet the Commission's statutory duty to ensure that communications services are available "without discrimination,"[2] the Commission's rules should be consistent with three principles:

[1] Public Knowledge et al., Motion for Extension of Time (May 26, 2017).
[2] 47 U.S.C. § 151.

- First, any rules meant to accelerate broadband deployment must promote racial equity.
- Second, any rules meant to accelerate broadband deployment must ensure that providers upgrade or replace, rather than decommission, networks that serve communities of color.
- Third, any rules meant to accelerate broadband deployment must encourage broadband deployment to communities of color while preserving those communities' right to self-determination.

These principles will ensure that communities of color have equitable access to innovative and cutting-edge communications services that providers do not retire networks or services in a manner that leaves communities of color behind, and that the Commission's rules do not improperly interfere with communities' property interests in rights of way.

II. ARGUMENT

A. Any Rules Meant to Accelerate Broadband Deployment Must Promote Racial Equity.

The Commission is charged with making sure communications services are available "without discrimination on the basis of race, color, religion, national origin, or sex."[3] However, the Commission has not always been successful in accomplishing this goal. As a result of broadband providers' business decisions, communities of color suffer from "digital redlining"—those communities generally have less access to broadband services, and where they do have access, those services are generally slower and suffer from lower service quality. While communities of color have a slightly higher rate of "wireless-only" households than their white counterparts, a substantial number of people of color still depend on TDM-based services.[4] Any policies designed to accelerate broadband deployment that do not remedy these historical

[3] 47 U.S.C. § 151.

[4] Division of Health Interview Statistics, National Center for Health Statistics, Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, January–June 2014 5 (Dec. 2014), *available at* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201412.pdf (last accessed October 26, 2015).

inequities are insufficient. In this proceeding, the Commission's should consider of the real-world racial equity impacts of its broadband deployment policies, particularly the ample, repeated evidence that deregulatory policies have consistently resulted in disparate impacts on communities of color.

1. Pole Attachment Reform, Copper Retirement, and Service Discontinuance are Racial Equity Issues.

It is important to note that concerns about racial inequities in access to telecommunications services are not theoretical. One of the primary drivers of digital redlining is income. As a result of the racial wealth and income gaps, people of color are disproportionately low-income. Furthermore, there is a direct correlation between income and broadband service quality. Accordingly, consumers from communities of color, who are disproportionately low-income, generally experience inferior broadband service quality.

As noted above, the Commission is charged with ensuring equitable access to broadband services. As the NPRM notes, pole attachment, copper retirement, and service discontinuance policies affect broadband deployment.[5] Accordingly, these policies affect not only consumers generally, but communities of color specifically, often with different consequences than those experienced by their white counterparts. Accordingly, pole attachment, copper retirement, and service discontinuance policies are racial equity issues, and the Commission has a statutory duty to consider those policies in that context.

[5] These comments discuss the extent to which those policies actually guarantee broadband deployment in section B, below.

2. Deregulatory Polices Do Not Increase Broadband Availability to Communities of Color.

The NPRM appears to endorse a theory that deregulation is the ideal mechanism for accelerating broadband deployment.[6] Greenlining disagrees with this hypothesis, and even if that hypothesis is true generally, deregulation of communications services has historically not led to increased broadband deployment to communities of color. For example, in California, recent legislative deregulation of broadband services intended to accelerate broadband deployment[7] have not resulted in any appreciable increase in broadband deployment. Rather, any increased deployment has occurred as a result of increased regulatory oversight in the form of merger conditions or state subsidies.[8] Accordingly, the idea that deregulation would somehow reverse decades of disparate treatment of communities of color by providers is dubious at best.

To look at the results of "light-touch" regulation on racial equity, one need look no further than providers' records on supplier diversity. Under the California Public Utilities Commission (CPUC) has implemented guidelines to increase providers' contracting with businesses owned by people of color, women, disabled veterans, and members of the LGBT community.[9] Providers of so-called "legacy" telephone services generally meet or exceed the CPUC guidelines, while providers of broadband services (including affiliates of the legacy telephone providers) regularly fail to meet, or even approach, the CPUC guidelines.[10] While there are no doubt many factors affecting providers' supplier diversity these successes and

[6] The faulty reasoning surrounding this assumption is further discussed in section II(B), below.
[7] Cal. Pub. Util. Code § 710
[8] See Cal. Pub. Util. Comm'n, Decision Granting Application Subject to Conditions and Approving Related Settlements, D.15-02-005 (Dec. 3, 2015).
[9] Stephanie Chen and Danielle Beavers, 2016 Supplier Diversity Report Card: California's Public Utilities (2016), *available at* http://greenlining.org/wp-content/uploads/2016/09/SDRC-2016-Public-Utiltiies-Spreads-1.pdf (last accessed June 15, 2017).
[10] *Id*.

failures, the fact that providers regulated with a "light touch" have made any significant progress in their supplier diversity efforts is notable, and should not be dismissed lightly.

3. Innovation Does Not Justify or Outweigh the Need for Racial Equity, Racial Justice, and the Preservation of Civil Rights.

At times, the NPRM appears to advocate deregulation simply for deregulation's sake. This is not the first time that Chairman Pai has argued for deregulation as a panacea. However, this view does not acknowledge the fact that deregulation often results in discrimination against communities of color and other groups. Chairman Pai has often argued that deregulation spurs innovation, but does not appear to have acknowledged that deregulation has allowed those "innovators" to engage in, or facilitate, discriminatory conduct. For example, in his dissent in the 2015 Tech Transitions Order, then-Commissioner Pai held up Uber and AirBNB as evidence of proof of the merits of deregulation:

> Could Uber have revolutionized transportation if it had to ask the City of New York permission before innovating? No. Could Airbnb have gotten the sharing economy off the ground if the government had to approve every rental? Of course not.[11]

What then-Commissioner Pai failed to acknowledge is that Uber and AirBNB's business models led to racial discrimination against individuals that used their services.[12] In Seattle, African-American passengers "faced notably longer wait times to get paired with drivers than white

[11] Statement of Commissioner Ajit Pai Approving in Part and Concurring in Part, Technology Transitions, GN Docket No. 13-5; USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services, WC Docket No. 13-5; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers, RM-11358.
[12] Eric Newcomer, Study Finds Racial Discrimination by Uber and Lyft Drivers (October 31, 2016), available at https://www.bloomberg.com/news/articles/2016-10-31/study-finds-racial-discrimination-by-uber-and-lyft-drivers (last accessed June 13, 2017).

customers."[13] AirBNB acknowledged that its app allows users to discriminate against people of color, but resisted making changes to counter that discrimination.[14]

It is worth noting that this discriminatory conduct impacts far more than just people of color. Uber has been accused of discriminatory conduct against women, including sexual harassment.[15] One study found that "women were sometimes taken on significantly longer rides than men," and that "other female riders reported 'chatty' drivers who drove extremely long routes, on some occasions, even driving through the same intersection multiple times. As a result, the additional travel that female riders are exposed to appears to be a combination of profiteering and flirting to a captive audience."[16]

Additionally, Uber has been accused of developing self-driving car technology based on theft of highly confidential data from Waymo and Google,[17] identifying and tagging user phones even after they'd deleted the Uber app,[18] making misleading representations regarding the measures Uber takes to ensure passenger safety, leading to sexual assaults (while adding a $1 safety fee to fares),[19] hiding behind claims of drivers acting as independent contractors to avoid

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[13] *Id.*
[14] *Id.*
[15] Susan J. Fowler, Reflecting On One Very, Very Strange Year At Uber (February 19, 2017), *available at* https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber (last accessed June 13, 2017).
[16] Eric Newcomer, Study Finds Racial Discrimination by Uber and Lyft Drivers (October 31, 2016), *available at* https://www.bloomberg.com/news/articles/2016-10-31/study-finds-racial-discrimination-by-uber-and-lyft-drivers (last accessed June 13, 2017).
[17] Adrienne LaFrance, A Doozy of a Lawsuit Over Self-Driving Cars (Feb. 24, 2017), *available at* https://www.theatlantic.com/technology/archive/2017/02/waymo-vs-otto-aka-google-vs-uber/517683/ (last accessed June 13, 2017).
[18] Mike Isaac, Uber's C.E.O. Plays With Fire (April 23, 2017), *available at* https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html?rref=collection%2Fsectioncollection%2Ftechnology (last accessed June 13, 2017).
[19] Stacy Perman, Is Uber Dangerous for Women? (May 20, 2015), *available at* http://www.marieclaire.com/culture/news/a14480/uber-rides-dangerous-for-women/ (last accessed June 13, 2017).

liability,[20] lying to drivers about earnings and vehicle financing,[21] and creating software meant to circumvent officials who were investigating the service.[22] While innovation is important, it does not justify or outweigh the need for racial equity, racial justice, and the preservation of civil rights. Any proposed plans that advocate for large-scale deregulation will be insufficient to protect racial equity, racial justice, and the preservation of civil rights. Additionally, there is a substantial risk that deregulatory policies will harm consumers and employees. Accordingly, the Commission should reject any solutions based on deregulation as a guiding principle.

4. The Proposed Changes in the NPRM are Insufficient to Ensure Equitable Deployment of Broadband to Communities of Color.

In their proposed form, the Commission's proposed criteria for Section 214 review do not sufficiently protect communities of color. While the proposed changes may make it easier for providers to shut down networks and services, there is no indication that providers will use the cost savings from those shutdowns to deploy broadband. In fact, as currently drafted, the proposed changes create a very real risk that providers will shut down networks and services, leaving some customers without any access to communications services whatsoever.

B. Any Rules Meant to Accelerate Broadband Deployment Must Ensure that Providers Upgrade or Replace, Not Decommission, Networks that Serve Communities of Color.

The NPRM purports to accelerate the deployment of broadband by making it easier for providers to discontinue services and decommission copper networks. However, in its haste to deregulate, the NPRM fails to explain how these changes will **necessarily** lead to accelerated

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[20] *Id*.
[21] Andrew J. Hawkins, Can Uber Be Saved From Itself? (March 6, 2017), *available at* https://www.theverge.com/2017/3/6/14791080/uber-sexism-scandal-strike-waymo-lawsuit-travis-kalanick (last accessed June 13, 2017).
[22] Mike Isaac, How Uber Deceives the Authorities Worldwide (March 3, 2017), *available at* https://www.nytimes.com/2017/03/03/technology/uber-greyball-program-evade-authorities.html (last accessed June 13, 2017).

broadband deployment. This failure appears rooted in a number of unproven assumptions. Additionally, there is a substantial risk that the proposed changes will actually further delay deployment of broadband services to communities of color. Accordingly, the Commission should not adopt the proposed changes without additional protection that guarantee that providers upgrade, not decommission, their networks, particularly those that serve communities of color.

1. The NPRM Relies on a Number of Faulty Assumptions Regarding the Effect of the Proposed Changes on Broadband Deployment.

The NPRM does not acknowledge these risks, in part because it relies on the unproven assumption that its suggested changes will directly lead to increased broadband deployment. The NPRM appears to make a number of assumptions about the correlation between pole attachment, network changes, and state policies and actual broadband deployment.[23] For example:

- The NPRM states that "Reforms which reduce pole attachment costs and speed access to utility poles would remove significant barriers to broadband infrastructure deployment."[24]
- The NPRM proposes changes to network change disclosure rules, purportedly 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."[25]
- The NPRM suggests that "state laws governing the maintenance or retirement of copper facilities…serve as a barrier to next-generation technologies and services that the Commission might seek to preempt."[26]

The NPRM relies on these assumptions to propose rule changes making it easier for providers to discontinue service and eliminating community oversight of infrastructure deployment. However, apart from vague assurances, the NPRM does not show that these rule changes will

[23] These assumptions appear to be rooted in the larger assumption, discussed above, that the deregulation at the federal and state levels will somehow, for the first time, lead to widespread broadband deployment.
[24] NPRM at ¶ 3.
[25] NPRM at ¶ 18.
[26] NPRM at ¶ 36.

actually lead to accelerated broadband deployment, because the lack of any concrete mechanisms to ensure the savings from new pole attachment, copper retirement, and federal preemption rules will actually lead to ubiquitous broadband availability. It is far more likely that providers will shut down their less profitable, so-called "legacy" networks, and focus any service improvements on high-income areas. As a result of this business model, there is a substantial risk that under the proposed rules, carriers' retirement of legacy services could result in discrete areas of the country—most likely home to low-income communities and communities of color—will lose access to affordable and reliable communications services. Additionally, in areas where there is still service, service quality would likely be substandard and more expensive.

2. Any Changes to the Current Discontinuance Rules Must Ensure that Customers do not Lose Access to Affordable, Reliable Service.

The NPRM asks a number of questions regarding service discontinuance, including functionality (including determining whether "services" goes beyond a single offering or product)[27] and discontinuance rules and notice requirements.[28] In order to ensure that communities of color are not disproportionately impacted by these policies, the Commission should ensure that providers do not discontinue service, leaving those communities without a replacement. To prevent this harm the Commission should ensure that any changes to discontinuance policies include:

- A "functional test" standard that requires that any "replacement service," from a customer perspective, provide the same functionality of the technology it is replacing;
- Rigorous exit approval requirements, at least as strong as those in the current rules; and
- Expansive notice requirements that ensure that carrier-customers' end-users have an opportunity to provide input and help the Commission develop a full record.

[27] NPRM at ¶ 40.
[28] NPRM at ¶¶ 37-59.

a. Any Replacement Service Must Provide the Same Functionality of the Technology It Is Replacing.

The NPRM asks questions about what constitutes a functionally equivalent service.[29] Greenlining cautions the Commission to, when performing this analysis, to focus not on whether a carrier seeking discontinuance feels that an alternative service is a replacement but rather whether **consumers** feel that the alternative service is an adequate replacement. Accordingly, to constitute an acceptable replacement service, an alternative service must provide the same functionality of the technology it is replacing. Additionally, the Commission's proposal to use state service quality guides to determine whether a replacement service is sufficient is, unfortunately, unworkable.

i. To Constitute an Acceptable Replacement Service, an Alternative Service Must Provide the Same Functionality as the Technology It Is Replacing.

The Commission should not allow concerns about regulatory certainty or administrative efficiency to outweigh the public's need for affordable, ubiquitous, and reliable service, Greenlining feels that to constitute an acceptable substitute service, a replacement technology must meet the standards and functionality of the technology it is replacing. For example, if a carrier proposes mobile wireless as a substitute for traditional wireline service, that carrier must demonstrate that the mobile wireless service allows a customer to make a call from any room in that customer's residence.

[29] NPRM at ¶ 40.

ii. The Commission Should Not Use State Service Quality Requirements to Determine Whether a Replacement Service is Sufficient.

The NPRM asks whether, in determining what constitutes a replacement service, the Commission should only consider tariffed services.[30] For many customers, this policy could actually result in less broadband availability, in large part because carriers promoting the dubious argument that states have no authority over what are clearly telecommunications services.[31] For example, under the proposed rule, California providers could discontinue broadband service as long as there were a replacement telephone service available. The Commission's adoption of a "tariffed services only" rule could result in, effectively, no requirements for replacement technologies at all. Accordingly, the Commission should consider all of a provider's offered services when determining whether a replacement service is sufficient.

iii. To Constitute a Functionally Equivalent Service, a Replacement Technology Must be Affordable.

When considering what constitutes a functionally equivalent service, the Commission should consider the issue of the affordability of replacement services. To a consumer, affordability is a major factor in determining whether a replacement technology is an adequate substitute, because a consumer cannot replace one service with another service that the customer cannot afford. Additionally, the migration to a new technology may require a customer to pay for equipment, as well as installation or other non-recurring fees which further contributed to the expense of the service. Greenlining urges the Commission to include affordability in its analysis of whether a replacement technology constitutes an adequate substitute.

[30] NPRM at ¶123.
[31] *See* Cal. Pub. Util. Code § 710.

Additionally, a carrier seeking to discontinue service should not be permitted to rely on one substitute product as to some services and a different substitute product as to other services. Allowing carriers to obtain approval under section 214 by relying on multiple services could result in customers having to obtain a Frankenstein monster of multiple services. As a result, the need to pay for multiple services could be unaffordable to some customers, who would then be unable to acquire an adequate substitute for the retired service. Additionally, the separate services could have different terms or contract lengths, creating further customer confusion.

iv. To Constitute a Functionally Equivalent Service, a Replacement Technology Must be Universally Available.

As noted above, allowing providers to discontinue service without mechanisms to ensure no customer loses service creates a substantial risk that some customers, particularly customers of color, will lose service and not have access to a replacement service. There should be sufficient availability of replacement services to serve **all** consumers in the service territory in which the carrier seeks to retire service. Additionally, Greenlining is concerned that a *de minimis* percentage could result in communities of color having disproportionately lower availability of the replacement service. Accordingly, the Commission should require carriers that seek to discontinue service to demonstrate that the availability of any substitute service does not result in disparate impacts availability on consumers of color.

v. To Constitute a Functionally Equivalent Service, a Replacement Technology Must be Non-Discriminatory.

As discussed above, the Commission should take steps to ensure that communities of color do not suffer disparate harm as a result of a carrier's retiring a service, and that any replacement service should be both available and affordable to communities of color. Accordingly, the Commission should consider whether the carrier has an adequate customer

education and outreach plan. Additionally, the Commission should consider whether a carrier's customer education and outreach plan is provided in languages other than English. To many limited English proficiency customers, an English-only education and outreach plan is useless. Greenlining urges the Commission to require that any communications from a carrier regarding the discontinuance of a service or availability of a substitute service be available in languages other than English. At a minimum, the communications should be available to customers in any language in which the customer's state publishes its voter guides.

b. Exit Approval Requirements Must be Rigorous.

The NPRM claims that the current exit approval requirements are burdensome, and questions whether strong consumer protections are necessary.[32] At the risk of stating the obvious, exit approval requirements are robust because they **need** to be robust. While efficiency improvements and cost reductions are important, they do not justify or outweigh the fact that communications services are critical to advancing economic opportunity, and that a consumer's loss of access to those services can have dire consequences. Exit approval requirements must be rigorous enough to ensure that customers will not need these critical services.

c. Notice Requirements Must Ensure that Carrier-Customers' End-Users Have an Opportunity to Provide Input and Help the Commission Develop a Full Record.

The NPRM contains a number of proposed changes to the Commission's discontinuance notice rules, including a 10-day public comment period for "grandfathering" [33] notices and a 10-day discontinuance notice for services which have been grandfathered 180 days. Additionally,

[32] NPRM at ¶ 56.
[33] NPRM at ¶ 23.

the NPRM shortens the time periods for consumers or other stakeholders to object to those notices, proposing automatic grants of 25 and 31 days, respectively. These extremely short periods are insufficient for the public to learn about and comment on the discontinuance of their services, much less make arrangements for a replacement service. Additionally, providing input and arranging for replacement service will likely be particularly difficult for participants in the Lifeline program. Any notice requirements must be robust enough to ensure that carrier-customers' end-users have an opportunity to provide input and help the commission develop a full record.

The NPRM also asks whether there are instances where streamlined treatment would be appropriate.[34] There may be such instances—for example, where there was same functionality at same cost, and new customers did not face a monopoly or duopoly. Unfortunately, because of the extremely accelerated comment timeline in this proceeding, there is not sufficient time to examine these issues. Accordingly, the Commission should maintain status quo or disallow streamlined processing until stakeholders have sufficient opportunity to provide a more complete analysis.

C. Any Rules Meant to Accelerate Broadband Deployment Must Encourage Broadband Deployment to Communities of Color while Preserving Those Communities' Right to Self-Determination.

As discussed above, the NPRM appears to have pre-determined that deregulation is the best approach for accelerating broadband deployment, a position that incumbent providers will no doubt support. Oddly, NPRM abandons that commitment to a so-called "light touch" deregulatory policy when it comes to regulations that will providers at the cost of communities.

[34] NPRM at ¶ 95.

The NPRM apparently feels that it is appropriate to rely on market forces to accelerate broadband deployment, except when it comes to local control of rights-of-way.

The NPRM alleges that municipal governments are delaying rights-of-way negotiations and approvals, charging excessive fees and costs, imposing unreasonable conditions, negotiating in bad faith, and otherwise obstructing providers' deployment of broadband.[35] The NPRM then offers an intrusive and heavy-handed solution: preemption of state authority to control local rights-of-way.[36] This solution is misguided and relies on false assumptions about the nature of public rights-of-way.

In making its argument, the NPRM frames state control of public rights-of-way as an example of unnecessary state regulation. However, state control of public rights-of-way are not issues of regulation, rather, they are property interests owned by communities and managed by municipalities.[37] Local communities have a property interest in the public rights-of-way.[38] Local communities authorize providers to use the public rights-of-way through franchises.[39] In a free-market economy, requiring communities to charge artificially low prices/fees, or without assigning appropriate conditions, distorts the market and forces consumers to subsidize providers' costs.[40] The NPRM's preemption proposals would deprive municipalities, (consisting of members of a community with comment interests), of the ability to negotiate with providers, (consisting of shareholders with common interests) at arms' length.

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[35] NPRM at ¶ 107-108.
[36] NPRM at ¶ 100.
[37] Frederick E. Ellrodd III & Nicholas P. Miller, Property Rights, Federalism, and Public Rights-of-Way (2003) 26 Seattle Univ. Law. Rev. 475, 477.
[38] *Id*. at p. 483.
[39] *Id*. at p. 485.
[40] *Id*. at p. 489.

Additionally, the Commission should reject the NPRM's representation of municipalities as somehow not invested in bringing broadband to their communities and wholeheartedly, and unreasonably, obstructionist. Municipalities are very aware that affordable high-speed broadband service is critical for education, employment, and economic development. More importantly, state and local governments are particularly well-positioned to ensure that providers are serving communities equitably and non-discriminatorily. While the Commission has the authority to promote broadband deployment, but that authority is not unchecked, nor is broadband deployment the sole state interest. The Commission's existing preemption process is sufficient to allow the Commission to promote broadband deployment without unduly interfering with communities' right to self-determination.

III. CONCLUSION

The issues addressed in this proceeding are racial equity issues, and any changes to the pole attachment, copper retirement, and service discontinuance rules are racial equity issues which the Commission must consider. Additionally, to truly accelerate broadband deployment, the rules must ensure that providers upgrade or replace, not decommission, networks that serve communities of color. Finally, any rules meant to accelerate broadband deployment must encourage broadband deployment to communities of color while preserving those communities' right to self-determination.

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