Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services	))))	WC Docket No. 13-3

OPPOSITION OF
THE UNITED STATES TELECOM ASSOCIATION

The United States Telecom Association (USTelecom) opposes the petition filed by the Ad Hoc Telecommunications Users Committee (Ad Hoc) seeking reconsideration of the Federal Communications Commission's (FCC or Commission) *Declaratory Ruling* in the above-referenced docket.[1] Ad Hoc seeks reconsideration of the ruling that incumbent local exchange carriers are no longer dominant in their provision of switched access services, and insists that the Commission must either reconsider that decision, or act on a proposal to apply "regulatory protections to the 'open' end of a toll-free call as apply [sic] to terminating 'sent-paid' service."[2] As explained below, the Petition is late-filed, and thus should be dismissed with prejudice on procedural grounds.[3] Moreover, Ad Hoc raises no new facts or changed circumstances that have not already been considered by the Commission. Therefore, in the alternative, the Petition should be denied on the merits.

---

[1] *USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, Declaratory Ruling, WC Docket No. 13-3, FCC 16-90 (rel. Jul. 15, 2016) (*Declaratory Ruling*).

[2] Petition for Reconsideration of the Ad Hoc Telecommunications Users Committee, WC Docket No. 13-3, at 2 (filed Aug. 22, 2016) (Petition).

[3] In the unlikely event the Commission finds this Petition to be timely-filed, it should waive the deadline for USTelecom to file in opposition, as discussed below.

I. THE PETITION SHOULD BE DISMISSED ON PROCEDURAL GROUNDS AS IMPROPERLY AND LATE-FILED.

USTelecom is filing this Opposition out of an abundance of caution in the unlikely event that the Commission deems the Petition to be timely and otherwise properly filed. We presume that the Commission has already determined that the Petition is not "timely filed in proper form," as it has not issued public notice to that effect in the Federal Register.[4] Moreover, because the deadline for filing oppositions to petitions for reconsideration "runs from the date of public notice" of a petition's filing in the Federal Register, we also dispute that the deadline for filing an opposition to this Petition has even been triggered.[5]

Under the Commission's rules, a petition for reconsideration of an action taken by the Commission must be filed "within 30 days from the date of public notice of such action."[6] Ad Hoc seeks reconsideration of a declaratory ruling, and because a declaratory ruling is a "non-rulemaking document," the date of public notice is the release date.[7] The *Declaratory Ruling* was released on July 15, 2016 and became effective on that same date;[8] therefore public notice occurred on that date, and the last day for filing a timely request for reconsideration was August 15, 2016.[9] The Petition was filed a week later on August 22. Ad Hoc offers no explanation for its failure to file the Petition within 30 days, and fails to seek a waiver of the filing deadline for good cause or otherwise. Thus, this Petition is untimely and is not properly before the Commission.

---

[4] *See* 47 C.F.R. § 1.429(e).

[5] *Id.*

[6] 47 C.F.R. § 1.429(d).

[7] *See* 47 C.F.R. § 1.4(b)(2).

[8] *See Declaratory Ruling* ¶ 211.

[9] The 30th day after public notice was August 14th, which fell on a Sunday, so the filing deadline is the next business day. 47 C.F.R. § 1.4(j).

The Commission should not deem this Petition to be timely merely because the *Declaratory Ruling* was decided in the same document – FCC 16-90 – as other orders adopted in notice and comment rulemaking proceedings.[10] The Commission included a separate ordering clause to make the *Declaratory Ruling* effective "upon release," which indicates its intent to treat that ruling as a separate action.[11] The Commission's decision to combine multiple decisions as a matter of convenience does not change the non-rulemaking nature of the decision being challenged in this Petition. Moreover, Ad Hoc clearly seeks reconsideration only of the Commission's grant of USTelecom's Petition for Declaratory Ruling, as indicated by the caption and content of the Petition. The Commission therefore is well within its discretion to require Ad Hoc to comply with the time limitations applicable to non-rulemaking decision documents, and to find that the Petition is untimely filed.

II. AD HOC'S CLAIMS ARE MERITLESS AND SHOULD BE DENIED ON SUBSTANTIVE GROUNDS.

In its Petition, Ad Hoc acknowledges that the Commission's analysis in the *Declaratory Ruling* is sound, but argues that it did not go far enough because it "ignored the fact that the Commission has yet to act on its proposal to apply those same rate protections to access charges for the originating or 'open' end of toll-free calls."[12] As an initial matter, in the *USF/ICC Transformation Order* the Commission did not propose to apply the same rate protections to originating access charges for toll-free service, as Ad Hoc claims, but merely asked whether it

---

[10] A *Second Report and Order* and *Order on Reconsideration* in GN Docket No. 13-5 and RM-11358 were also released as FCC 16-90. Public notice of documents in notice and comment rulemakings occurs on the date of publication in the Federal Register. *See* 47 C.F.R. 1.4(b)(1).

[11] *Declaratory Ruling* ¶ 211. On the other hand, the Commission ordered that the *Second Report and Order* and *Order on Reconsideration* would be effective "30 days after publication in the Federal Register" or after certain information collection requirements are approved by OMB, as applicable. *Id.* ¶ 213.

[12] Petition at 3.

should treat originating access reform differently for toll-free traffic.[13] Thus, Ad Hoc is wrong about the Commission ignoring its own proposal. Moreover, in the *Declaratory Ruling* the Commission addressed the status of its regulations regarding originating access minutes as determined in the *USF/ICC Transformation Order*:

> Interstate switched access services have been removed from traditional access charge regulation and placed under transitional pricing rules that cap the rates charged for each rate element. ... Originating access and other remaining rate elements will remain capped at current levels until a transition timetable is established for these rate elements.[14]

Even if the Commission did not specifically address originating access charges for toll-free calls in the *USF/ICC Transformation Order* or the *Declaratory Ruling*, Ad Hoc offers no evidence or basis for concluding that the Commission did not intend its general rulings on originating access to apply to such charges. Moreover, even if Ad Hoc is right that the Commission failed to act on proposals that (according to Ad Hoc) were mooted in 2000 but again became relevant and were not addressed over a decade later as part of the *USF/ICC Transformation Order*,[15] it had the opportunity to raise these concerns and seek redress in the *Declaratory Ruling* proceeding, but failed to do so in its comments.[16] Ad Hoc therefore waived any right to complain at this late juncture that the Commission overlooked something that was not even expressly before it in this proceeding.

---

[13] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18111, ¶ 1303 (2011), *aff'd sub nom In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (*USF/ICC Transformation Order*).

[14] *Declaratory Ruling* ¶ 25 (internal citations omitted).

[15] *See* Petition at 4-5.

[16] *See* Comments of the Ad Hoc Telecommunications Users Committee, WC Docket 13-3 (filed Feb. 25, 2013).

Ad Hoc's Petition is in essence a petition for the Commission to revive, or initiate, a rulemaking.[17] As noted, this request is outside the scope of the *Declaratory Ruling* proceeding. Ad Hoc is free to seek the same relief in another vehicle, but has not demonstrated that the Commission erred by failing to address its claims here.

III. THE COMMISSION SHOULD CONSIDER USTELECOM'S OPPOSITION.

Ad Hoc did not directly notify USTelecom that it was seeking reconsideration of the ruling granting our petition, despite the Commission's encouraging of parties to serve petitions on parties "where the number of parties is relatively small."[18] USTelecom only became aware of the Petition several days after it was filed, and due to the lack of service directly to USTelecom and intervening Labor Day holiday, we were unable to file this Opposition within 15 days of Ad Hoc's untimely filing.[19] We reiterate (and otherwise do not waive) our position that the deadline for opposing the Petition has not yet been triggered.[20] If the Commission disagrees and determines that the Petition is timely and appropriately filed, it nevertheless should accept and consider the arguments in this Opposition; to decide otherwise would be unfair and contrary to the public interest.

The Commission may waive its rules "for good cause shown,"[21] and generally waiver is appropriate where the particular facts make strict compliance inconsistent with the public

---

[17] *See* Petition at 6 (asking the Commission to "restore [its] rule that applies the same rate protections to both originating toll-free access minutes and terminating switched access minutes").

[18] *See* 47 C.F.R. § 1.429(e).

[19] *See* 47 C.F.R. 1.429(f) ("Oppositions to a petition for reconsideration shall be filed within 15 days after the date of public notice of the petition's filing ...").

[20] *See supra* note 5 and accompanying text.

[21] 47 C.F.R. § 1.3.

interest; that is, if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest.[22] The Commission may also take into account considerations such as hardship and equity when considering whether to waive its rules.[23]

Although Ad Hoc has given the Commission ample reasons to dismiss and deny the Petition on its own motion, thereby making the arguments in this Opposition moot, we ask that USTelecom not be penalized for opposing the Petition 16 rather than 15 days after it was filed. The public interest is not served when Petitioners fail to abide by regulatory deadlines and requirements in seeking relief from the Commission, or when they raise non-persuasive arguments that are not properly before the Commission. We therefore ask the Commission to waive the deadline for opposing the Petition to the extent necessary to consider USTelecom's arguments in this Opposition.

IV. CONCLUSION

For the reasons set forth herein, the Commission should dismiss the Petition as untimely and improperly filed, or in the alternative deny it on the merits for failure to present arguments that rely on facts not previously presented to the Commission or changed circumstances.

Respectfully submitted,

By: _____

Diane Griffin Holland
United States Telecom Association
607 14th Street, N.W., Suite 400
Washington, DC 20005
(202) 326-7300

Dated: September 7, 2016

[22] *See Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[23] *See, e.g., WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972).

CERTIFICATE OF SERVICE

I, Karen Rena Stephens, hereby certify that on the 7th day of September 2016 I caused a copy of the foregoing *Opposition of the United States Telecom Association* to be served, by electronic mail, upon the following:

Colleen Boothby
Stephen J. Rosen
Levine, Blaszak, Block & Boothby, LLP
2001 L Street, NW, Suite 900
Washington, DC 20036
202-857-2550
Counsel for Ad Hoc Telecommunications
Users Committee
cboothby@lb3law.com
srosen@lb3law.com

/s/ Karen Rena Stephens