

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

In the Matter of	)	
Ensuring Customer Premises Equipment Backup Power for Continuity of Communications	)	PS Docket No. 14-174
Technology Transitions	)	GN Docket No. 13-5
Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers	)	RM-11358
Special Access for Price Cap Local Exchange Carriers	)	WC Docket No. 05-25
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services	)	RM-10593

**PETITION FOR RECONSIDERATION OF  
THE UNITED STATES TELECOM ASSOCIATION**

Pursuant to section 1.429 of the Commission's rules,<sup>1</sup> the United States Telecom Association submits this Petition for Reconsideration of the Declaratory Ruling in the above-captioned proceedings.

On November 25, 2014, the Commission issued what purports to be a declaratory ruling that changed the long-standing definition of what constitutes a "discontinuance, reduction, or impairment of a service" for purposes of interpreting section 214.<sup>2</sup> In doing so, the Commission

---

<sup>1</sup> 47 C.F.R. §1.429.

<sup>2</sup> *Technology Transitions, et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593; FCC 14-185 (rel. Nov. 25, 2014) ("*Declaratory Ruling*").

imposed new substantive requirements, or rules, on providers without any notice or opportunity for comment. The new definition is impermissibly vague and, instead of terminating a controversy or removing uncertainty, it creates unnecessary confusion. Specifically, the Commission holds that a “service” may no longer be defined by its provider (in, for example, a tariff or product guide), but instead should now be defined using an amorphous “functional test that takes into account the totality of the circumstances from the perspective of the relevant community or part of a community.”<sup>3</sup> Under this new view, providers are unable to gauge what services or aspects of their products or services might require a section 214 filing to discontinue or grandfather. Instead, the new view leaves providers guessing whether particular changes they may make to their services – or changes they may make to their facilities that have ancillary effects on their services – trigger a 214 application process. The resulting uncertainty complicates and will almost certainly impede the process of upgrading consumers to next-generation networks and services. The Commission should withdraw its Declaratory Ruling and instead rely on the already established rulemaking process so that all parties may comment on its new interpretation.

**I. The Commission Improperly Imposed New Substantive Requirements Without Adequate Notice or Opportunity for Comment.**

The Commission cannot make substantive changes to the application of section 214 through a declaratory ruling. The Commission has effectively redefined what constitutes a “service” under section 214. This is a substantive change that will affect all providers and that must be implemented, if at all, pursuant to a rulemaking. As such, the Declaratory Ruling is procedurally infirm and must be withdrawn.

---

<sup>3</sup> *Declaratory Ruling* at ¶ 117.

An agency cannot change existing rules simply by adopting a new test or by issuing guidance under the guise of a clarification or interpretation, as the Commission has attempted to do here. The Supreme Court has made clear that if an agency effects “a substantive change” in an existing regulation, an Administrative Procedure Act (“APA”) rulemaking is required.<sup>4</sup> Likewise, the D.C. Circuit has held that new rules that work “substantive changes”<sup>5</sup> or “major substantive legal additions”<sup>6</sup> to prior regulations are subject to the APA’s rulemaking procedures.<sup>7</sup> As the court in *Sprint Corp. v. FCC* explained, “when an agency changes the rules of the game ... more than a clarification has occurred.”<sup>8</sup> Thus, “fidelity to the rulemaking requirements of the APA” bars courts from permitting agencies to use the declaratory ruling process to “avoid those requirements by calling a substantive regulatory change an interpretative rule.”<sup>9</sup>

Under these well-established tenets, the Commission has recognized that “a declaratory ruling may not be used to substantively change a rule” and avoid the APA’s rulemaking requirements.<sup>10</sup> While a declaratory ruling is appropriate for purposes of “terminating a

---

<sup>4</sup> *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100-01 (1995) (internal quotation marks omitted); see 5 U.S.C. § 553.

<sup>5</sup> *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (“*Sprint*”).

<sup>6</sup> *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000).

<sup>7</sup> See also *Alaska Prof’l Hunters Ass’n v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) (“*Alaska Prof’l Hunters*”) (“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule ....”); *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (“If a second rule repudiates or is irreconcilable with [a prior rule], the second rule must be an amendment of the first ....”) (quotation mark omitted).

<sup>8</sup> *Sprint*, 315 F.3d at 374; see also *SBC Inc. v. FCC*, 414 F.3d 486, 497-498 (3d Cir. 2005).

<sup>9</sup> *U.S. Telecom Ass’n*, 400 F.3d at 33-35; see *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000); *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997).

<sup>10</sup> *Auditory Assistance Device Order*, 26 FCC Rcd at 13603 ¶ 10 & n.22 (citing *U.S. Telecom Ass’n*, 400 F.3d at 35); *Travelers Information Stations, et al.*, 25 FCC Rcd 18117, 18121 ¶ 12 & n.37 (2010) (“[A] declaratory ruling may not be used to substantively change a policy.”) (citing *U.S. Telecom Ass’n*, 400 F.3d at 35).

controversy or removing uncertainty,”<sup>11</sup> it may not be used *sua sponte* or otherwise to change existing interpretations or rules.<sup>12</sup>

There is no question that in this instance, the Commission has changed the rules of the game. The Commission did not “clarify” existing rules or interpretations; it substantively changed the rules by adding presumptions and factors to the section 214 process, including for the first time in the term “service” those features and functionalities “outside of the tariff definition” that “the community or part of a community reasonably would view as the service provided by the carrier.”<sup>13</sup> With this never-before articulated or applied test, the Commission’s more expansive definition overturns the long held view that a provider offering a “service” is the one that defines that service. Instead, under the Commission’s new view, the service will be defined by post hoc determinations based on the presence of third-party services and devices that a provider may not even know exist.

The law is clear that a carrier’s interstate telecommunications services are defined by the terms of its tariff or contracts. Section 214 directs carriers to obtain from the Commission a certificate of public convenience and necessity before “discontinu[ing], reduc[ing], or impair[ing] service to a community, or part of a community.”<sup>14</sup> Congress’s use of “carrier” and “service” — and its placement of § 214 within Title II — establishes that § 214(a) is limited to actions by telecommunications carriers that affect the provision of interstate telecommunications

---

<sup>11</sup> 47 C.F.R. § 1.2 (incorporating the declaratory ruling provision of the APA, 5 U.S.C. § 554(e)).

<sup>12</sup> See *Alaska Prof'l Hunters*, 177 F.3d at 1034.

<sup>13</sup> Declaratory Ruling, at ¶¶ 115, 117.

<sup>14</sup> 47 U.S.C. § 214(a). In its review, the Commission must confirm “that neither the present nor future public convenience and necessity will be adversely affected thereby.” *Id.*

services.<sup>15</sup> The statute defines “[t]elecommunications service” as the service offered, “regardless of the facilities used.”<sup>16</sup> As the Commission and courts have recognized, a “service” is defined by what a provider offers to its customers, not the facilities a provider uses or the other uses to which the customer may put the service.<sup>17</sup> Thus, the interstate telecommunications services that a carrier offers are defined by the terms of its federal tariff or, in the case of telecommunications services that have been detariffed, in its contracts with its customers.<sup>18</sup> Where detariffing has not occurred, telecommunications carriers must file with the Commission “schedules” — that is, tariffs — that set forth the “charges, classifications, regulations, [and] practices” that define the specific interstate telecommunications services they offer.<sup>19</sup> Moreover, under the filed tariff doctrine, the tariff “conclusively and exclusively enumerate[s] the rights and liabilities” of the carrier and its customer.<sup>20</sup> Enforcing that doctrine, the Supreme Court has held that “[d]eviation from [the filed tariff] is not permitted” and that claims by customers seeking “privileges not

---

<sup>15</sup> See *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994) (holding that § 214, like “[a]ll of the described regulation . . . under [T]itle II . . . hinges upon the premise that the regulated entity is a common carrier”); accord *id.* at 1484; see also *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (holding that the “tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act” and that § 214, among other provisions of “the Communications Act subchapter applicable to Common Carriers” is “premised upon the tariff-filing requirement of § 203”).

<sup>16</sup> 47 U.S.C. § 153(53).

<sup>17</sup> See, e.g., *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 990-91 (2005) (finding that “a telephone company “offers” consumers a transparent transmission path that conveys an ordinary-language message, not necessarily the data-transmission facilities that also “transmi[t] . . . information of the user’s choosing,” § 153(43), or other physical elements of the facilities used to provide telephone service, like the trunks and switches, or the copper in the wires.”).

<sup>18</sup> Indeed, one of the basic tenets of contract law is that it is the offeror who controls the offer. See, e.g., *Jones v. Georgia Pac. Corp.*, 90 F.3d 114, 117 (5th Cir. 1996); *Bourque v. FDIC*, 43 F.3d 704, 711 (1st Cir. 1994).

<sup>19</sup> 47 U.S.C. § 203(a)-(b)(1).

<sup>20</sup> *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (internal quotation marks omitted; emphasis original); see *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (holding that a federal tariff is “the law’ and exclusively govern[s] the rights and liabilities of the carrier to the customer”).

included in the tariff . . . are barred.”<sup>21</sup> Thus, under established precedent, unless specified in the tariff or the contract, a service is not defined by the uses to which a customer may put a carrier’s service; it is defined by what is offered.<sup>22</sup> In contrast, the Declaratory Ruling effectively requires providers to ensure that their offerings include more than what is included in the tariff or contract (suggesting that, at most, a tariff provides some “evidence” of the service being offered).

Indeed, there is a risk that the Commission’s interpretation could be used to argue that a community’s perception might trump the language of a tariff including any limitations therein.

Further, precedent confirms that section 214 does not require Commission approval before providers make changes to non-tariffed features or functionalities. The D.C. Circuit has refused to extend § 214 to circumstances where a rate discount was discontinued but the “services which had been offered under [a carrier’s] tariff were still available” from the carrier, noting that “[t]he attendant burdens” of interpreting § 214 to apply despite such continuity of service “would be enormous.”<sup>23</sup>

For these reasons, the Commission’s ruling that providers must maintain non-tariffed functionality or features unless and until they obtain permission under section 214 to discontinue a service conflicts with the established filed rate doctrine. To have appropriately proffered such a substantive change, the Commission would have needed to place parties “on notice” that it was proposing a rule change.<sup>24</sup> The Commission did not do so here, even though it recognized in the Notice section of this proceeding that it must seek comment on the appropriateness of the change

---

<sup>21</sup> *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 226 (1998).

<sup>22</sup> See 47 U.S.C. § 153(53) (defining “[t]elecommunications service” as the service offered, “regardless of the facilities used”).

<sup>23</sup> *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1233 (D.C. Cir. 1980).

<sup>24</sup> See *Sprint*, 315 F.3d at 376.

being made here. Specifically, it sought comment on how to establish “criteria to evaluate replacement technologies when a carrier files an application to discontinue a retail service pursuant to section 214(a),”<sup>25</sup> including criteria related to functionality. Remarkably, the Commission even asked what call functionality is relevant in evaluating section 214 filings, and with regard to non-call functionality, whether it should consider functionality of third-party CPE and/or services such as home alarms, fax machines and medical alert monitors.<sup>26</sup> We agree that notice and an opportunity for comment are necessary before the Commission may impose functionality criteria as described in the Declaratory Ruling. Having failed to provide such notice before changing established precedent, the Declaratory Ruling is unlawful and should be withdrawn.

## **II. The Declaratory Ruling’s New Interpretation of “Services” Subject to Section 214 Is Impermissibly Vague.**

The Commission’s new amorphous standard, if implemented, will deny providers of due process if it was enforced against them and is, as such, impermissibly vague. Additionally, implementing it could increase delays in upgrading networks and in bringing new products and services to customers.

The D.C. Circuit has repeatedly held that “[i]n the absence of notice – for example, where the regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.”<sup>27</sup> The Commission,

---

<sup>25</sup> See *Technology Transitions Notice*, *supra* note 2, at ¶ 93.

<sup>26</sup> *Id.* at ¶ 97.

<sup>27</sup> *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-29 (D.C. Cir. 1995) (“*Gen. Elec.*”). Here, providers will potentially be subject to enforcement action for failure to correctly predict when a section 214 application must be filed.

too, has acknowledged that “due process” requires that parties receive fair notice.<sup>28</sup> “It is hornbook law that ‘where [a] regulation is not sufficiently clear to warn a party about what is expected of it – an agency may not deprive a party of property by imposing civil or criminal liability.’”<sup>29</sup> Thus, as the Commission has noted, liability cannot be imposed unless “a regulated party acting in good faith would be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform.”<sup>30</sup>

Here, the standard contemplated by the Declaratory Ruling is so amorphous that it leaves providers without appropriate notice as to what services or products might or might not be required to undergo section 214 review. Nor does it provide notice as to what changes in services might trigger a 214 review. The Commission’s new standard will instead require providers to guess how some members of a community might be using their services, including whether they are employing third party products or services. Those could include, by the Commission’s own examples, the use of outside vendors’ systems or devices – products which the provider may never be aware of or contemplate.<sup>31</sup> Indeed, under the Commission’s formulation, a 214 application could be required even if a small number of members of a

---

<sup>28</sup> Notice of Apparent Liability, *In re SBC Commc’ns Inc.; Apparent Liability for Forfeiture*, 17 FCC Rcd 1397, ¶ 22 n.51 (2002) (emphasis added) (quoting *Trinity Broad. of Florida, Inc.*, 211 F.3d 618, 628 (D.C. Cir. 2000)); see also Order on Review, *Infinity Broad. Corp. of Florida*, 24 FCC Rcd 4270, ¶ 17 (2009).

<sup>29</sup> Forfeiture Order, *In re SBC Commc’ns Inc.; Apparent Liability for Forfeiture*, 17 FCC Rcd 19923, ¶ 5 (2002) (quoting *Trinity Broad.*, 211 F.3d at 628).

<sup>30</sup> Forfeiture Order and Notice of Apparent Liability for Forfeiture, *Syntax-Brilliant Corp.*, 23 FCC Rcd 6323, ¶ 19 n.70 (2008) (citing *Gen. Elec.*, 53 F.3d at 1329).

<sup>31</sup> The Commission cites to precedent that allows non-harmful devices and equipment to be attached to the telephone network as support for its assertion that a provider’s “service” may include features outside of the tariff definition. See Declaratory Ruling at ¶117 (citing, *inter alia*, *Use of the Carterphone Device in Message Toll Telephone Service, et al.*, Docket No. 16942, et al., Decision, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968)). We do not dispute the right of consumers to attach legal devices to the telephone network, but if the Commission seeks to treat those devices, once connected, as part of a provider’s service offering, it must first provide notice and seek comment.

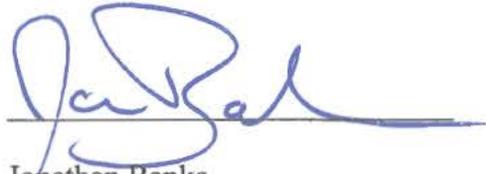
community are using an obsolete model of third party equipment that relies on a legacy feature or service, one that a provider might have no way of knowing was still being used.

The impact of such a requirement means that a provider cannot realistically plan its own product and service life cycles, when it has no way of knowing whether it will have to subject itself to section 214 review as it reviews its product and service line. To avoid the risk of an enforcement action, providers may be effectively placed in the position of having to seek a pre-determination as to whether the Commission might decide that some change or modification in its product or service would somehow be viewed as a reduction or impairment in the now amorphous “service” some community might view it to be offering.

The very fact of having to undergo review pursuant to section 214 handicaps carriers in a way their competitors are not. Even if approval to make changes is eventually granted, the Commission’s process often has unpredictable delays and timelines. The Commission may – and regularly does – remove a proceeding from the regular timeline, leaving providers with no way of knowing when the Commission’s review might be completed or how to effect a resolution.

In short, the Commission’s dramatic shift in how it defines a provider’s service for purposes of section 214 analysis leaves providers no clear guidance as to when they might need to seek review under section 214, even for minor changes in features and functionality. Providers cannot identify with any ascertainable certainty the standards to which the Commission expects them to conform. As such, the Declaratory Ruling is improper and should be withdrawn, and the Commission should refrain from imposing any additional changes to the 214 process until the rulemaking in this proceeding is completed.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'Jonathan Banks', written over a horizontal line.

Jonathan Banks  
~~Robert Mayer~~  
U.S. Telecom Association  
607 14th Street, NW  
Suite 400  
Washington, D.C. 20005  
(202) 326-7300

December 23, 2014