

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

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

**OPPOSITION OF COMPTTEL TO THE PETITION FOR RECONSIDERATION OF THE
UNITED STATES TELECOM ASSOCIATION**

The Commission clarified in its *Declaratory Ruling* that the application of section 214 of the Communications Act of 1934, as amended, (“the Act”) is not limited to tariffed services or by the description of the service in a tariff. Rather, the Commission “takes a functional approach that looks at the totality of the circumstances” in determining whether a change constitutes a discontinuance, reduction, or impairment of service.¹ The United States Telecom Association (“USTelecom”) filed a petition for reconsideration, alleging the Commission has changed rather

¹ Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, GN Docket No. 13-5 *et al*, FCC 14-185, ¶¶ 114 – 115 (2014)(“ Declaratory Ruling”).

than clarified existing law. Contrary to USTelecom’s contention, the Commission’s clarification is consistent with existing law on the matter. As such, the Commission should deny the Petition.

It is well established that the Commission may “on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.”² Section 214 states that 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...”³ As the incumbent carriers have begun to discontinue legacy TDM-based services and replace those services with IP-based service, it has become apparent that some of the incumbents’ new IP-based services may be priced higher than existing TDM services and lack capabilities of the TDM services upon which consumers have come to rely. For example, Verizon disclosed to subscribers and regulators that the technological platform over which it intends to offer its fixed wireless IP voice service, once it retires its copper facilities, may not support fax machines, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems.⁴ AT&T, in its Proposal for Wire Center Trials, states that Wireless Home Phone and Wireless Home Phone and Internet currently does not support alarm monitoring, medical alert and credit card validation applications.⁵

² 47 C.F.R. § 1.2 (incorporating the declaratory ruling provision of the APA, 5 U.S.C. § 554(e)).

³ 47 U.S.C. 214.

⁴ Verizon New York Inc. and Verizon New Jersey Inc., *Section 63.71 Application of Verizon New York Inc. and Verizon New Jersey Inc. for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Discontinue the Provision of Service*, WC Docket No. 13-150, Second Response to Information, Data and Document Request, at 11 (filed Sept. 4, 2013), <http://apps.fcc.gov/ecfs/document/view?id=7520942191> (VZ Second Response to Information Request).

⁵ Letter from Christopher M. Heimann, General Attorney, AT&T Services, Inc., to Marlene H.

AT&T acknowledged that these applications are vitally important to its customers and committed to supporting them.⁶ Verizon, on the other hand, has indicated its view that the fact that certain services/functionalities will cease to be supported does not constitute a discontinuance, reduction, or impairment of a service if those services/functionalities are not specifically listed as a supported service/functionality in its tariff.⁷ In the *Declaratory Ruling*, the Commission clarified that the definition of a “service” in section 214(a) is not limited to the description of a service in a tariff filing. As the Commission clarified, a carrier’s tariff definition of its own service is important evidence of the service provided, but it is not dispositive. The community’s (or part of a community) view of a service is also relevant to the definition of a service under section 214(a).⁸

USTelecom asserts that, since “the law is clear” that the “service” at issue in section 214(a) is solely defined by the terms of a carrier’s tariff or contracts,⁹ the Commission was required under the APA to issue an NPRM seeking input on its proposed clarification before adopting it. But USTelecom provides no precedent to support its claim that such a “clear” standard existed in the context of Section 214(a) prior to the adoption of the *Declaratory Ruling*. Rather, USTelecom argues that such clarity must be inferred based on its assertions that (1) “the Commission and the courts have recognized, a ‘service’ is defined by what a provider offers to

Dortch, Secretary, Federal Communications Commission, GN Docket Nos. 13-5, 12-353, (filed Feb. 27, 2014) (“AT&T Proposal for Wire Center Trials”) at Attach., p. 15 (“AT&T Plan”).

⁶ *Id.*

⁷ *See Declaratory Ruling* at ¶ 114.

⁸ *Id.* at ¶ 115.

⁹ Petition at 4.

its customers, not the facilities a provider uses or the other uses to which a customer may put the service”¹⁰ and (2) under the filed rate doctrine, the service provider defines the scope of the service offered.¹¹ USTelecom offers no basis for concluding that inference justifies a determination that a rule is “clear” and well-established. This is itself fatal to the argument. In any event, neither of the assertions USTelecom offers in support of its purported inference is remotely persuasive.

First, USTelecom relies on *Brand X* to support its claim as to what Commission and Court precedent is in defining services.¹² But the Court’s discussion in *Brand X* (and the underlying decision by the Commission) did not focus on the carrier’s tariff or contract language in defining the service and accepted the extent of the Commission’s reliance on the consumer’s point of view.¹³ Therefore, it does not support US Telecom’s assertion that the law is clear that a carrier’s service is strictly “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.”¹⁴

Second, USTelecom also relies heavily on case law applying the filed rate doctrine to support its premise that the “service,” for purposes of the application of section 214(a), is defined by the language of a carrier’s tariff or service contract. This likewise makes no sense. To begin with, the filed rate doctrine, which is codified by section 203 of the Act, only applies to tariffed

¹⁰ Petition at 4-5.

¹¹ Petition at 5.

¹² Petition at 5, n. 17 citing to *National Cable & Telecommunications Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005)(“Brand X”).

¹³ *Brand X* at 988.

¹⁴ Petition at 5.

offerings, so it is irrelevant to detariffed services offered under contract.

As to tariffed services, the filed rate doctrine does not support the conclusion that “service” as used in Section 214(a) must be defined by the terms of a carrier’s tariff offering. Nothing in the language of section 214(a) indicates that the “service” at issue must or should be *specifically identified* by the carriers’ tariffed description of its offering. And, if anything, by defining the prior approval provision in Section 214(a) as triggered by discontinuance, reduction, or “impairment” of service to a “community or part of a community,” the statutory language focuses on the perspective of customers. It is more sensible to assess whether service has been “impaired” from the perspective of the customer rather than from the perspective of the service provider. Similarly, determining whether the effects have been experienced by a “community” or “part of community” again signifies that the focus should be on the customers’ use of the service, not the provider’s description of the service.

Furthermore, defining a service differently in the filed rate doctrine and market exit review under section 214(a) contexts makes sense because the two regimes serve entirely different purposes. The filed rate doctrine is concerned primarily with preventing a carrier from discriminating among end-users, i.e., ensuring all similarly-situated customers are charged the same rate and subject to the same terms and conditions for a service.¹⁵ The primary purpose behind the application of section 214 is the establishment of safeguards to protect the “public convenience and necessity,” i.e., preventing the public from losing a service unchecked.

In any event, the non-discrimination principle of the filed rate doctrine is not compromised by the Commission looking beyond the tariff/contract, to the totality of the

¹⁵ *Hill v. AT&T Corp.*, 138 F.3d 1308, 1315-7 (2d Cir. 1998). The other is nonjusticiability (preserving Commission authority over rate-setting) which is also not impacted.

circumstances, in determining if a service is being discontinued, reduced or impaired to a community. The Commission’s functional definition of “service” as used in Section 214(a) does not bestow any undue advantage or provide to a particular customer something that is not open to others in the same situation,¹⁶ as the service is being defined by the impact on all customers in the community or a part of a community. Indeed, the Commission clarifies that not every functionality supported by a network is *de facto* a part of the “service,” specifically noting that an “important factor in this analysis is the extent to which the functionality traditionally has been relied upon by the community.”¹⁷ On the other hand, the public’s loss of a service upon which consumers have come to rely, without appropriate safeguards, would compromise the public convenience and necessity.

For the foregoing reasons, the Commission should deny USTelecom’s petition.

Respectfully submitted,

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¹⁶ *AT&T Co. v. Central Office Tel., Inc.* at 224.

¹⁷ *Declaratory Ruling* at ¶ 119.