

**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

**OPPOSITION OF PUBLIC KNOWLEDGE
TO PETITION FOR RECONSIDERATION
OF
UNITED STATES TELECOM ASSOCIATION**

Public Knowledge (PK) files this Opposition to the Petition for Reconsideration filed by the United States Telecom Association (USTA) on December 23, 2014.¹

¹ Petition for Reconsideration of the United States Telecom Association, *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 (Dec. 23, 2014) (USTA Petition).

SUMMARY

USTA's Petition fails because it proceeds from a false premise, *i.e.*, that the Commission altered the substantive rights of any party. To the contrary, the confusion surrounding Verizon's § 214(a) request to discontinue all wireline service to two communities following destruction of those networks by Superstorm Sandy² ("*Fire Island 214(a)*"), made it abundantly clear that critical questions of first impression remained unclear throughout the stakeholder community. That staff removed the application from fast track, and sought extensive new information not included in the initial application, further demonstrates that interpretation of key statutory terms remained confused and unsettled.

All the Commission has done here is issue some additional guidance to potential parties (including USTA's members) of how the Commission intends to interpret heretofore unresolved statutory terms in adjudications governed by Section 214(a).³ This is the very archetype of an "interpretive" rule designed to assist parties and avoid time-consuming additional requests for data. Parties remain free to challenge the Commission's interpretation in precisely the same way they were before the *Declaratory Ruling* in any future adjudication. The only difference between applications for Section 214(a) filed before the *Declaratory Ruling* issued and those filed since

² See 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 (June 7, 2013) (*Fire Island § 214(a) Application*).

³ See *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, Notice of Proposed Rulemaking and Declaratory Ruling (rel. Nov. 25, 2014).

then is that those filings have a better idea as to what information the Commission needs to process an application.

Likewise, any subscriber could previously have filed a complaint that a carrier allowing service to degrade so that it no longer functioned violated § 214(a), or the Commission could have brought an enforcement action at any time. USTA points to no rule or previous § 214(a) adjudication that would have foreclosed such an action. While it is equally true that no rule or prior case explicitly authorized such a complaint, this does not render the Declaratory Ruling a change in the law. To the contrary, as the Commission explained, it clarified existing law and thus removed uncertainty.

If USTA's position on what constitutes a change in the law, and thus a legislative decision subject to Administrative Procedures Act (APA) notice and comment, were accepted, it would effectively foreclose any interpretive ruling. However, as past Commission practice shows, it is precisely in situations such as this, where disputes over the nature of a statutory duty arise, that an interpretive declaratory ruling is appropriate.⁴

For the same reason, the *Declaratory Ruling* is not impermissibly vague. USTA's members cannot be "confused" about their "new obligations" because they do not *have* any new obligations—a confusion the Commission may resolve by denying their Petition. The sole function of the Declaratory Ruling was to provide additional clarity on when to file a § 214(a) discontinuance request, and how the Commission would evaluate whether the discontinuance "adversely affected" the "present [or] future public convenience and necessity."⁵ It was not designed to answer every single question that might arise, because it is not a rule. USTA

⁴ See, e.g., *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, 22 FCC Rcd 11629, 11631 (WCB 2007) (clarifying duty to complete calls to suspected "traffic pumpers").

⁵ 47 U.S.C. §214(a).

members are no worse off now than they were before with regard to understanding their responsibilities under the statute.

Finally, as a policy matter, PK supports the Commission's lawful action, and urges the Commission to reject the USTA Petition. As demonstrated by the *Fire Island § 214(a)*, genuine confusion over a critical question statutory interpretation exists. AT&T intends to file a § 214(a) request sometime in the second half of this year as part of its proposed test projects for the technology transitions.⁶ A disaster such as Sandy could happen again at any time, raising precisely the same confusion raised in the *Fire Island § 214(a)*. The Declaratory Ruling provides valuable guidance to prospective applicants, prospective stakeholders who may challenge the applications, and avoids needless delay and waste of staff resources on additional requests for information. All of these factors make it highly probable that the next § 214(a) request to discontinue service to another community will occur before a notice and comment rulemaking could be concluded. This is precisely why the APA authorizes interpretive rulings without notice and comment.

ARGUMENT

USTA complains the Commission's Declaratory Ruling "imposed new substantive requirements or rules" and thus constitutes a "legislative rule" subject to APA notice and comment.⁷ USTA misstates the test for a legislative rule. "The mere fact that [an interpretive] rule may have a substantial impact 'does not transform it into a legislative rule.'"⁸ Rather, as explained by the D.C. Circuit in *Central Texas*, an interpretive rule must (a) not repudiate a

⁶ See Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 13-5, GN Docket No. 12-353 (Sept. 9, 2014).

⁷ See USTA Petition at 2.

⁸ *Cent. TX Tel. Coop. v. FCC*, 402 F.3d 205, 214 (D.C. Circ. 2004) ("*Central Texas*").

previous legislative rule;⁹ and, (b) actually interpret a statute or existing rule.¹⁰ In doing so, an interpretive rule may “transform a vague statutory duty or right into a sharply delineated duty or right,”¹¹ but providing greater explanatory detail as to what a law or rule requires does not constitute a substantive rule requiring notice and comment.

I. THE DECLARATORY RULING DID NOT CREATE A NEW SUBSTANTIVE RULE.

Tellingly, USTA points to no previous adjudication or rulemaking which the Declaratory Order purportedly overrules or contradicts. Its reliance on *Sprint*¹² and *USTA*¹³ is therefore misplaced. In both those cases, the D.C. Circuit identified previous *rules*, which the relevant Commission Order substantively changed. While USTA claims that the Commission’s declaratory ruling altered the “rules of the game”¹⁴ and repeatedly states that the Declaratory Ruling worked a substantive change in policy, USTA identifies no actual rule or policy that the Declaratory Ruling contradicts or amends. Nor does USTA produce a single § 214(a) adjudication adopting an interpretation contrary to that provided by the Commission here.

Instead, USTA embarks on an exercise in statutory interpretation of its own. But none of the decisions or rules cited by USTA are on point. Rather, USTA seeks to argue that a ruling limiting the interpretation of § 214(a) to the bare minimum service that arguably complies with the tariff in question would be more consistent with Commission precedent.¹⁵ However, as the D.C. Circuit observed in *Central Texas*, whether a Commission is right or wrong in its

⁹ *Id.* at 211-12.

¹⁰ *Id.* at 213.

¹¹ *Id.* at 214 (citations omitted).

¹² *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003).

¹³ *USTA v. FCC*, 400 F.3d 29 (D.C. Cir. 2005).

¹⁴ USTA Petition at 3 (citing *Sprint Corp. v. FCC*, 315 F.3d 369 (D.C. Cir. 2003)).

¹⁵ *Id.* at 4-6.

interpretation is not the determining factor in whether an order is “legislative” or “interpretive.”¹⁶ What is relevant is whether the order amends or contradicts a previous rule or interpretation of the statute. None of the cases cited by Petitioner address either the question of what constitutes the relevant service for § 214(a) purposes, or what circumstances trigger the obligation to file a § 214(a) application—the two relevant questions here.

USTA’s members will have the opportunity to argue the merits of the statutory interpretation when they file a § 214(a) application, or when the Commission adjudicates a complaint that a carrier has allowed service to degrade to a point that constitutes impairment. As the Commission stressed, the Declaratory Ruling did not predict any specific outcome, but merely advised carriers wishing to apply that they must consider the actual impact on subscribers a pertinent matter of inquiry and not rely on their filed tariff as a shield.

USTA bemoans the purported additional burdens now placed on its members to maintain their lines at a suitable level of operation consistent with the traditional expectation of service to the community, and the additional showing it must now make when applying to discontinue service under the statute. Essentially, USTA argues that because the Commission has made clear that the statute requires more than USTA’s members initially understood (or might like), this clarity imposes new burdens and thus rises to the level of a legislative rule.

This is exactly the argument the D.C. Circuit rejected in *Central Texas*. There, the court addressed a Commission Order clarifying that wireless carriers would need to continue to support number ports to wireline providers outside of their calling area where they had no point-of-presence, even though this imposed considerable expense on the supporting carrier.¹⁷ The court rejected the argument that because this clarification had the affect of forcing carriers to

¹⁶ See *Central Texas*, 402 F.3d at 212.

¹⁷ *Id.* at 208-210.

change their previous practices and incur new costs as a consequence. Critically, and fatal to USTA's argument, the *Central Texas* court explicitly distinguished *Sprint* and *USTA* based on this distinction between working a substantial change to a pre-existing *rule* versus an interpretation of the existing rule requiring carriers to change their pre-existing *practices*.¹⁸

Because USTA does not point to a rule or practice the Commission purportedly modified, the Declaratory Ruling does not constitute a legislative rule. The Commission should therefore deny USTA's Petition.

II. THE DECLARATORY RULING CANNOT BE 'IMPERMISSIBLY VAGUE' BECAUSE IT DOES NOT IMPOSE ANY NEW DUTIES OR RESPONSIBILITIES.

USTA's complaint that the Declaratory Ruling is impermissibly vague likewise fails because the Declaratory Ruling imposes no new obligation. If USTA members desire further clarity as to their existing responsibilities, they have erred in filing a Petition for Reconsideration rather than a Petition for Clarification or a Petition for Declaratory Ruling.

USTA argues that "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."¹⁹ It is hard to see how USTA members are worse off than they were before: a situation in which Verizon was apparently uncertain as to whether it needed to file a § 214(a) when its operations ceased altogether, and which has so far required multiple requests for data so the Commission may determine whether complete elimination of all elements of its tariffed service would adversely affect the present or future public interest and convenience of the New Jersey Barrier Islands. At a minimum, carriers are now relieved of the confusion that total cessation of the tariffed service does not qualify as at

¹⁸ *Id.* at 214-16.

¹⁹ USTA Petition at 8.

least an “impairment,” if not an outright discontinuance. Likewise, carriers are relieved of their apparent confusion that allowing a service to rot away to the point where it no longer functions is not an “impairment.” If carriers require further clarification, they are free to request it, or await clarification via adjudication of complaints.²⁰

It is useful to note the Commission has in the past issued similar Declaratory Rulings reminding carriers of their statutory duties. For example, when rural call completion problems began to surface, the Wireline Bureau, with no notice and comment, issued a Declaratory Ruling reminding carriers of their obligation to terminate calls to all exchanges—including rural exchanges.²¹ This action neither created new duties nor was it impermissibly vague. Similarly, when carriers began to employ “self-help” by refusing to complete calls to alleged “traffic pumpers,” the Wireline Bureau released a Declaratory Ruling clarifying that the Communications Act prohibits carriers from refusing to complete calls.²²

Here, carrier actions and their consequences to consumers once again require the Commission to clarify pre-existing statutory duties. In the wake of Verizon’s confusion as to whether it needed to file a § 214(a) application at all, and the apparent willingness of providers to allow their copper to rot, the Commission needs to clarify to carriers their pre-existing statutory duties. As in the previous cases where the Commission has issued declaratory rulings to clarify carrier statutory responsibilities, the general nature of these clarifications amounts to “yes, that

²⁰ See *Central Texas*, 402 F.3d at 215-16 (Commission not required to consider all aspects or implications of its interpretive ruling, and may defer additional questions until an appropriate time).

²¹ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Declaratory Ruling, 27 FCC Rcd 1351 (WCB 2012).

²² *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11,629, 11,631 (WCB 2007).

thing you're doing: stop it," or "that thing you're not doing: do it." These clarifications have not been unduly vague in the past, and are not unduly vague here.

III. LAW AND POLICY SUPPORT THE COMMISSION'S DECLARATORY RULING.

As an initial matter, USTA is simply wrong as to what the statute requires. Section 214(a) requires the Commission to make a finding that discontinuation or impairment of service would not adversely affect the present or future public convenience and necessity. Just as consideration of an application for an initial license or an application to transfer a license under § 214(a) requires an inquiry beyond the four corners of the tariff to consider broader public interest benefits and harms, so too the application under precisely the same Section to discontinue or reduce the service must extend beyond the four corners of the tariff. Furthermore, as Public Knowledge has repeatedly argued, where the Communications Act or Commission regulation imposes on carriers particular obligations, these obligations are understood by both the carrier and the public as part of the provision of service.²³

Additionally, the Commission has previously exercised § 214(a) authority over permissively detariffed common carrier services.²⁴ If § 214(a) depended solely on the filed tariff, then Commission discontinuance authority would end with the permissive detariffing. The fact that the Commission has reserved § 214(a) authority over permissively detariffed services demonstrates that the definition of service and the nature of the public interest inquiry are not dependent on, and limited to, the four corners of the filed tariff.

²³ See, e.g., Letter from Jodie Griffin, Senior Staff Attorney, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 12-353, GN Docket No. 13-5 (Sept. 25, 2014).

²⁴ See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14,853, 14,900-14,908 (2005).

Finally, as the Commission has noticed on numerous occasions, the tech transition is continuing rapidly. The Commission has a responsibility to ensure that carriers adhere to their statutory obligations to serve their communities until the Commission grants them permission to do otherwise. Carriers should not be permitted to claim confusion, or be permitted to rely on inaccurate understanding of their existing responsibilities. The Commission should not reconsider its entirely lawful and appropriate action to ensure that § 214(a) is properly obeyed.

CONCLUSION

WHEREFORE, the Petition for Reconsideration of the United States Telecom Association should be denied.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that on January 23, 2015, I caused the foregoing Opposition to Petition for Reconsideration to be served upon the following:

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Respectfully submitted,

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