

**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)	RM-10593
)	

OPPOSITION OF GRANITE TELECOMMUNICATIONS, LLC

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Granite Telecommunications, LLC respectfully submits this Opposition to the Petition for Reconsideration (“Petition”)¹ filed by the United States Telecom Association (“USTA”).²

I. Introduction

In the *Technology Transitions NPRM and Declaratory Ruling*,³ the Commission sought comment on proposals to strengthen its “pro-consumer and pro-competition policies and protections in a manner appropriate for the technology transition” and the post transition communications environment.⁴

The discontinuance rules derived from Section 214 of the Act are a crucial component of the Commission’s “pro-competition” policies.⁵ These rules require carriers to obtain Commission approval before discontinuing, reducing, or impairing telecommunications service. The Commission’s public review process helps ensure that the public is protected and harm to consumers is minimized. In the Declaratory Ruling, the Commission clarified that the “service”

¹ Petition for Reconsideration of the United States Telecom Association, *In the Matter of Ensuring Customer Premises Equipment*, PS Docket No. 14-174, *Backup Power for Continuity of Communications 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*, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling, (filed Dec. 23, 2014) (“*Petition*”).

² *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, PS Docket No. 14-174 et al., Order, DA14-1903 (rel. Dec. 30, 2014).

³ *In the Matter of Ensuring Customer Premises Equipment*, PS Docket No. 14-174, *Backup Power for Continuity of Communications 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*, RM-10593, Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185 (rel. Nov. 25, 2014) (“*Technology Transitions NPRM and Declaratory Ruling*”).

⁴ *Technology Transitions NPRM and Declaratory Ruling* at ¶ 2.

⁵ *Id.* at ¶ 5.

that the Commission addresses in its discontinuance process “is defined in a functional manner, and not exclusively by reference to how the service is described in [the carrier’s] tariff.”⁶

This clarification means that the Commission’s Section 214 discontinuance process applies even “where access to third-party services and devices are not defined by the tariff as a part of the service offering.”⁷ For example where consumers who are losing copper-based TDM services are transitioned to wireless service, the Commission will consider the impact of the proposed discontinuance on consumers’ loss of access to faxing, credit card verification services, medial alert services and alarm monitoring that the TDM copper-based network supports.⁸

USTA now seeks reconsideration of the Declaratory Ruling, claiming that the Commission’s ruling changed substantive law, asserting that the Commission’s clarification “overturns the long held view that a provider offering ‘service’ is the one that defines that service.”⁹ USTA further argues that the clarification creates an “impermissibly vague” standard that will deny applicants seeking discontinuance due process.

Granite provides voice and data communications to national companies that need a small number of voice lines (typically 3 to 15) at each of a significant number of geographically dispersed locations. Granite primarily serves its customers with wholesale services obtained from ILECs. In most instances, Granite’s customers lack a meaningful choice among telecommunications suppliers at each particular location where they desire service. In addition, Granite’s customers rely on some of the features of the ILEC’s copper-based TDM services that are not necessarily defined as part of the service under the ILEC tariff or contract. These

⁶ *Id.*

⁷ *Id.* at ¶ 114.

⁸ *Id.* at ¶¶ 98, 116.

⁹ *Petition* at p. 4.

customers will therefore benefit from the Commission’s clarification that it will not simply rubber stamp ILEC claims that the services on which Granite and its customers rely will be available during and after the technology transition.

II. The Commission’s Declaratory Ruling Was a Valid Clarification of its Section 214 Rules

USTA is correct that under the Administrative Procedure Act (“APA”), an agency’s obligation to provide notice depends on whether its decision results in a legislative rule or interpretive rule.¹⁰ A clarification typically falls within the ambit of an interpretive rule which is described as one “issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.”¹¹ USTA is wrong, however, in its characterization of the Declaratory Ruling as a legislative rule; it is plainly a clarification and thus an interpretive rule not subject to the notice and comment procedures set forth in the APA.

A. The Declaratory Ruling is an Interpretive Rule Clarifying the Meaning of Terms Used in Section 214 of the Act

In the Declaratory Ruling, the Commission plainly explains that it is clarifying the application of the term “service” used in Section 214 of the Act and the Commission’s discontinuance rules.¹² The Commission indicates that this clarification is in response to one instance where a carrier seeking Section 214 approval to discontinue service construed the term “service” to be limited to the terms of that carrier’s tariff.¹³

USTA argues that the Declaratory Ruling cannot be an interpretive rule because it

¹⁰ *Petition* at pp. 3-4.

¹¹ *See Clark Reg. Med Ctr. v. HHS*, 314 F.3d 241, (6th Cir. 2002) quoting *Shalala v. Guernsey Memorial Hosp.*, 514 U.S. 87, 99 (1995).

¹² *Technology Transitions NPRM and Declaratory Ruling* at ¶ 114.

¹³ *Id.*

produces a substantive change to established law.¹⁴ But there is no substantive change to the regulation or the Commission’s interpretation of that regulation.¹⁵ USTA fails to cite to any Section 214 cases in which the Commission enunciated a different view. USTA instead relies on definitions from sections of the statute, such as Section 203, that are not applicable to the terms or purposes of Section 214. Other than the single case cited in Commissioner Pai’s dissent, USTA points to no Section 214 jurisprudence where the Commission established that its analysis of whether a service to a community is impaired under Section 214 is limited to the service as defined in the carrier’s tariff or contract.

As the Commission explained in the Declaratory Ruling, Commissioner Pai’s (and thus USTA’s) reliance on *Western Union* is inappropriate. In that case,¹⁶ the complainant asked the Commission to suspend an AT&T tariff filing because it would have an impact on the wholesale service Western Union obtained under tariff.¹⁷ But Western Union also acknowledged that the changes in the terms and conditions of its purchase of wholesale inputs under AT&T’s tariff would not have an impact on the retail service Western Union provided to end users. Because there was no impact on end users, there was no concern with AT&T’s discontinuance.¹⁸

The Declaratory Ruling, in contrast, specifically refers to concerns about potential impairment that end users have raised about proposed transitions from copper networks.¹⁹ These customers rely on the functionality provided over the copper TDM network, such as support for

¹⁴ *Petition* at p. 4.

¹⁵ *See Declaratory Ruling* at ¶ 115.

¹⁶ *Western Union Tel. Co. Petition for Order to Require the Bell System to Continue to Provide Group/Supergroup Facilities*, Memorandum Opinion and Order, 74 FCC 2d 293 (1979) (“*Western Union*”).

¹⁷ *Id.* at 294.

¹⁸ *Id.*

¹⁹ *See Declaratory Ruling* at ¶ 116.

fax machines, medical alert systems, credit card readers and point of sale transaction terminals.²⁰

The Commission's previous actions in the Technology Transitions proceeding substantiate the position that there is no change in the Commission's administration of section 214. In the Technology Transitions Task Force Public Notice,²¹ the Commission considered the value of trials that would assess "whether consumers/businesses lose any capabilities previously available to them or what steps consumers/businesses must take to keep the functionality of certain services."²² In particular, one aim of the proposed trial was to assess the impact of the technology transition on capabilities such as "access to 911 and emergency services, the ability to send and receive a fax, credit card transactions for small businesses, alarm/security systems, and the ability for individuals with disabilities to continue to use the devices they use on a regular basis."²³ Had the Commission intended to limit the scope of its service discontinuance evaluation to the description of the service offered by the carrier, rather than functionality of the service, there would have been little need for the Commission's above inquiry.

B. The Cases On Which USTA Relies Can Easily Be Distinguished

USTA cites several cases in an attempt to bolster its argument that the Declaratory Ruling is invalid because the agency did not first put the issue out for public comment. But the cases that USTA cites do not support USTA's argument.²⁴

²⁰ See *Declaratory Ruling* at ¶ 116.

²¹ Public Notice *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, 28 FCC Rcd. 6346, 6353 (2013) ("*Technology Transitions Notice*").

²² *Id.*

²³ *Id.* at n. 32.

²⁴ USTA places significant weight, for example, on *Shalala v. Guernsey*, 514 U.S. 87, 100-01 (1995), but even in that case the United States Supreme Court held that the agency action under review was an interpretive rule and was not subject to the APA's notice and comment procedures.

First, in *USTA v. FCC*,²⁵ USTA challenged the Commission's declaratory ruling that wireline to wireless ports were mandatory even where the wireless carrier lacked a physical presence in the wireline carrier's local calling area.²⁶ This was a departure from the Commission's first two orders on intermodal number portability which mandated a physical presence as a prerequisite to the portability requirement.²⁷ The D.C. Circuit found that the Commission's decision eliminating the physical location requirement was a legislative rule that could not be adopted absent compliance with the notice and comment procedures in the APA.²⁸ No such departure exists here because USTA's Petition does not identify a prior Commission rule or decision limiting the term "service" as used in Section 214 or the Commission's discontinuance rules to the service as defined in the carrier's tariff or contract. The best that USTA can muster is that there was a "long held view that a provider offering a service is the one that defines the service."²⁹ But USTA offers no case, rule or Commission decision that supports this "long held view." Courts have cautioned that parties with business before the Commission should "exercise[e] caution in light of ambiguous agency law."³⁰ The alternative -- "unilaterally cho[osing]" to adhere to its own interpretation of ambiguous provisions "without Commission sanction or approval ... assume[s] the risk of an adverse Commission decision."³¹ Here of course there is no change; the Commission has never defined - for purposes of Section 214 - that the Commission's evaluation of impairment of a service only examines the parameters of the service

²⁵ *U.S. Telecom Assoc. v FCC*, 400 F.3d 29 (D.C. Cir. 2005).

²⁶ *Id.* at 35.

²⁷ *Id.* at 30-32.

²⁸ *Id.* at 36.

²⁹ *Petition* at p. 4.

³⁰ *See AT&T v. FCC*, 454 F.3d 329, 334 (D.C. Cir. 2006).

³¹ *Id.*

as described in the carrier’s contract or tariff.

Nor does *Sprint Corp v. FCC*³² support USTA’s argument. Sprint challenged the Commission’s Second Payphone Reconsideration Order.³³ In the First Payphone Order, the Commission determined that facilities based providers, including IXCs such as Sprint, must track coinless calls and compensate payphone providers for such calls.³⁴ In the First Payphone Reconsideration Order, the Commission defined the term “facilities-based carrier” and thus extended the tracking and compensation obligations to resellers that owned their own switches.³⁵ The Second Payphone Reconsideration Order, the order on which Sprint sought review, subsequently adopted a new approach to compensation, leaving the IXCs as the sole party responsible for tracking coinless calls compensating payphone providers.³⁶

Not surprisingly, the *Sprint* court found that this clear departure from the Commission’s previous rule that the IXCs and switch based resellers were jointly liable could not be adopted absent compliance with the APA’s notice and comment requirements.³⁷ The *Sprint* court further cited the Commission’s First Reconsideration Order as an example of a clarification — an interpretive rule — because it defined an ambiguous term not previously defined by the agency.³⁸ Here, the Commission is clarifying the meaning of the term “service” as used in its 214 rules. It is not, as the Commission tried unsuccessfully in the Second Payphone Order, reversing a clearly articulated existing rule.

³² *Sprint Corp. v FCC*, 315 F.3d 369 (D.C. Cir. 2003).

³³ *Id.* at 373.

³⁴ *Id.* at 371.

³⁵ *Id.* at 372.

³⁶ *Id.* at 373.

³⁷ *Id.* at 375.

³⁸ *Id.* at 374.

Finally, USTA cites *Alaska Prof'l Hunters Ass'n v. FAA*, 177 F.3d 1030 (DC Cir. 2003) and *Am. Mining Cong. v. Mine Safety & Health Admin*, 995 F.2d 1106, 1109 (D.C. Cir. 1993). The parentheticals spelled out in USTA's petition³⁹ are simply not applicable. The principle cited in the *Alaska Hunting* case only applies where the agency "has given its regulation definitive interpretation." But USTA points to no instance in which the FCC has given such a "definitive interpretation." Likewise, while citing *Am. Mining*, USTA fails to identify the precise prior rule that is irreconcilable with the Declaratory Ruling. That is because there is none, and the Commission is now clarifying the scope of the term "service" under its Section 214 discontinuance rules.

III. The Declaratory Ruling is Not Impermissibly Vague

USTA further claims that the Commission's clarification creates an "amorphous" standard that jeopardizes the due process rights of Section 214 applicants.⁴⁰ This claim is simply not credible.

USTA hypothesizes some rare and unknown use of the carrier's network posing an unforeseen barrier to discontinuance and suggests that carriers will have to "guess" how consumers are using their services. But the Commission is not addressing this issue in the abstract. Rather it is addressing a serious issue resulting from widespread use of the functionality of the ILEC's copper based network for uses other than those specifically enumerated in the carrier's tariff. The Commission explained that it was concerned whether the technology transitions underway could have an impact on capabilities currently available to consumers such as "access to 911 and emergency services, the ability to send and receive a fax, credit card transactions for small businesses, alarm/security systems, and the ability for individuals with

³⁹ *Petition* at n. 7.

⁴⁰ *Petition* at p. 7.

disabilities to continue to use the devices they use on a regular basis.”⁴¹

ILECs and other carriers are well aware that their copper TDM based services are used for fax services, alarm monitoring, point of sale terminals and some medical alert services. ILECs have for years marketed sales of additional lines to facilitate access to such services. ILECs are also well aware of the technical characteristics of their service and what technical parameters are needed to support services such as alarm monitoring. It is disingenuous now for their trade association to claim surprise that their networks are being used for such services and to object to the Commission’s efforts to protect such users from discontinuances of their service absent the availability of sufficient replacement services.

CONCLUSION

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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⁴¹ *Technology Transitions Notice*, 28 FCC Rcd. 6353, at n. 32.