

**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

**VERIZON'S REPLY IN SUPPORT OF
USTELECOM'S PETITION FOR RECONSIDERATION**

As USTelecom demonstrates, and NCTA and GVNW agree, the “functional test” that the Commission adopted in the *Declaratory Ruling*¹ is procedurally and substantively unlawful because it violates the Administrative Procedure Act (“APA”) and the Constitution’s Due Process Clause. Procedurally, the unprecedented functional test for determining whether a carrier’s change in the facilities underlying a service it provides triggers the approval requirement in Section 214 violates the APA by effectively amending the Commission’s Part 63 rules without notice and comment. The *Declaratory Ruling* is not an interpretive rule that is

¹ Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications et al.*, FCC 14-185 (Nov. 25, 2014) (“*Declaratory Ruling*”).

exempt from the APA’s notice and comment requirements, as some commenters assert. The Commission has already promulgated legislative rules to implement Section 214 that do not adopt — and in fact are incompatible with — the newly announced functional test.

Substantively, the Commission’s new functional test is impermissibly vague in violation of both the APA and the Constitution’s Due Process Clause. Carriers have no way of knowing every piece of third-party equipment customers use in connection with the services they offer. Nor can carriers know in advance which incompatibilities with third-party equipment the Commission will deem to require an application under Section 214 and the Commission’s rules. The Commission’s statement that “[n]ot every” such incompatibility will count makes the already vague “totality of the circumstances” test even more so. *Declaratory Ruling* ¶¶ 115, 119. Commenters that support the Declaratory Ruling simply assert that the functional test is clear, but their assurances are no substitute for the fair notice that the Commission is required to give to providers, which face potential penalties or extensive delays if they guess wrong about how the functional test applies.

DISCUSSION

I. THE COMMISSION VIOLATED THE APA BY ADOPTING THE *DECLARATORY RULING* WITHOUT PROVIDING NOTICE AND AN OPPORTUNITY FOR COMMENT ON THE FUNCTIONAL TEST

As USTelecom demonstrated (at 4-6), the *Declaratory Ruling*’s functional test departs radically from the Commission’s consistent interpretation and application of the “discontinuance” provision in Section 214 since its enactment in 1943.² The Commission first

² See An Act To Amend the Communications Act of 1934, Pub. L. No. 78-4, § 2, 57 Stat. 5 (1943). As the Commission has recognized, this Act primarily authorized telegraph companies to merge, and Congress added the discontinuance provision out of concern that such mergers might leave communities during wartime without any telegraph service at all. See Memorandum Opinion and Order, *Western Union Telegraph Co. Petition for Order To Require the Bell System To Continue To Provide Group/Supergroup Facilities*, 74 F.C.C.2d 293, ¶ 6 n.4 (1979).

adopted regulations to implement the discontinuance provision in 1946.³ The rules then, as they do today, provide that carriers “shall . . . request[]” to discontinue, reduce, or impair service “by formal application containing the information required by the Commission.”⁴ Section 63.62 lists specific scenarios that require a formal application. None of the scenarios — then or now — includes the *Declaratory Ruling*’s functional test by “tak[ing] into account the totality of the circumstances from the perspective of the relevant community.” *Declaratory Ruling* ¶ 117. Instead, consistent with Congress’s concern with ensuring that communities are not left without service, the specific scenarios involve, for example, the “dismantling or removal of a trunk line” or “the closure of a public toll station.”⁵ The Commission also promulgated a catch-all rule, requiring a formal application for “[a]ny other type of discontinuance, reduction or impairment of telephone service not specifically provided for by other provisions of this part.”⁶ The *Declaratory Ruling*, therefore, must be purporting to interpret this catch-all rule.

But the catch-all rule has also never included the *Declaratory Ruling*’s functional test. Applicants filing under the catch-all rule have never had to identify in their applications uses to which customers may put the services the carrier offers, or third-party equipment customers may be using in connection with the carrier’s offered service. Nor is it clear how they even could provide such information. Instead, applicants have always had to identify only the “service

(“*Western Union Order*”); Further Notice of Proposed Rulemaking, *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 84 F.C.C.2d 445, ¶ 114 (1981).

³ See 46 Fed. Reg. 11213 (Oct. 2, 1946).

⁴ Compare *id.* at 11214 (adding § 63.62) with 47 C.F.R. § 63.62.

⁵ Compare 46 Fed. Reg. at 11214 (adding § 63.62(a), (d)) with 47 C.F.R. § 63.62(a), (d).

⁶ Compare 46 Fed. Reg. at 11214 (adding § 63.62(e)) with 47 C.F.R. § 63.62(e).

involved”: that is, the “service *by the applicant* available to the community or part thereof.”⁷

The service the applicant makes available is the telecommunications service set forth in its tariff or, for detariffed services, in its product guide or contract. *See* USTelecom Pet. at 4-5.⁸ Indeed, the Commission cites no prior instance in which a carrier voluntarily filed — or was required to file — a discontinuance application under the catch-all based on the functional test.⁹

Moreover, the *Declaratory Ruling*’s functional test conflicts with the way the Commission’s rules have always defined “discontinuance, reduction, or impairment of service.” Since 1946, those rules have expressly stated that a “shift in [the] hours” during which a carrier provides service that “does not result in any reduction in the [total] number of hours of service” is *not* a discontinuance, reduction, or impairment of service.¹⁰ That long-standing rule cannot be squared with the Commission’s new view that the relevant test is “what the ‘community or part of a community’ reasonably would view as the service provided by the carrier.” *Declaratory*

⁷ Compare 46 Fed. Reg. at 11217 (App. F, subsection(k)) with 47 C.F.R. § 63.505(k) (emphasis added).

⁸ The Commission’s statement that the “purpose of a tariff is not to define the full scope of the service provided,” *Declaratory Ruling* ¶ 115, is flatly inconsistent with on-point Supreme Court precedent. *See AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 226 (holding that the filed rate doctrine applies to the Communications Act and “bar[s]” a customer from seeking “privileges not included in the tariff”); *see also MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230 (1994) (holding that numerous provisions in the Communications Act, including Section 214, are “premised upon the tariff-filing requirement of § 203”).

⁹ Contrary to the implication in the *Declaratory Ruling* (¶ 116), Verizon did not file a Section 214 application following Hurricane Sandy because certain third-party equipment that customers use is incompatible with the Voice Link service (a resold wireless service) that Verizon proposed as a replacement for its prior service offerings. Instead, Verizon explained that certain wireline interstate telecommunications services — namely, “interstate interexchange and exchange access service” — would be discontinued. Section 63.17 Application of Verizon New York Inc. and Verizon New Jersey Inc., WC Docket No. 13-150, at 4 (June 7, 2013). When Verizon later decided to deploy fiber facilities to replace the damaged copper on Fire Island, it specifically *withdrew* the Section 214 application as to that area, because those interstate telecommunications services no longer would be discontinued. *See* Amendment, WC Docket No. 13-150 (Sept. 27, 2013).

¹⁰ Compare 46 Fed. Reg. at 11214 (§ 63.60(a)(2)) with 47 C.F.R. § 63.60(b)(2).

Ruling ¶ 115. At the time when telephone companies did not provide 24-hour service, the community (or some part of it) would surely have felt a “practical impact,” *id.* ¶ 116, from a shift in the hours of service — say, from 9 a.m. to 5 p.m., to noon to 8 p.m. Yet, under the Commission’s rules, carriers have been free to make such changes to their hours of operation without triggering Section 214, irrespective of the perceptions of customers.

Furthermore, the *Declaratory Ruling*’s functional test is an unexplained departure from the *Western Union Order*. There, the Commission held that “rates, terms, and conditions of service are to be established through the tariffing process as governed by Sections 201-205,” and that it is “inappropriate” to use Section 214 “to challenge changes in rates, terms, and conditions of service.” *Western Union Order* ¶ 6. Yet that is exactly what the functional test permits. Even worse, it expands the definition of the relevant service beyond the definition of the service in the tariff (or, for detariffed services, the product guide or contract).

Paragraph 6 of the *Western Union Order* cannot be brushed aside as being “specific to the carrier-to-carrier context of the dispute there.” *Declaratory Ruling* ¶ 115 n.227. The Commission’s discussion in the *Western Union Order* that was specific to “the carrier-to-carrier service offerings” at issue there starts in paragraph 7. *Western Union Order* ¶ 7. Moreover, the Commission identifies that aspect of its discussion as “[a]nother matter,” separate from the statutory interpretation in paragraph 6. Despite this, in the *Declaratory Ruling*, the Commission cites only paragraph 7 of the *Western Union Order* and ignores paragraph 6, even though Commissioner Pai specifically called the Commission’s attention to the key language in paragraph 6.¹¹ It is axiomatic that an agency must “display awareness that it *is* changing

¹¹ Compare *Declaratory Ruling* ¶¶ 102 n.198, 115 n.227 with Pai Statement at 2 & nn.4, 8.

position.” *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). The Commission’s failure to grapple with paragraph 6 violates that standard.

Thus, the *Declaratory Ruling*’s functional test “effectively amends” the Commission’s existing regulations implementing Section 214 and, therefore, is a legislative rule for which the Commission was required to provide notice and comment.¹² “[F]idelity to the rulemaking requirements of the APA bars courts from permitting agencies to avoid th[e] [notice and comment] requirements by calling a substantive regulatory change an interpretative rule.”¹³

Nor can the Commission defend the *Declaratory Ruling*’s functional test as a permissible interpretation of the catch-all rule in § 63.62(e). Courts have rejected agency attempts to use interpretive rules to give content to open-ended legislative rules.¹⁴ That is because, “[t]o fall

¹² *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993); *see also, e.g., Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (“A rule is legislative if it . . . adopts a new position inconsistent with existing regulations”); *Nat’l Family Planning & Reprod. Health Ass’n, Inc. v. Sullivan*, 979 F.2d 227, 239 (D.C. Cir. 1992) (finding that agency’s rule was a legislative rule that required notice and comment where, as here, this is “not an agency’s first attempt at interpreting a statutory term but a situation where the agency has, through legislative rulemaking, already interpreted the statute, and is now changing that interpretation”).

¹³ *USTelecom Ass’n v. FCC*, 400 F.3d 29, 35 (D.C. Cir. 2005). The Commission cannot evade the notice and comment requirements by claiming that the *Declaratory Ruling* is an adjudication, rather than a rule. The new functional test “bear[s] all the hallmarks . . . of rulemaking, not adjudication”: the test has purely prospective effect and claims to “provide a transparent and public process” (*Declaratory Ruling* ¶ 118) that is “utterly divorced from any specific application of the statute” or the Commission’s rules and the “effect” of which “will only become clear” after the new test is applied in particular cases. *City of Arlington, Tex. v. FCC*, 668 F.3d 229, 242-43 (5th Cir. 2012). Notably, none of the commenters defending the *Declaratory Ruling* disputes that the Commission has adopted a rule.

¹⁴ *See Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775, 781-83 (10th Cir. 1998) (rejecting Secretary of Education’s claim that he could use an interpretive rule to implement a legislative rule that authorized the Secretary to impose “any additional conditions” on certain schools); *United States v. Picciotto*, 875 F.2d 345, 346-48 (D.C. Cir. 1989) (rejecting the Park Service’s claim that it could use an interpretive rule to implement a legislative rule that authorized “additional reasonable conditions”); *see also C.F. Communications Corp. v. FCC*, 128 F.3d 735, 739 (D.C. Cir. 1997) (“We do not suggest that the Commission could not amend its rules to render ‘premises’ a term of art encompassing telephone equipment or land owned and

within th[e] category” of interpretive rules, “the rule must be interpreting something” — the interpretive rule “must derive a proposition from an existing document whose meaning compels or logically justifies the proposition.”¹⁵ A rule like the functional test that purports to provide content to an open-ended, catch-all regulation is not “a proper interpretation of [the agency’s] own regulations because it is no interpretation at all” of any text in that open-ended rule.¹⁶ Because the functional test “cannot fairly be viewed as interpreting” the catch-all rule, it is a legislative rule and “is not an interpretive rule exempt from notice and comment rulemaking.”¹⁷

In asserting that the *Declaratory Ruling* is an interpretive rule and therefore exempt from notice and comment, Public Knowledge and Granite Telecommunications ignore entirely the Commission’s Part 63 regulations addressing discontinuations. As shown above, those regulations do not adopt — and, in fact, are contrary to — the newly announced functional test. And Granite Telecommunications is wrong (at 4) that the *Western Union Order* can be explained away by Western Union’s concession that it could continue providing service despite AT&T’s tariff change. Like the Commission in the *Declaratory Ruling*, Granite simply ignores the Commission’s holding that Section 214 is not to be used “to challenge changes in rates, terms, and conditions of service,” which reflected the Commission’s interpretation of the statute and the statutory structure, rather than any of Western Union’s assertions. *Western Union Order* ¶ 6.

controlled by a third party on which telephone equipment is located. But to do so, it must use the notice and comment procedure of the Administrative Procedure Act. It may not bypass this procedure by rewriting its rules under the rubric of ‘interpretation.’”).

¹⁵ *Central Texas Tel. Co-op., Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005) (internal quotation marks omitted).

¹⁶ *Mission Group*, 146 F.3d at 783.

¹⁷ *Central Texas*, 402 F.3d at 212.

In sum, the Commission should grant USTelecom’s petition for reconsideration because the *Declaratory Ruling* is a legislative rule that was promulgated without notice and comment, in violation of the APA.

II. THE COMMISSION’S FUNCTIONAL TEST IS UNLAWFULLY VAGUE

The functional test is unlawfully vague because it does not give providers fair notice of the rule that the Commission now purports to be applying. The Commission describes its new functional test as an “approach that evaluates the totality of the circumstances” to “identify the service the carrier actually provides to end users” based on what they “reasonably would view as the service provided.” *Declaratory Ruling* ¶ 115. At the same time, “[n]ot every functionality supported by a network is de facto a part of a carrier’s ‘service.’” *Id.* ¶ 119. The Commission states that “[a]n important factor in this analysis is the extent to which the functionality traditionally has been relied upon by the community.” *Id.* But that is only *one* factor. The Commission gives no hint of what the others might be.

Providers are therefore left without guideposts for determining what — beyond the carrier’s own statement, as set forth in its tariff, product guide, or contract, of the service it actually offers — it is “reasonable” for consumers to view as the service provided. *See* O’Rielly Statement at 1; USTelecom Pet. at 8-9; NCTA at 2. Providers must guess when a change to the underlying facilities or technology used to provide a telecommunications service — but *not* to the offered service itself — requires a Section 214 application. Carriers that guess wrong and do not file a Section 214 application could face sanctions for violating the Commission’s amorphous functional test. Nor is filing prophylactic Section 214 applications a solution, as those applications add unpredictable costs and delays to a carrier’s network upgrades, denying consumers the benefits of those next-generation facilities. *See* USTelecom Pet. at 9; GVNW at 2-3.

For these reasons, the *Declaratory Ruling* does not provide “[f]air notice of the standards against which [a carrier] is to be judged”; such notice “is a fundamental norm of administrative law.”¹⁸ When “an agency utterly fails to provide a standard for its decision, it runs afoul of more than one provision of the Administrative Procedure Act.”¹⁹ Such vagueness is also an unconstitutional denial of due process, because regulations “must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.”²⁰ An agency has the obligation “to state with ascertainable certainty what is meant by the standards [it] has promulgated.”²¹ The *Declaratory Ruling* fails this test and is independently unlawful for this reason as well.

Defending the functional test, Public Knowledge and Granite Telecommunications simply assert that the new standard is sufficiently clear because 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.”²² As Verizon has explained to the Commission in the context of its network change notifications, customers should be able to use all of those devices when Verizon provides POTS service over its upgraded, next-generation fiber network, rather than over copper loops.²³ But Verizon cannot know every brand, make, and model of third-party equipment that its customers use. Is an application required if, for idiosyncratic reasons, some

¹⁸ *Marrie v. SEC*, 374 F.3d 1196, 1206 (D.C. Cir. 2004).

¹⁹ *Checkosky v. SEC*, 139 F.3d 221, 226 (D.C. Cir. 1998).

²⁰ *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Rev. Comm’n*, 108 F.3d 358, 362 (D.C. Cir. 1997).

²¹ *Gates & Fox Co. v. Occupational Safety & Health Review Comm’n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (internal quotation marks omitted).

²² Granite Telecommunications at 9.

²³ See, e.g., Verizon Response at 2, 7, *Wireline Competition Bureau Short Term Network Change Notification filed by Verizon New England Inc. d/b/a Verizon Massachusetts et al.*, Report Nos. NCD-2365, NCD-2372, NCD-2373 (July 14, 2014).

third-party equipment only works over particular technologies? The Commission does not say. Leaving carriers to guess at how the ill-defined functional test will apply to changes to the underlying facilities used to provide a service in particular regions is precisely the kind of vagueness that the APA and the Due Process Clause prohibit.

CONCLUSION

For the foregoing reasons, the Commission should grant USTelecom's petition for reconsideration.

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