

**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
)	

**REPLY OF AT&T SERVICES, INC.,
IN SUPPORT OF PETITION FOR RECONSIDERATION
OF UNITED STATES TELECOM ASSOCIATION**

Terri Hoskins
Christopher Heimann
Gary Phillips
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, DC 20036
(202) 457-3046

Aaron M. Panner
Melanie L. Bostwick
Matthew A. Seligman
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

January 30, 2015

The comments opposing the petition for reconsideration filed by United States Telecom Association (“USTelecom”) demonstrate exactly why that petition should be granted. As USTelecom explained, the Commission’s Declaratory Ruling regarding the scope of the discontinuance provision in 47 U.S.C. § 214(a) is no mere “interpretive rule” but marks a dramatic and substantive departure from the Commission’s longstanding interpretation of the statute, as reflected in its orders and regulations. The Commission cannot change course in this way without undertaking notice-and-comment rulemaking. And, even apart from its procedural infirmities, the Declaratory Ruling is unlawful because it is impermissibly vague. For the first time, the Declaratory Ruling purports to tell carriers that their services are defined not by what the carriers themselves believe they have offered to consumers but by particular functions or features that customers may view as service-defining – though the Commission provides no insight into how a carrier is supposed to determine which particular functions and features are sufficiently important and traditional to be service-defining, and which are not.

AT&T supports USTelecom’s petition and urges the Commission to reconsider its improper Declaratory Ruling.

I. Introduction and Background

On November 25, 2014, the Commission issued its *Technology Transition NPRM and Declaratory Ruling*.¹ In the portion of the order styled a “Declaratory Ruling,” the Commission purported to “clarify that the analysis under section 214 of whether a change constitutes a discontinuance, reduction, or impairment of service is a functional test.”² In particular, the Commission rejected “[t]he assumption . . . that where access to third-party services and devices

¹ See Notice of Proposed Rulemaking and Declaratory Ruling, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 et al., FCC 14-185 (rel. Nov. 25, 2014) (“Declaratory Ruling”).

² *Id.* ¶ 114.

are not defined by the tariff as a part of the service offering, a move from a legacy-based service to an alternative service that does not support such third-party services or devices does not constitute a discontinuance, reduction, or impairment of a service.”³ The Commission issued the Declaratory Ruling without providing notice or the opportunity for comment. Commissioner Pai, dissenting from the Declaratory Ruling, explained that this “functional test” is an “abrupt reversal of decades-old policy [that] is unnecessary and counterproductive,” yet the Commission “never asked the public to weigh in on this issue. That’s not how we are supposed to operate.”⁴

On December 23, 2014, USTelecom filed a petition for reconsideration of the Declaratory Ruling. USTelecom’s petition explained that the Declaratory Ruling was improper because (1) it changed the longstanding definition of what constitutes a “discontinuance, reduction, or impairment of a service” under § 214(a), and therefore could not be adopted without notice-and-comment rulemaking; and (2) instead of terminating a controversy or removing uncertainty, the Declaratory Ruling creates “unnecessary confusion” by adopting a new, “amorphous ‘functional test’” that takes the power to define a service offering away from the carrier and places it instead in the hands of customers and others who use the service.⁵

Certain parties oppose the petition.

II. The Commission Violated the Administrative Procedure Act by Issuing the Declaratory Ruling Without Notice and an Opportunity for Comment

Contrary to the opposing parties’ views, the Commission acted unlawfully by failing to follow notice-and-comment procedures before issuing the Declaratory Ruling. The Commission

³ *Id.*

⁴ *Id.* at 72-73 (Statement of Commissioner Pai, dissenting); *see also id.* at 74 (Statement of Commissioner O’Rielly, dissenting) (“Such a nebulous standard appears nowhere in the Act and has no basis in wireline precedent.”).

⁵ Petition for Reconsideration of United States Telecom Association at 1-2, PS Docket No. 14-174 et al. (filed Dec. 23, 2014) (“USTelecom Pet.”).

treats its Declaratory Ruling as an adjudication, which is not subject to notice and comment.⁶

Although the Commission is authorized to issue declaratory rulings “to terminate a controversy or remove uncertainty,”⁷ there are limits on an agency’s discretion to use declaratory rulings to circumvent the Administrative Procedure Act’s procedural requirements for rulemakings.⁸ The Commission exceeded those limits here.

The Declaratory Ruling “bear[s] all the hallmarks of [the] product[] of rulemaking, not adjudication.”⁹ First, it has purely prospective effect, which is “the central distinction between rulemaking and adjudication.”¹⁰ Second, and relatedly, the Declaratory Ruling affects “the rights of broad classes of unspecified individuals” rather than “resolv[ing] [a] dispute[] among specific individuals in [a] specific case[.]”¹¹ The Commission does not purport to apply its new “functional” test for when a service is discontinued to any preexisting dispute, but rather “clarif[ies]” how it will undertake that analysis in the future.

Third, and as explained in more detail below, the Declaratory Ruling significantly expands the scope of what constitutes a “service” – and a “discontinuance” of a service under

⁶ See Order, *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174 et al., DA 14-1903, ¶ 3 (Wireline Comp. Bur. rel. Dec. 30, 2014) (stating that the decision for which USTelecom seeks reconsideration “is adjudicatory in nature”); see also Declaratory Ruling ¶ 114 & n.221 (relying on 47 C.F.R. § 1.2, which allows the Commission to issue declaratory rulings “in accordance with [5 U.S.C. § 554(e)],” a statutory provision that governs adjudications).

⁷ 5 U.S.C. § 554(e); 47 C.F.R. § 1.2.

⁸ See, e.g., *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (recognizing that there are “situations where [an agency’s] reliance on adjudication would amount to an abuse of discretion or a violation of the Act”); *Yesler Terrace Cmty. Council v. Cisneros*, 37 F.3d 442, 449 (9th Cir. 1994) (“An agency cannot avoid the requirement of notice-and-comment rulemaking simply by characterizing its decision as an adjudication.”).

⁹ *City of Arlington v. FCC*, 668 F.3d 229, 242 (5th Cir. 2012), *aff’d*, 133 S. Ct. 1863 (2013).

¹⁰ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring); see also *Yesler*, 37 F.3d at 448.

¹¹ *Yesler*, 37 F.3d at 448.

§ 214 – thereby unsettling carriers’ reasonable reliance interests. As the Commission has previously recognized, “a declaratory ruling may not be used to substantively change a rule.”¹² Relying on the Commission’s rules and orders, carriers have operated under the understanding that their obligations under § 214 are delimited by the definition of services as offered by those carriers (whether by tariff or otherwise), and not by the uses to which customers (or other service providers) may put those services. The “adverse consequences ensuing from . . . reliance” on the Commission’s prior orders is “so substantial that the [Commission] should be precluded from reconsidering the issue in an adjudicative proceeding.”¹³

Fourth, like a rule and unlike an adjudication, the Declaratory Ruling offers a freestanding legal conclusion divorced from the context of any ongoing dispute between parties. The “basic distinction between rulemaking and adjudication” is between “proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other.”¹⁴ Although agencies may announce general legal principles in adjudication,¹⁵ the Supreme Court has explained that doing so may be appropriate only where “[i]t is doubtful whether any generalized standard could be framed which would have more than marginal utility.”¹⁶ Here, by contrast, the Declaratory

¹² Order and Notice of Proposed Rulemaking, *Amendment of Part 15 of the Commission’s Rules to Amend the Definition of Auditory Assistance Device in Support of Simultaneous Language Interpretation*, 26 FCC Rcd 13600, ¶ 10 & n.22 (2011).

¹³ *Bell Aerospace*, 416 U.S. at 295; see also *Ruangswang v. INS*, 591 F.2d 39, 44 (9th Cir. 1978) (holding agency’s “use of adjudicative proceedings to change course in midstream” was “beyond the bounds of that which is permissible under *Bell*”).

¹⁴ *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-45 (1973).

¹⁵ See *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).

¹⁶ *Bell Aerospace*, 416 U.S. at 294.

Ruling unambiguously establishes a generalized standard to apply across various and as-yet-identified factual circumstances.

In short, the Declaratory Ruling was in substance a rulemaking, and the Commission cannot avoid its notice-and-comment obligation simply by calling it an adjudication.¹⁷

Nor can the Commission rely on the excuse offered by some opposing commenters, who characterize the Declaratory Ruling as an interpretive rule exempt from notice and comment under 5 U.S.C. § 553(b)(3)(A).¹⁸ As USTelecom explained,¹⁹ the Declaratory Ruling is not simply a clarification or advisory as to how the Commission views the scope of § 214, but instead works a substantive (and substantial) change in the Commission’s prior treatment of that question.

To begin with, opposing commenters such as Public Knowledge are incorrect to suggest that the test for determining whether a rule is legislative or interpretative is limited to “whether the order amends or contradicts a previous rule or interpretation of the statute.”²⁰ This misstates the law²¹ and makes little sense, as under Public Knowledge’s apparent view an initial rulemaking offering the agency’s first interpretation of a statute by definition could not be

¹⁷ See *City of Arlington*, 668 F.3d at 241-42 (upholding the Commission’s declaratory ruling on harmless-error grounds but noting the court’s “serious doubts as to the propriety of the FCC’s choice of procedures” in light of the ruling’s adoption outside the context of a concrete dispute between specific parties, its general and prospective application, and the fact that the contours of the ruling would only become clear in subsequent applications to specific disputes).

¹⁸ See *Opposition of Public Knowledge to Petition for Reconsideration of United States Telecom Association* at 5-7, PS Docket No. 14-174 et al. (filed Jan. 23, 2015) (“Public Knowledge Opp.”); *Opposition of Granite Telecommunications, LLC* at 3-5, PS Docket No. 14-174 et al. (filed Jan. 23, 2015) (“Granite Opp.”).

¹⁹ USTelecom Pet. at 2.

²⁰ Public Knowledge Opp. at 6.

²¹ See *General Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002) (“The ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law.”) (internal quotation marks and brackets omitted).

legislative. Legislative (or “substantive”) rules also include “those that ‘grant rights, impose obligations, or produce other significant effects on private interests.’”²² The Declaratory Ruling purports to establish a binding norm governing the extent of carriers’ obligation to seek certification under § 214. Carriers presumably would be subject to enforcement action if they failed to file a § 214 application when changing a service in a way that would fall within the Commission’s “functional” test.

Furthermore, the new “functional” test set out in the Declaratory Ruling *does* contradict multiple existing legislative rules (as well as Commission orders); because the test is irreconcilable with those rules, it is itself a legislative rule that can only be adopted through notice-and-comment rulemaking.²³ The Commission has, by rule, defined the types of service changes that constitute a “discontinuance, reduction, or impairment” requiring approval under § 214. The Commission’s new functional test cannot be squared with those rules. As an example, the functional test would encompass alterations to “the practical functionality” of a service as viewed from the perspective of the consumer, even if the substance of the service from the carrier’s perspective remained the same.²⁴ But the Commission’s rules have *excluded* such changes since those rules were first adopted in 1946, shortly after the “discontinuance” provision of § 214 was added. For nearly seven decades, the rules have required carriers to file § 214 applications when they *reduce* the hours of service at a particular station but *not* when they

²² *American Tort Reform Ass’n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) (quoting *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980)); *see also National Mining Ass’n v. McCarthy*, 758 F.3d 243, 251-52 (D.C. Cir. 2014).

²³ *See American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining that second rule is legislative if it “repudiates or is irreconcilable with” a prior legislative rule) (internal quotation marks omitted).

²⁴ Declaratory Ruling ¶ 118.

merely *shift* those hours of service.²⁵ A change in the hours of service at a particular station could dramatically affect a communications service from the customer’s point of view; but the rule focuses instead on the nature of the service offered by the carrier, which has not changed.

The new rule is also a repudiation of the network change notice rules cited in the Declaratory Ruling itself.²⁶ The Declaratory Ruling for the first time suggests that § 214 approval is required when a network change renders a particular device used by the customer – and supplied by someone other than the carrier – incompatible with the network. But, in the same paragraph, the Commission points out that its existing rules require only that the carrier provide its customer *notice* of the impending change; they do not require the carrier to seek advance approval from the Commission.²⁷ Indeed, the Commission has long held that the requirements of § 214 do not apply where a network change entails that a user “will no longer be able to use [certain] equipment.”²⁸ Such changes to the “functional” characteristics of a network that do not appear on its tariff are apparently what the Commission’s new test would capture and are precisely the sort of extra-tariff service features that some commenters seek to protect.²⁹

Finally, although a rule’s lawfulness does not determine whether it is interpretive, it is notable that the Commission’s new rule contradicts settled understandings of the definition of a

²⁵ See 47 C.F.R. § 63.60(b)(2); see also 11 Fed. Reg. 11,213, 11,214 (Oct. 2, 1946) (adopting this rule).

²⁶ See Declaratory Ruling ¶ 117.

²⁷ See 47 C.F.R. § 68.110(b).

²⁸ Memorandum Opinion and Order, *Western Union Telegraph Co.*, 74 F.C.C.2d 293, ¶ 9 (1979).

²⁹ See Granite Opp. at 2 (“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.”); Opposition of COMPTTEL to the Petition for Reconsideration of the United States Telecom Association at 2, PS Docket No. 14-174 et al. (filed Jan. 23, 2015) (“[I]t has become apparent that some of the incumbents’ new IP-based services may . . . lack capabilities of the TDM services upon which consumers have come to rely.”).

“service” as reflected in the statute, regulations, case law, and Commission precedent. These contradictions underscore the fact that the definition is a new and unexpected substantive change, not a mere “reiterat[ion]”³⁰ of what has always been true. Nothing in § 214 itself (or in the Commission’s implementing regulations) has ever given carriers reason to believe that certification would be required for service changes that altered the way a customer might use a service, as opposed to the way the carrier held out the service to the public.³¹ Other statutes have supported this understanding. For example, the Communications Act defines a “telecommunications service” not by reference to the features as perceived by customers but as “the offering” of telecommunications “regardless of the facilities used.”³² For tariffed services, the Act *forbids* carriers from extending “any privileges or facilities” in connection with a service “except as specified in [the tariff].”³³ An interpretive rule “must flow fairly from the substance of [an] existing document.”³⁴ The Commission’s new functional test does not “flow fairly” from the substance of § 214, the rest of the Communications Act, or the Commission’s rules. It is a significant change in law that can only be adopted, if at all, through proper rulemaking.

III. The Declaratory Ruling Creates, Rather Than Removes, Uncertainty

As USTelecom’s petition explained, the Declaratory Ruling is unlawful not only because of the Commission’s failure to adhere to procedural requirements, but also because the ruling

³⁰ Declaratory Ruling ¶ 117.

³¹ Indeed, the statute has always made clear that changes to the “operation” or “equipment” of the carrier’s network do not require certification unless the “adequacy or quality” of the service provided is impaired. 47 U.S.C. § 214(a).

³² 47 U.S.C. § 153(53).

³³ *Id.* § 203(c). The fact that a service may be detariffed does not change the analysis. The service is still what is described in the offering document. As USTelecom correctly points out (Pet. at 5 & n.18), this is as much a principle of contract law as of the law governing tariffs.

³⁴ *Central Texas Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 212 (D.C. Cir. 2005) (internal quotation marks omitted).

itself “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.”³⁵ The opposing commenters do not meaningfully respond to USTelecom’s argument; the most they can muster is Public Knowledge’s assertion that at least carriers are no “worse off than they were before.”³⁶ But that is not the standard for judging agency action. “Fair notice of the standards against which one is to be judged is a fundamental norm of administrative law.”³⁷ To satisfy that norm, an agency’s rules “must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit.”³⁸

Based on the Commission’s Declaratory Ruling, AT&T cannot tell when a § 214 application is required and when it is not. How is AT&T to judge the way a community “reasonably would view” its service,³⁹ if not by the way AT&T itself defines the service when it offers it to that community? How is AT&T to determine the way the Commission will judge “the totality of the circumstances”⁴⁰ when the Declaratory Ruling does not clearly explain which “circumstances” are and are not part of that test? What burden does AT&T bear to inform itself of the “wide range of productive activities”⁴¹ for which customers are apparently using the common carrier telecommunications services provided by AT&T? And, even if it answers all

³⁵ USTelecom Pet. at 8.

³⁶ Public Knowledge Opp. at 7.

³⁷ *Marrie v. SEC*, 374 F.3d 1196, 1206 (D.C. Cir. 2004).

³⁸ *Freeman United Coal Mining Co. v. Federal Mine Safety & Health Review Comm’n*, 108 F.3d 358, 362 (D.C. Cir. 1997).

³⁹ Declaratory Ruling ¶ 115.

⁴⁰ *Id.*

⁴¹ *Id.* ¶ 116.

those questions, how can AT&T make the ultimate decision of whether any given feature is one that a community “traditionally has . . . relied upon”⁴² so as to require a § 214 application?

Beyond the basic unfairness of holding AT&T accountable for ensuring the operability of (some unspecified subset of) the “fax machines, DVR services, credit card machines, some medical alert devices, and some (but not all) other monitoring systems like alarm systems”⁴³ that AT&T does not offer or provide to its customers, the Commission’s Declaratory Ruling sets out an unpredictable standard that will, in all likelihood, radically increase the filing frequency of § 214 applications from carriers afraid that every minor network change now counts as a “discontinuance” of service. Indeed, at least one opposing commenter apparently believes that every service outage sufficient to prompt a customer complaint now amounts to a § 214 problem.⁴⁴ AT&T presumes that the Commission did not intend its Declaratory Ruling to cause such an expansive (and unlawful) extension of § 214. But the broad interpretation of the Ruling advanced by its supporters underscores the difficulty carriers will have in attempting to comply.

IV. Conclusion

The Commission should grant USTelecom’s petition for reconsideration, withdraw the Declaratory Ruling, and, if it wishes to adopt a functional test for “services” under § 214, clearly describe that test in a notice of proposed rulemaking and allow interested parties an opportunity to comment on the proposal.

⁴² *Id.* ¶ 119.

⁴³ *Id.* ¶ 116.

⁴⁴ Opposition of Rural Broadband Policy Group to Petition for Reconsideration of United States Telecom Association at 3, PS Docket No. 14-174 et al. (filed Jan. 23, 2015).

Respectfully submitted,

/s/ Aaron M. Panner

Aaron M. Panner
Melanie L. Bostwick
Matthew A. Seligman
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, DC 20036
(202) 326-7900

Terri Hoskins
Christopher Heimann
Gary Phillips
AT&T SERVICES, INC.
1120 20th Street, N.W., Suite 1000
Washington, DC 20036
(202) 457-3046

January 30, 2015