

**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
)	

**THE UNITED STATES TELECOM ASSOCIATION’S
REPLY IN SUPPORT OF PETITION FOR RECONSIDERATION**

The Commission’s attempt to “clarify” the section 214 process by redefining what is “service” under section 214(a) imposed impossibly vague new substantive requirements on providers without any notice or opportunity for comment.¹ Under its unlawful new functional test, the Commission will look beyond what service a provider offers to its customers, instead relying on “the perspective of the relevant community or part of a community” to decide whether the provider’s service offering is being discontinued.² A provider’s service therefore could be defined to include unknown features and functionality beyond the basic voice service a provider

¹ See *Technology Transitions, et al.*, Notice of Proposed Rulemaking and Declaratory Ruling, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, FCC 14-185 (rel. Nov. 25, 2014) (“*Declaratory Ruling*”).

² *Declaratory Ruling* at ¶ 117.

offers if one or more customers decide that it does, or should, include such unknown features and functionality.

Several of the parties opposing USTelecom's petition³ mischaracterize it and show a fundamental misunderstanding of USTelecom's concerns with the Commission's decision to issue a Declaratory Ruling rather than address these important issues in a rulemaking. For example, some suggest that USTelecom is advocating against customer notification.⁴ In the past our members have provided, and will continue to provide, adequate notice of service changes consistent with statutory and regulatory requirements. Moreover, our members have worked, and will continue to work with the Commission, consumers, and competing providers to resolve issues as they arise with discontinuances and in connection with network changes.

But the Commission's action in the Declaratory Ruling will not help consumers. Rather than increasing protection, the vagueness of the new "functionality" test will end up detracting from the important work of achieving the public interest and policy goal (described in the National Broadband Plan and endorsed many times over by the Commission) of transitioning to fiber and IP-based networks, because providers will be deterred from upgrading their networks.⁵ Redefining "service" under section 214 "in such a novel and burdensome manner,"⁶ without a showing that it is necessary to protect the public interest and necessity, will predictably delay and impede progress on technology transitions. The Commission therefore should withdraw its

³ Petition for Reconsideration of the United States Telecom Association, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (Dec. 23, 2014) ("*USTelecom Petition*").

⁴ See, e.g., Opposition of Rural Broadband Policy Group to Petition for Reconsideration of United States Telecom Association, PS Docket No. 14-174, *et al.*, at 4 (Jan. 23, 2015) ("*RBPG Opposition*") (referring to "the danger of losing service without proper notification").

⁵ See Letter from David Cohen, Senior Policy Advisor and Jeffry H. Smith, President/CEO, GVNW Consulting, Inc., to Marlene Dortch, Secretary, FCC, PS Docket No. 14-174, *et al.*, at 2-3 (Jan. 23, 2015) ("*GVNW Letter*") (explaining that the new section 214 standard discourages providers from making upgrades designed to benefit consumers).

⁶ Comments of the National Cable & Telecommunications Association, PS Docket No. 14-174, *et al.*, at 2 (Jan. 23, 2015) ("*NCTA Comments*").

Declaratory Ruling and instead rely on the rulemaking process so that all parties may comment on its new interpretation.

I. The Commission Improperly Created New Substantive Requirements.

Opposing parties argue incorrectly that the Commission’s ruling does not create new substantive requirements.⁷ To the contrary, the Commission has effectively redefined what constitutes a “service” under section 214 by enabling customers to determine the scope of what service a provider is offering. Thus, even where a provider intends to replace a basic voice service provided over a legacy copper network (as described in its tariff or contract) with a basic voice service provided over an IP-based fiber network, a customer’s view that the provider actually offers more than basic voice service could be used to require a section 214 application, which in turn would result in delay to or blocking of the provider’s ability to upgrade its network. The test thus improperly conflates the copper retirement and network change notice-based procedures with section 214 application procedures. Moreover, contrary to Public Knowledge’s views,⁸ this creates a significant burden on providers that may now have to file for section 214 authority in every instance where they seek to upgrade legacy facilities, or face unpredictable and unknown consequences. Under this new test, there is a risk that a facilities change (heretofore subject only to adequate notice) could potentially be treated like a service change (subject to permission).⁹ Conflating the requirements in these two areas is directly

⁷ Opposition of Public Knowledge to Petition for Reconsideration of United States Telecom Association, PS Docket No. 14-174, *et al.*, at 5 (Jan. 23, 2015) (“*Public Knowledge Opposition*”); Opposition of Granite Telecommunications, LLC, PS Docket No. 14-174 *et al.*, at 4 (Jan. 23, 2015) (“*Granite Opposition*”) (“there is no substantive change to the regulation or the Commission’s interpretation of that regulation”).

⁸ See *Public Knowledge Opposition* at 2-3 (“The only difference between applications for Section 214(a) filed before the Declaratory Ruling issued and those filed since then is that those filings have a better idea as to what information the Commission needs to process an application.”).

⁹ As previously noted, *US Telecom Petition* at 9, “[t]he very fact of having to undergo review pursuant to section 214 handicaps carriers in a way their competitors are not. Even if approval to make changes is eventually granted, the Commission’s process often has unpredictable delays and timelines.”

contradicted by the plain text of section 214, which provides that an application is not necessary for “any installation, replacement, or other changes in plant, operation, or equipment, other than new construction, which will not impair the adequacy or quality of service provided.”¹⁰

Thus, the Commission is not merely “clarifying the meaning of the term ‘service’” in section 214,¹¹ it is redefining the term, which “clearly changes the existing standard for grant of a section 214 discontinuance request.”¹² The Commission need not take such an extraordinary measure to protect consumers, and it erred by doing so without first allowing public comment on whether this ruling is in the public interest, including whether the technology transitions process will be irreparably harmed.

No opposing party seriously rebuts our conclusion that defining a provider’s service to include features and functionality that are not offered by the provider in its tariff or contracts is a substantive change that goes beyond a mere clarification or interpretation. Opposing parties take great pains to discredit our assertions by attempting to distinguish (or simply wish away the relevance of) cases and statutory provisions cited in our petition,¹³ finding fault with what they claim is our failure to demonstrate that the law is clear on how “service” should be defined.¹⁴ Their arguments are unavailing.

For example, contrary to COMPTTEL’s assertions,¹⁵ *Brand X* confirms that a telephone company service offering does not necessarily include “data transmission facilities ... or other physical elements of the facilities used to provide telephone service, like the trunks and switches,

¹⁰ 47 U.S.C. § 214(a).

¹¹ *Granite Opposition* at 7.

¹² *GVNW Letter* at 2.

¹³ *See, e.g., Granite Opposition* at 5-8; *COMPTTEL Opposition* at 4.

¹⁴ *COMPTTEL Opposition* at 3-4; *see also Public Knowledge Opposition* at 5 (stating that USTelecom points to no previous adjudication or rulemaking that is overruled or contradicted).

¹⁵ *COMPTTEL Opposition* at 4.

or the copper in the wires,” and that “[s]uch functionally integrated components need not be described as distinct offerings.”¹⁶ Thus, if the Commission wishes to define “service” under section 214(a) to include more than the integrated voice product offered by the provider, it must do so through a proper rulemaking process. It would be difficult to imagine that the Commission could justify interpreting features and functionalities, especially those requiring CPE to be attached or using a third-party service, to be part of the “service” a provider offers to its customers, and it certainly would be improper to do so without providing notice and an opportunity for public comment on whether such an interpretation is reasonable under the statute.

Similarly, attempts to dismiss entirely the relevance of the filed rate doctrine fall short. With regard to tariffed services, COMPTTEL is simply wrong; the filed rate doctrine confirms that the tariff’s provisions control the rights and liabilities of the carrier and its customers,¹⁷ and the Supreme Court has held that claims by customers seeking “privileges not included in the tariff ... are barred.”¹⁸ Even where a tariff is not at issue and the carrier describes its service offering in a contract, it is just as true that the contract defines the provider-customer relationship. Thus, in both cases carriers, not their customers, traditionally have controlled how their service offering is defined.¹⁹ Moreover, the scope of a provider’s service offering, whether under tariff or by contract, should not differ depending on how each customer uses it. For example, a provider should not be attributed with providing basic telephone service plus fax transmission service and alarm monitoring services to some but not all of its customers,

¹⁶ *National Cable & Telecommunications Ass’n v. Brand X Internet Svcs.*, 545 U.S. 967, 990-91 (2005).

¹⁷ *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998) (internal quotation marks omitted; emphasis original); see *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1315 (11th Cir. 2004) (holding that a federal tariff is “the law’ and exclusively govern[s] the rights and liabilities of the carrier to the customer”).

¹⁸ *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222, 226 (1998).

¹⁹ See *USTelecom Petition* at 5-6 (discussing filed rate doctrine).

especially when the provider does not intend nor claim to provide more than basic telephone service.

Opposing parties also make a big deal of USTelecom's assertion²⁰ that a declaratory ruling may not be used to substantively *change* a rule, arguing that failure to identify a specific rule or statute that was changed by the Declaratory Ruling is fatal to our petition.²¹ Not so, since it goes without saying that the Commission likewise may not use a declaratory ruling to *create* a new substantive obligation from scratch.²² Thus, Public Knowledge is simply wrong in asserting that the failure to point to a rule or practice the Commission purportedly modified means the Declaratory Ruling does not constitute a legislative ruling.²³ This and other assertions that USTelecom's petition fails to identify an existing standard, regulation or interpretation that is modified by the Declaratory Ruling,²⁴ even if true, are unavailing because here the Commission has created new substantive requirements, which may only be accomplished through rulemaking.

Opposing parties cite to no authority that has questioned the right of a service provider to define its own service offering in a tariff or by contract. Defining a provider's service offering by what customers think the service is or want the service to be, rather than what the provider is offering, is a major departure from Commission precedent. Indeed, there is a risk that the Commission's interpretation could be used to argue that a community's perception might trump the language of a tariff or contract, including any limitations therein. And the difference is not merely semantics; how "service" is defined can determine regulatory treatment under section

²⁰ See *USTelecom Petition* at 3-7.

²¹ See *Granite Opposition* at 6; *Comptel Opposition* at 3-4.

²² See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements [] by labeling a major substantive legal addition to a rule a mere interpretation.") (citations omitted).

²³ *Public Knowledge Opposition* at 7.

²⁴ See *Granite Opposition* at 4; *COMPTEL Opposition* at 3-4.

214. For example, a facilities upgrade, currently subject only to notice, might, under the Commission's new test, be deemed a service discontinuance if it affects the operation of a single piece of CPE, regardless of how obsolete or how often it is (or is not) being used. There is no question that in this instance, the Commission has changed the rules of the game.

II. The Declaratory Ruling's New Definition of "Services" Subject to Section 214 Is Impermissibly Vague, and Provides Less Certainty for Providers and Consumers.

Public Knowledge is simply wrong in asserting that because of the Declaratory Ruling "those filings [sic] have a better idea as to what information the Commission needs to process an application."²⁵ To the contrary, the Commission raised far more questions than it answered. For example, providers have been told the Commission will now define their services based on what customers think they are offering rather than what they intend to and in fact do offer, but have been given no guidance as to how this new scheme fits within the structure of section 214, which asks whether "future public convenience and necessity will be adversely affected."²⁶ Notably, the Commission doesn't explain or clarify how many customers must lose access to a feature or functionality to trigger a section 214 filing, or under what circumstances and at what point a community or part of a community will be deemed to be adversely affected. Providers are worse off than they were before the Commission decided to change how their "service" offerings will be defined because they now have no discernable guidance on how to define the scope of their own services for purposes of section 214. Are providers expected to poll every customer to find out what kind of CPE and third-party services they use? What do they do with that information

²⁵ *Public Knowledge Opposition* at 3 (also asserting that "[t]he 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'").

²⁶ 47 U.S.C. § 214(a).

once they have it? How will the Commission evaluate that information in deciding the impact to the public convenience and necessity?

RBPG further claims that the Declaratory Ruling provides clarity for providers to know “*when* [they] should inform consumers and regulators about changes to a network that affects basic telephone service, and *when* they need to proceed with the appropriate steps outlined by Section 214.”²⁷ To the contrary, however, the ruling provides no such clarity. Because the Commission doesn’t enumerate what features and functionality will be treated as *de facto* parts of a carrier’s service, the ruling doesn’t help providers know when to file a section 214 application. For example, a provider has no way of determining how many community members would need to use CPE or a third party service before a particular functionality would be deemed a *de facto* part of a provider’s service.²⁸ Rather, this ruling will compel providers to file as the default rather than risk adverse action from the Commission if they guess wrongly. As the Commission has noted, an imposition of liability under such circumstances (i.e., where “a regulated party acting in good faith would [not] be able to identify, with ‘ascertainable certainty,’ the standards with which the agency expects parties to conform”) would be patently improper.²⁹

Similarly, the Commission’s ruling not only will confuse consumers, but it offers them no more protection than they are already afforded under the current rules. In particular, there is no such right, as RBPG asserts, for a consumer “to continue to receive the service they have

²⁷ *RBPG Opposition* at 2 (emphasis in original).

²⁸ Thus, we take little comfort in the Commission’s acknowledgement that “[n]ot every functionality supported by a network is de facto a part of a carrier’s ‘service.’” *Declaratory Ruling* at ¶ 119.

²⁹ Forfeiture Order and Notice of Apparent Liability for Forfeiture, *Syntax-Brilliant Corp.*, 23 FCC Rcd 6323, ¶ 19 n.70 (2008) (citing *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (“*Gen. Elec.*”); Forfeiture Order, *In re SBC Commc’ns Inc.; Apparent Liability for Forfeiture*, 17 FCC Rcd 19923, ¶ 5 (2002) (quoting *Trinity Broad.*, 211 F.3d at 628). *See also Gen. Elec.*, 53 F.3d at 1328-29. Here, providers will potentially be subject to enforcement action for failure to correctly predict when a section 214 application must be filed.

come to expect from their provider.”³⁰ In the case of a copper loop retirement, e.g., the rules provide for notice of the retirement process, but objectors cannot unduly delay or ultimately prevent the retirement process from moving forward.³¹ Moreover, the Commission doesn’t suggest that other notice provisions in its rules have not effectively protected consumers and communities.³² Careless statements of what consumers are entitled to with technology transitions such as those in RBPG’s comments will serve only to mislead consumers and make transition much harder to accomplish. No matter what the Commission ultimately decides, it should ensure that consumers are not misled with inaccurate promises and unrealistic hopes about what transition will mean.

In conclusion, the Commission’s dramatic shift in how it defines a provider’s service for purposes of section 214 analysis leaves no clear guidance as to when providers might need to seek review under section 214. Having already decided that transitioning to fiber and IP-based networks is in the public interest and is necessary to achieve the nation’s broadband deployment goals, the Commission should be encouraging providers to upgrade their networks, not erecting barriers to that process. Similar to the manner in which the Commission, aided by service providers, states, and municipalities, successfully shepherded consumers through the digital television transition, it should employ that same approach in helping the public embrace the enhanced offerings that will be made possible with fiber networks. Faxing, alarm monitoring services, and the like will continue to be available to consumers post-transition.³³ And, in the same manner that consumers transitioned to subscription TV service, purchased digital TVs,

³⁰ *RBPG Opposition* at 2.

³¹ *See generally* 47 C.F.R. § 51.333.

³² *See Declaratory Ruling* at ¶ 117 (pointing wireline carriers to their obligations under 47 C.F.R. § 68.110(b), but not otherwise suggesting that provision has not been effective in protecting consumers).

³³ For example, many consumers have the ability to scan documents and send them as email attachments, thus eliminating the need to use fax machines.

and/or got set top boxes so their analog televisions continued to receive over-the-air broadcasts, consumers will survive the transition to fiber and IP-based networks.

We note further that 25 megabits per second (Mbps) for downloads and 3 Mbps for uploads will not be achieved with legacy, copper-based networks.³⁴ So it is in everyone's best interest that the Commission carefully weigh the numerous benefits of allowing technology transitions to happen unimpeded by unnecessary regulation against the minimal burdens that some customers may (but need not with proper notice and education) experience. The Commission therefore should refrain from imposing any additional changes to the 214 process until the rulemaking in this proceeding is completed.³⁵

Respectfully submitted,



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³⁴ See News Release, FCC, FCC Finds U.S. Broadband Deployment Not Keeping Pace, (Jan. 29, 2015) (announcing the updated broadband speed benchmark in the 2015 Broadband Progress Report), http://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0129/DOC-331760A1.pdf.

³⁵ Indeed, the Commission signaled its intent to consider seek comment and additional information on these issues before determining how to address them for purposes of technology transitions. See *Technology Transitions NPRM*, *supra* note 2, at ¶ 93; *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, Public Notice, DA 13-1016, at 8 and n.32 (rel. May 10, 2013).