No. 17-73283

IN THE

United States Court of Appeals for the Ninth Circuit

GREENLINING INSTITUTE, PUBLIC KNOWLEDGE, THE UTILITY REFORM NETWORK, AND NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents,

and

USTELECOM,
Intervenor.

On Petition for Review of an Order of
the Federal Communications Commission

PETITIONER'S REPLY BRIEF

Harold Feld
John Bergmayer
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20037
202-559-1044
Counsel for Public Knowledge

David C. Bergmann
3293 Noreen Drive
Columbus, OH 43221
Counsel for National Association of State Utility Consumer Advocates

Vinhcent Le
THE GREENLINING INSTITUTE
2nd Floor 360 14th St.
Oakland, CA 94612
Counsel for Greenlining Institute

Christine A. Mailloux
THE UTILITY REFORM NETWORK
785 Market Street, Suite 1400
San Francisco, CA 94104
Counsel for The Utility Reform Network

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INTRODUCTION

Respondents Federal Communications Commission ("FCC") and United States, and Intervenor USTelecom, fail to defend the fatal flaws in the Order on Review. Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, *Report and Order, Declaratory Ruling, and Further Notice of Proposed Rulemaking*, 32 FCC Rcd 11128 (2017) [SER 1-115] ("Order on Review"). Respondents fail to rebut Petitioners' argument that limiting the definition of "service" to the tariff or service contract solely in the case of copper loop retirement or service termination under Sections 214(a) and 214(c) is contrary to the plain meaning of the statute, 47 U.S.C. § 214 (a), (c). Even if the Commission's interpretation were permissible, its reasoning is arbitrary, and the process by which the FCC arrived at the Order on Review's Declaratory Ruling, Order on Review ¶¶ 128-55 (2017) [PSER 58-70] ("Order on Review's Declaratory Ruling"), violated the Administrative Procedure Act ("APA") and the Commission's rules. Respondents' efforts to wave these flaws away by characterizing the Order on Review's Declaratory Ruling as an informal adjudication or advisory opinion are unavailing. Under this Court's precedents, the

Order on Review's Declaratory Ruling is a "legislative" rule requiring notice and comment. *See Hemp Industries Association v. DEA*, 333 F.3d 1082 (9th Cir. 2003). Furthermore, because the Commission failed to assert this below in response to Petitioners' notice arguments, *see* Written Ex Parte of Public Knowledge, *et al.* WC Docket No. 17-84 (Fil. Nov. 9, 2017) [ER 17]; Public Knowledge Comments, WC Docket No. 17-84 (Fil. June 15, 2017) [ER 13], the Commission cannot raise this defense here for the first time. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943).

Similarly, Respondents' fail to explain how reversal of the expanded notice rules is consistent with the "Enduring Values Statement" the Commission adopted in 2014, *see* In the Matter of Technology Transitions, et al., *Order, Report and Order, and Further Notice of Proposed Rulemaking, Proposal for Ongoing Data Initiative*, 29 FCC Rcd 1433, ¶¶ 23, 37-69 (2014) [PSER 134-147] ("Enduring Values Statement"), and which prompted the Commission in 2015 to reject the same arguments that the Commission adopted in 2017. This reversal without explanation, or even an apparent awareness of reversal, renders the Order on Review arbitrary and capricious. *See*

Cal. Pub. Util. Comm'n v. FERC, 879 F.3d 966, 975 (9th Cir. 2018) ("*CPUC*"). Similarly, Respondents' arguments cannot hide that the 2017 FCC ignored most of the factual record, which prompted the expanded notice requirements. An administrative agency may always reevaluate the policy of the previous administration, but it cannot ignore the factual record upon which previous decisions relied. *See Organized Village of Kake v. USDA*, 795 F.3d 956, 968 (9th Cir. 2015) (en banc). The failure of the 2017 FCC to acknowledge facts in the previous record—let alone offer a reasoned explanation for departure from them—renders the Order on Review arbitrary and capricious.

Respondents' claim that Petitioners confuse the copper loop retirement rules and the service termination rules is factually incorrect. The same precedents and factual record undergirded both the changes in the retirement notice rules and the service termination rules, and the previous FCC promulgated the expanded notice rules because it found these rules necessary to protect the Enduring Values of competition and consumer protection. *See* Technology Transitions, Policies and Rules Governing Retirement of Copper Loop Lines by Incumbent Local Exchange Carriers, *Report and Order, Order on Reconsideration, and*

Further Notice of Proposed Rulemaking, 30 FCC Rcd 9372, ¶ 76 (2015) [PSER 133] ("2015 Tech Transitions Order") ("The updated network change disclosure rules we adopt today are crucial to protecting the core values of the Act, specifically the promotion of competition and protection of consumers."). Finally, even if no single violation of procedure and failure to engage were sufficient on its own, the combination demonstrates that the FCC failed its duty to engage with an open mind and provide its best considered judgement.

Respondents try to avoid the argument by challenging Petitioners' standing, and by renewing arguments previously rejected in their *Motion to Strike*, Respondent's *Motion to Strike Supplemental Motion for Relief* (Apr. 26, 2018) [PSER 47-58]. The Court should reject these efforts to avoid the merits.

I. THE TARIFF TEST FAILS BOTH *CHEVRON* STEP ONE AND STEP TWO.

Petitioners' initial brief demonstrated that the term "service" as used in the statute is unambiguously broader than the meaning assigned by the Commission in the Order on Review, and therefore the new interpretation in the Order on Review should be rejected. Pet. Br. 45-48. Specifically, word "service" unambiguously means more than

simply the federal tariff. Because the interpretation given by the FCC "goes beyond the meaning that the statute can bear," *MCI v. AT&T*, 512 U.S. 218, 229 (1994), it is not entitled to deference and should be rejected by the Court as contrary to Congress' clear intent.

Notably, Respondents' brief emphasizes policy arguments and argues that its policy choices were reasonable. Res. Br. 34-37. But the question of whether the Commission thinks a policy is reasonable is different from whether Congress clearly intended to confine the Commission's discretion, however reasonable. *See MCI,* 512 U.S. at 234. As in *MCI*, this is reinforced by the importance of Section 214 in ensuring service "to all Americans"—one of the central goals of the Communications Act. *See* Enduring Values Statement, ¶50 [PSER 87].

Intervenor's brief supports Petitioners' arguments rather than Respondents. Intervenor notes that "the Communications Act of 1934 repeatedly uses the unadorned word 'service' to refer back to the interstate 'communications service' that was the original subject of the Act." Int. Br. 31. Petitioners made this very point, noting that every other use of the word "service," ***including in the same section of 214***, goes well beyond the scope of the tariff or service agreement. Br. 48-49.

The Commission itself conceded that the word "service" in Section 214(c) applies to both the Commission's merger review and service termination authorities, but that the same word, in the same sentence, has a more expansive meaning applied to merger review than when applied to service termination. Br. 63-64. Neither Respondents nor Intervenor offer any explanation as to why the word "service" is broader than the tariff throughout the Communications Act, broader than tariff in Section 214, even broader than tariff when applied to the word "merger" or "license" in Section 214(c), but changes meaning when applied to line retirement or service termination review.[1]

Indeed, Petitioners made precisely the same argument as Intervenor, that the term "service" in Section 214 means "telecommunications service." Br. 52. As Petitioners noted, the statute

[1] Even if this contradiction were somehow permissible under *Chevron* Step 1, the Commission's failure to explain it is arbitrary under *Chevron* Step 2. *See Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984). Similarly, the failure of the FCC to explain why the seminal Carterfone case, Use of the Carterfone Device in Message Toll Telephone Service, 13 FCC 2d 420 (1968), supports the 2017 Commission when the FCC cited it as support for its Declaratory Ruling in 2014, *see* Ensuring Customer Premises Equipment Back Up Power for continuity of Communications, Technology Transitions, et al., *Notice of Proposed Rulemaking and Declaratory Ruling*, 29 FCC Rcd 14968, ¶ 117 (2014) [ER 124] ("2014 Declaratory Ruling"), is arbitrary.

broadly defines "telecommunications service" as going well beyond the mere scope of the tariff. *See* 47 U.S.C. § 153(50), (53). While vigorously reiterating Petitioners' arguments that the term "service" in Section 214 means "telecommunications service," Intervenor offers no explanation for why the broader definition of "telecommunications service" does not apply.[2] Instead, Intervenor points to Section 203, which is not, and has never been, the definitional section of the statute.[3] Having conceded that "service" means "telecommunications service" as it does throughout Title II and the Communications Act generally, it follows that the statutory definition of "telecommunications service" in Section 153(53) applies to all portions of Section 214.[4]

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[2] Intervenor's argument that Amicus California Public Utilities Commission has raised a "new argument," Int. Br. 33, is without merit. Petitioners raised precisely this argument.

[3] Further, neither Respondents nor Intervenor explain why if Section 203 supplies the definition of service for Section 214, Section 214 applies to de-tariffed services. This contradiction is fatal under *Chevron* Step 1 and arbitrary under Step 2.

[4] As noted in Petitioners' Brief, because this has nothing to do with tariffs, reliance on principles like the "filed rate doctrine" are irrelevant. Additionally, neither Respondents nor Intervenor explain how, if the relevant section of Section 214 means "tariff," the Commission can substitute "service contract" for tariff when de-tariffed services are subject to Section 214 termination review. *See* Br. 49-50.

II. THE DECLARATORY RULING REQUIRED NOTICE AND COMMENT AND WAS PROCEDURALLY DEFICIENT.

Petitioners' Brief highlighted the procedural defects in the Order on Review's Declaratory Ruling. Br. 59-62. Specifically, the suspect manner in which the Commission sought to hide its intent to issue a new declaratory ruling, and that there was no pending "controversy" to justify a declaratory ruling as required by 47 C.F.R. § 1.2. Respondents and Intervenor dispute Petitioners' contention that the Commission's actions were procedurally deficient. They claim there was nothing suspicious about raising a legal question settled 2 years earlier, in a separate proceeding, without following the standard practice of including any of the previous dockets in the caption and using a descriptive term ("Request for Comment") not used in the rulemaking context or defined in the Commission's rules. As Petitioners' Brief observed, APA notice and comment is not a game where an agency seeks to technically mention a possible intent while actively trying to obscure that intent from the public. *See Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977). To the contrary, "the requirement is designed to give interested persons . . . an opportunity to participate in the rulemaking process," and "ensure that government agencies are

accountable and their decisions reasonable." *Erringer v. Thompson*, 371 F.3d 625, 629 (9th Cir. 2004) (citations omitted). The Commission's conduct provided ample "indicia of inadequate consideration" and should therefore be reversed and vacated as arbitrary and capricious. *See CPUC*, 879 F.3d at 975.

A. The Declaratory Ruling Was A "Legislative Rulemaking," And Lack of Proper Notice Was Not Harmless.

Respondents argue that the Order on Review's Declaratory Ruling repealing the functional test was either "adjudicatory" or "advisory" under the APA, and therefore did not require notice. Res. Br. 44-49. Alternatively, they argue that the failure to provide adequate notice was harmless. Res. Br. 47. Neither of these arguments has merit.

In *Hemp Industries,* this Court considered the question of how to distinguish an "advisory" ruling that does not require notice and comment from a "legislative" or "substantive" ruling, which does. *See Hemp Industries,* 333 F.3d at 1087-89. The Court adopted the test enunciated by the D.C. Circuit in *American Mining v. Mine Safety and Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993). In this case, the Commission has clearly altered the settled expectations of the parties

and established new, substantive rules limiting the protections to which Petitioners' members were entitled prior to the Order on Review. Regardless of whether or not the 2014 Declaratory Ruling was "advisory" or "legislative," the new limitation on subscriber protections constitutes a legislative rule.[5] *See Hemp Industries*, 333 F.3d at 1090 (although interpretation might have been advisory in absence of previous interpretation, change in settled interpretation altering rights of parties is legislative). *See also Sprint Corp. v. FCC*, 315 F.3d 369, 375 (D.C. Cir. 2003) (where FCC did more than simply reverse previous rule, the new rule is legislative not advisory).

That the Commission chose to act through a declaratory ruling, which may be classified as an adjudication for certain purposes, does not end the inquiry. The Court has the responsibility to determine the

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[5] Contrary to the assertion of Respondents, Res. Br. at 45, at no time did Petitioners (or the Commission for that matter) argue that the 2014 Declaratory Ruling was adjudicatory. The Commission did state in its 2015 Order on Reconsideration, 2015 Tech Transitions Order, ¶¶ 181-201, that the 2014 Declaratory Ruling was advisory, but this issue was never adjudicated by a court. Furthermore, even if the 2014 Declaratory Ruling were advisory, it would not follow that the 2017 Declaratory Ruling, Order on Review, ¶¶ 128-156 [SER 49-60], was advisory. The 2017 Declaratory Ruling did not simply reverse the 2014 Declaratory Ruling, it substantively "changed the rules of the game" by creating a new limit on subscriber rights. *See Sprint*, 315 F.3d at 374.

true nature of the agency action regardless of how the agency characterizes its actions. *See Erringer*, 371 F.3d at 630 (agency characterization is "relevant but not dispositive"). In *Central TX Tel. Coop v. FCC*, the D.C. Circuit held that a declaratory ruling ***might*** be considered an informal adjudication rather than formal rulemaking subject to notice and comment. *See Central TX Tel. Coop v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2004). This is quite different from a holding that all declaratory rulings are informal adjudications rather than rulemakings or other final decisions subject to APA notice and comment. Respondents do not offer any explanation in their brief, nor did the FCC explain below, why this particular action should qualify as an informal adjudication rather than a legislative rule. Given that the Commission's 2015 Tech Transitions Order—as further defined in the 2016 Report and Order, In the Matter of Technology Transitions, et al., *Declaratory Ruling, Second Report and Order, and Order on Reconsideration*, 31 FCC Rcd 8283, ¶¶ 60-194 (2016) [PSER 79-133] ("2016 Report and Order")—created new rules protecting consumers, the Order on Review adopting the "Tariff or Service Contract" rule clearly "changes the rules of the game" and required notice. *See Sprint,*

315 F.3d at 274. "To find otherwise would intolerably blur the line when the APA notice requirement is triggered and when it is not." *Id.* at 376.

Assuming for a moment one *could* define the Order on Review's Declaratory Ruling as an adjudication, it would create a far more egregious procedural error warranting reversal. Unlike advisory opinions, which are exempt from Section 553 notice requirements and governed by no other section, adjudications that do not require notice are governed by the provisions of Section 554, and thus require a hearing. *Compare* 5 U.S.C. § 553(b)(A) (exempting, "except where notice or hearing is required by statute" only "interpretive rules, general statements of policy, and or rules of agency organization, procedure or practice;" *with* 5 U.S.C. § 554(a) ("this section applies . . . in every case of adjudication required by statute to be determined on the record ***after opportunity for an agency hearing***.") (emphasis added); *Accord Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007) (applying *Central TX Tel. Coop* in case involving immigration hearing). This hearing must include notice to all interested parties. *See* 5 U.S.C. § 554(b). At no time did the FCC afford "an opportunity for hearing" or provide notice of such hearing as required by Section 554. Nor do

Respondents explain under what exemption to the hearing requirement the Commission acted. *See* 5 U.S.C. §§ 554(a)(1) – (6). Consequently, this proceeding can only be considered an informal rulemaking subject to Section 553 and its notice requirements, or a procedurally deficient adjudication in violation of 554(a).[6]

Further, because Respondents raise this argument for the first time here, despite the fact that Petitioners raised notice questions below, the agency may not raise it now through counsel on appeal. *See Chenery*, 318 U.S. at 87 (1943). Indeed, this is precisely the kind of "convenient litigating position, or . . . *post hoc* rationalization advanced by an agency seeking to defend past agency conduct from attack," that this Court has found to be "indicia" of arbitrary decision making. *CPUC*, 879 F.3d at 975. As Petitioners have argued, the FCC issued its declaratory ruling in violation of its own rules. It had before it neither a request for declaratory ruling nor a controversy that would justify issuance of a declaratory ruling on its own motion. *See* 47 C.F.R. § 1.2.

[6] Because the D.C. Circuit's speculation in *Central TX Tel. Coop* was speculative *dicta,* it did not elaborate on what requirements would be required of a declaratory ruling by adjudication rather than by informal rulemaking.

To reverse Petitioners' settled expectations by issuing an "informal adjudication" in violation of its own rules is clearly an abuse of discretion as contemplated by *Miguel-Miguel*.

Finally, Respondents raise the ultimate fallback of harmless error. Res. Br. 47-48. As the D.C. Circuit has warned, an overbroad application of the prejudice requirement "would virtually repeal Section 553's requirements." S*print*, 315 F.3rd at 376 (citations omitted).[7] For this reason, the test is not whether petitioners were unable to express their views, or whether Petitioners can affirmatively show actual prejudice. Rather, if there is ***any*** uncertainty as to how the failure of notice impacted the proceeding, or even a colorable argument that the parties would have presented their views more forcefully had they been aware of the agency's intent, "the error cannot be considered harmless." *Id*. As Petitioners noted in their brief, the number of comments filed in the 2017 proceeding declined precipitously from the comments filed in

[7] This caution is particularly important with regard to the FCC, as 47 U.S.C. § 405(a) requires that the Commission have the opportunity to pass on all issues of law or fact before judicial review. If the standard were merely the opportunity to express one's views, as Respondents argue here, this would make claims of insufficient notice by the FCC impossible to review.

2014 when these issues were first raised, and the bulk of commenters—including those who had previously commented in support of the Functional Test and opposed the "tariff" argument—focused primarily on those aspects designated as "Notice of Proposed Rulemaking" and "Notice of Inquiry." Br. at 61. This strongly implies that Petitioners were not alone in their perception that by designating the section dealing with the Functional Test as a "Request for Comment," the Commission was collecting information to justify a subsequent notice and comment rulemaking rather than actually contemplating repeal of the Functional Test and adoption of the Tariff Test.

B. There Was No Controversy, and Therefore the Issuance of The Declaratory Ruling Violated the Commission's Own Rules.

Respondents claim that because carriers responded to the Commission's invitation for comment stating that that they faced "substantial uncertainty," this meets the requirement of 47 C.F.R. §1.2. This argument fails for several reasons. First, the Order on Review failed to explain what had changed since the Commission rejected precisely the same arguments when it adopted the Functional Test in 2015. This is the kind of reversal without explanation that this Court

has repeatedly found fatal. This is especially true here, where the complaints of uncertainty were prompted by an invitation from the agency rather than arising *sua sponte* from the carriers.

More importantly, in 2016, the FCC explained clearly what services would be covered by the Functional Test. *See* 2016 Report and Order, ¶ 89 [PSER 89]. The Commission also set a date certain for when carriers would no longer need to support legacy service or equipment. *See* 2016 Report and Order, ¶ 159. [PSER 118]. Although the 2016 Report and Order noted that future experience might require additional rulemaking to add additional services, this created no more uncertainty than any other rulemaking subject to subsequent modification. If the possibility of a future rulemaking can satisfy the uncertainty requirement, then this limitation on the Commission's discretion is meaningless. Indeed, the Commission's failure to address the certainty created by establishing rules in 2016, and its failure to address the record on which the Commission relied in the 2015 Tech Transitions Order, constitute independent reasons to find the Commission's Order on Review's Declaratory Ruling arbitrary.

III. THE ORDER FAILS TO ACKNOWLEDGE DEPARTURE FROM PAST PRECEDENT AND PREVIOUS FACTUAL FINDINGS.

A consistent theme with regard to all of the provisions challenged by Petitioners is the repeated failure of the Commission to even acknowledge contrary Commission precedent, or the factual record underlying its previous decisions. As discussed at length in Petitioners' Brief, this departure *sub rosa* from past agency decisions and failure to address the record undergirding those decisions renders the Order on Review arbitrary. Br. 69-73. Respondents and Intervenor respond by quibbling with certain specific examples cited by Petitioners, but fail to address the largest and most glaring omissions of the Order on Review, the complete absence of any consideration of the Enduring Values policy adopted to guide the transition in January 2014 and the failure to address the factual basis on which the 2015 FCC based the 2015 Tech Transitions Order.

A quick perusal of the 2014 Declaratory Ruling and the 2015 Tech Transitions Order finds 30 references to Enduring Values as significant

to the Commission's determination.[8] In particular, the Commission rejected arguments upon which the Order on Review relied because the Commission found that they would be inconsistent with the values guiding the transition. Br. 57-58.[9] The failure of either the 2017 NPRM, Accelerating Wireline Broadband Wireline Deployment by Removing Barriers to Infrastructure Investment, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment*, 32 FCC Rcd 3226 (2017) [SER 288-317] ("2017 NPRM"), or the Order on Review to even mention the Enduring Values Statement is a clear failure to display even "an awareness that it is changing position" and an attempt to "depart from a prior policy *sub silentio*." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Similarly, the agency cannot simply announce that carriers have sufficient market incentives not to abandon rural customers without at least acknowledging that the Commission

[8] The 2014 Declaratory Ruling has 15 references to the Enduring Values Statement in various forms (e.g., "values," "enduring values," "core values). The 2015 Tech Transitions Order also has 15 such references.

[9] See, e.g., 2015 Tech Transitions Order, ¶69 (importance of notice to state and local officials to protect values); ¶76 (expanded notice to consumers needed to protect core values of competition and consumer protection); ¶79 (defining when notice obligation is triggered, including de facto retirement, needed to protect core values).

repeatedly found over the course of decades that carriers had strong market incentives to abandon their rural customers, *see*, *e.g.*, Implementation of Section 402(B)(2)(A) of the Telecommunications Act of 1996, 14 FCC Rcd 11364, ¶¶ 29-32 (1999) [ER 218-220], let alone on the basis of a record demonstrating that carriers had, in fact, been abandoning rural customers. Br. 66-69. Such a complete reversal, without even an acknowledgement of the reversal, is clearly arbitrary.

Nor can Respondents and Intervenor waive away the failure of the 2017 NPRM or the Order on Review to deal with significant factual events, such as Superstorm Sandy, that formed the factual basis of both the copper loop retirement related rules and the termination of service portion of the rules. "Elections have consequences. But . . . even when reversing policy after an election, an agency may not simply discard prior factual findings without a reasoned explanation." *Village of Kake*, 795 F.3d at 968. In 2014 and 2015, the Commission based the expanded notice requirements, including the *de facto* retirement notice requirement, on the events of Superstorm Sandy and the numerous cases presented in the record demonstrating consumer frustration and confusion, as well as loss of important services, from copper line

retirements. The decision of the 2017 Commission to pretend as if these events never happened, let alone provide a reasoned explanation for rejecting them now, is thus fatal. *Id.* at 967-969.

Respondents' and Intervenor's claim that Petitioners have confused the copper loop retirement rules with the service termination rules is both inaccurate and a red-herring. The Commission based its decision with regard to both the expanded notice requirements and the service termination rules on the same policy statement, the same factual record, and the same past precedent with regard to the incentive of carriers to abandon less-valuable customers in higher cost areas. The Commission's decision to simply ignore inconvenient facts and precedent is fatal regardless of which set of rules Respondents claim to be at issue.

IV. PETITIONERS HAVE BOTH ARTICLE III AND STATUTORY STANDING TO CHALLENGE THE COMMISSION'S 2017 ORDER.

This Court's review of standing involves two inquiries. First, do Petitioners have standing to bring this case under Article III of the Constitution? Second, do Petitioners have statutory (or "prudential") standing? *See Int'l Bhd. of Teamsters v. United States DOT*, 861 F.3d

944, 950-52 (9th Cir. 2017) ("Standing has a constitutional as well as a statutory component.")[10]

A. Petitioners Have Constitutional Standing to Bring Their Challenge in the Instant Case.

To establish constitutional standing, plaintiff must have suffered injury in fact that is fairly traceable to the challenged action and that is likely to be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Plaintiffs may establish standing as consumers of wireline services. *See Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006) (Finding that an organization may establish standing to challenge an agency order as consumers whose interests are adversely affected by the order). In addition, only one Petitioner needs to have standing to permit the Court to consider the petition for review. *See Mass. v. Envtl. Prot. Agency*, 549 U.S. 497, 518 (2007). If the Plaintiff is the object of a suit

[10] While Petitioners sufficiently pled standing in their opening brief, to the extent that their burden of establishing standing was not met at that stage in the briefing, petitioners appropriately establish standing now in their reply brief. In cases that challenge agency decisions, this Court has allowed Petitioners to establish standing at any time during the briefing phase. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1528 (9th Cir. 1997).

that challenges the legality of government action or inaction, there is, "little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it. *Lujan*, 504 U.S. at 561-62.

Here, the harm is clear and the way in which the judicial decision remedies the harm is clear. As the regulated parties (subscribers) who are the objects of the suit, Petitioners are adversely affected by the Order on Review. *See* Affidavits of Regina Costa, et al. ("Petitioners' Affidavits") [PSER 1-14] (Seven of Petitioners' members are identified by name as users of traditional copper-line phone service). Prior to the Order on Review, Petitioners had a right to have their services protected under the Section 214 Functional Test. They had a right to notice of copper retirement and a right to expect that their state government would be alerted to the situation. They likewise had a right to file a complaint when copper line was de facto retired. The FCC ***identified the need for these critical consumer protections and determined that these rights were essential to protecting access to vital services***. *See* 2015 Tech Transitions Order, ¶ 191 [ER 146, 161-162]; IP Enabled Services, *Report & Order*, 24 FCC Rcd 6039, ¶¶ 11-14

[ER 187-89] (2009). Petitioners suffered concrete, particularized, and self-evident harms when their rights were stripped away by the Order on Review. *See* Order on Review ¶¶ 22, 31, 37, 41, 45, 58, 128, 130 (2017) [PSER 70-79]. Wireline consumers are also harmed by the lack of support that they would receive from their state and local governments as identified in the 2015 Tech Transitions Order. *See* 2015 Tech Transitions Order, ¶ 70 [ER 285-86].[11]

For purposes of standing analysis, the court assumes all facts are true. *See Nat'l Counsel of La Raza v. Cegavaske,* 800 F.3d 1032, 1039 (9th Cir. 2015). This includes the findings of the FCC in 2015 that the rules at issue here are necessary to protect consumers—particularly rural consumers—from the loss of critical services. The current FCC's determination that the 2015 findings that these rules are unnecessary may ultimately prevail on the merits, but that does not matter to the standing analysis, which rests on the harms identified by the 2015 FCC and on which Petitioners rely. *See Mielo v. Steak 'N Shake Operations, Inc.*, 897 F.3d 467, 478-79 (3rd Cir. 2018) ("our standing analysis must

[11] NASUCA may also be impacted by the failure to notify the state PUCs, since it is its job to advocate for consumers before the PUCs.

avoid any consideration of the merits"); *see also Cotrell v. Alcorn Labs*, 874 F.3d 154, 162 (3rd Cir. 2017). The 2015 FCC, in turn, relied on a record of harms already suffered by consumers from the lack of notice, and interference with vital services. *See Mielo*, 897 F.3d at 480 & n.15 (that injury occurred in the past makes it reasonable to assume that injury will occur in the future, and actions based on this experience are tangible injury). The risk of copper loop deterioration and/or termination of TDM service is not hypothetical. As discussed at length in Petitioners' Brief, it has been the national policy since the FCC's 2010 National Broadband Plan to phase out traditional copper line service. It is not a matter of if carriers will retire copper or terminate existing TDM service, it's a matter of when. *See Nat'l Resources Defense Council v. Envtl. Prot. Agency*, 464 F.3d 1, 6-7 (D.C. Cir. 2006) (increased risk from exposure to toxic chemicals creates mathematical certainty that members of organization will be impacted, even if it is impossible to know which members or when). When this takes place, Petitioners will be unable to find acceptable substitutes that support their existing security systems and will be incapable of contacting emergency services during power outages, some of which are mandated

by Regulatory Order, and potentially by Court Order, during adverse weather conditions to reduce the risk of power lines causing fires. *See* Petitioners' Affidavits; Public Utilities Commission of the State of California, *Resolution Extending De-Energization Reasonableness Notification, Mitigation and Reporting Requirements in Decision 12-04-024 to All Electric Investor Owned Utilities*, Resolution ESRB-8 (July 16, 2018); PG&E Court Order; PG&E Letter [PSER 1-26]. A favorable judicial determination in the instant case will overturn the Order on Review and reinstate the 2015 rules. This result will redress the injuries in fact to Petitioners outlined above.

B. Petitioners Have Statutory Standing Under the Communications Act.

The statutory standing inquiry asks "whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit." *Nuclear Info. & Res. Serv. v. NRC*, 457 F.3d 941, 950 (9th Cir. 2006) (quoting *City of Sausalito v. O'Neil*, 386 F.3d 1186, 1199 (9th Cir. 2004)). To show statutory standing, Petitioners must show their "complaint fall[s] within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (quoting *Elk Grove Unified School Dist. v.*

Newdow, 542 U.S. 1, 12 (2004)). Whether a plaintiff comes within the zone of interests requires the Court to use tools of statutory interpretation to determine "whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Lexmark Int'l, Inc.*, 572 U.S. at 118.

Here, Petitioners challenge the Commission's interpretation of the term "service" in Section 214(a) of the Communications Act. The Act generally, and Section 214 specifically, are designed to protect the community served—which includes subscribers and persons engaged in communication. *See* 47 U.S.C. § 152(a) ("The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio. . . and to all persons engaged within the United States in such communication . . . "); 47 U.S.C. § 214(a) ("No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby."). As discussed above, Petitioners are users of wireline services who have suffered harms due to the decisions of the current Commission in the

Order on Review. Petitioners are therefore squarely within the zone of interests protected by the law.

V. THE COURT SHOULD REJECT RESPONDENT'S EFFORT TO LIMIT THE SCOPE OF ISSUES PRESENTED.

Respondents again argue that Petitioner's notice arguments are not properly before the Court. Neither Respondents nor Intervenor add to the issues presented in the *Motion to Strike* and Petitioner's response, Petitioner's *Response to Respondent's Motion to Strike* (May 3, 2018) [PSER 27-47], that this Court rejected. *See* United States Court of Appeals, Ninth Circuit, Order, No. 17-73283 (Aug. 22, 2018) [PSER 15-17]. This Court should again reject these efforts to limit its review.

As Respondents and Intervenor concede, Petitioners filed a timely petition, properly designating the Order on Review, as required by the plain language of 28 U.S.C. § 2344. This satisfied the jurisdictional requirement of the Hobbs Act and Fed. R. App. 15. *See Nat'l Center for Immigrants Rights, Inc. v. INS*, 892 F.2d 814, 817 (9th Cir. 1989) (*per curiam*). Respondents therefore propose a novel and unsupported theory of "voluntary limitation"—that by including more than the bare minimum required by the statute to establish jurisdiction, Petitioners "voluntarily" foreclosed issues they were not required to raise until the

opening brief. Nothing in the plain language or legislative history supports such a reading of the statute, and neither Respondents nor Intervenor cite a single case in support of this interpretation.

Respondents therefore lean heavily on a single Eighth Circuit case addressing an issue unrelated to the jurisdictional nature of the Hobbs Act, *Goos v. ICC*, 911 F.2d 1283 (8th Cir. 1990). *Goos* dealt with the failure to properly identify all parties to the Petition for Review by name. *Goos* followed *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), finding that the specific language of the Federal Rules, i.e. that "the petition shall specify the parties seeking review," required dismissing every Petitioner not explicitly named. Significantly, that case had nothing to do with the "jurisdictional nature" of 28 U.S.C. § 2344 and relied entirely on the specific wording of Rules relating to identification of parties. Furthermore, as this Court explained in *Retail Flooring Dealers of Am. v. Beaulieu of Am.,* 339 F.3d 1146 (9th Cir. 2003), Congress found the Supreme Court's interpretation so harsh that Congress amended the rule so that as long as one petitioner was properly identified, the other petitioners would not be dismissed for failure to state their names. *Id.* at 1148. Accordingly, *Goos* is no longer

even good law in the Eighth Circuit, let alone in the Ninth. To the extent *Goos* and its subsequent history teaches anything, it illustrates Congress' commitment to the principle that "the Federal Rules reject the approach that pleading is a game of skill in which one misstep may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

To the extent the parties appeal to the discretion of the court, Petitioners note that the parties have twice failed to address the line of reasoning announced by the Court in *Sierra Club v. Penfold*, 857 F.2d 1307, 1315-16 (9th Cir. 1988) (citing *Santana v. Holiday Inns, Inc.*, 686 F.2d 736, 739 (9th Cir. 1982)). Under *Penfold*, the court should permit a party to add additional claims to an appeal under Fed. R. App. 15 where a district court would allow amendment to a claim following expiration of the statute of limitations, i.e. where the claim arises out of the same "particular transaction or set of facts." *Penfold*, 857 F.2d at 1315. Respondents apparently concede the application of *Penfold* and therefore mischaracterize Petitioners as seeking to impermissibly open long-settled aspects of previous decisions (Res. Br. 58.) Cf. *Penfold* at

1316 (finding that claims related back not to the order on appeal but to a previous order years in the past). As all the claims presented by Petitioner arise out of the same order on appeal, Respondents' argument is meritless. Similarly, the FCC's effort to argue prejudice is foreclosed by *Penfold*, which explicitly found that the modification of the Petition for Review results in no prejudice. *Id*.[12]

CONCLUSION

The failure of the Commission to genuinely engage with the record would, on its own, justify reversal. But even if the Court decides to give the Commission the benefit of the doubt that it did not treat this proceeding as merely a box to check before issuing a predetermined conclusion, the manifold failings and errors of the Order on Review cannot be defended.

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[12] In addition to being directly contradicted by *Penfold*, the FCC's unsupported speculation that others might have intervened on its behalf is somewhat ironic given its position that the lack of notice with regard to the declaratory ruling caused no harm. Res. Br. at 47. *See also* Int. Br. at 25. Assuming these hypothetical intervenors existed, they could have sought Intervention as a matter of discretion by the Court in the nearly nine months since Petitioners filed their amended Petition. Intervenor USTelecom's argument in the alternative that § 2344 and Rule 15 are "a mandatory claim-processing rule" pursuant to *Hamer v. Neighborhood Hous. Servs of Chi.,* 138 S. Ct. 13 (2017) fails for the same reasons that the jurisdictional argument fails.

WHEREFORE, Petitioners ask this Court to reverse and vacate the Order on Review.

Dated: January 22, 2019

Respectfully submitted,

/s/ *John Bergmayer*
John Bergmayer
Counsel for Petitioners

STATEMENT OF RELATED CASES

There are no related cases.

Dated: January 22, 2019

/s/ *John Bergmayer*
John Bergmayer
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

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Dated: January 22, 2019

/s/ *John Bergmayer*
John Bergmayer
Counsel for Petitioners

CERTIFICATE OF FILING AND SERVICE

I, John Bergmayer, hereby certify that on January 22, 2019, I filed the foregoing Brief for the Respondents with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit using the electronic CM/ECF system.

I further certify that all participants in the case, listed below, are registered CM/ECF users and will be served electronically by the CM/ECF system.

Dated: January 22, 2019

/s/ *John Bergmayer*
John Bergmayer
Counsel for Petitioners

SERVICE LIST

Makan Delrahim
Assistant Attorney General

Andrew C. Finch
Principal Deputy Assistant Attorney General

Michael F. Murray
Deputy Assistant Attorney General

Robert B. Nicholson
Nickolai G. Levin
Attorneys

U.S. DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
950 Pennsylvania Ave. NW
Washington, DC 20530

Scott H. Angstreich
Counsel for Intervenor USTelecom-The Broadband Association

KELLOGG, HANSEN, TODD,
FIGEL & FREDERICK, P.L.L.C.
1615 M Street, NW
Washington, DC 20036

Thomas M. Johnson, Jr.
General Counsel

David M. Gossett
Deputy General Counsel

Richard K. Welch
Deputy Associate General Counsel

Sarah E. Citrin
Counsel

FEDERAL COMMUNICATIONS COMMISSION
445 12th Street SW
Washington, DC 20554
(202) 418-1740
fcclitigation@fcc.gov

ADDENDUM

Statutes

5 U.S.C. § 553

Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or
(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;
(2) reference to the legal authority under which the rule is proposed; and
(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or
(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.
(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through

submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
(2) interpretative rules and statements of policy; or
(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 554

Adjudications

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;
(2) the selection or tenure of an employee, except a [1] administrative law judge appointed under section 3105 of this title;
(3) proceedings in which decisions rest solely on inspections, tests, or elections;
(4) the conduct of military or foreign affairs functions;
(5) cases in which an agency is acting as an agent for a court; or
(6) the certification of worker representatives.

(b)Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;
(2) the legal authority and jurisdiction under which the hearing is to be held; and
(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and
(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings.

This subsection does not apply—

(A) in determining applications for initial licenses;
(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

28 U.S.C. § 2344

Review of orders; time; notice; contents of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;
(2) the facts on which venue is based;
(3) the grounds on which relief is sought; and
(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

47 U.S.C. § 152

Application of chapter

(a) The provisions of this chapter shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone. The provisions of this chapter shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to the facilities of cable operators which relate to such service, as provided in subchapter V–A.

(b) Except as provided in sections 223 through 227 of this title, inclusive, and section 332 of this title, and subject to the provisions of section 301 of this title and subchapter V–A, nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier, or (2) any carrier engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (3) any carrier engaged in interstate or foreign communication solely through connection by radio, or by wire and radio, with facilities, located in an adjoining State or in Canada or Mexico (where they adjoin the State in which the carrier is doing business), of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with such carrier, or (4) any carrier to which clause (2) or clause (3) of this subsection would be applicable except for furnishing interstate mobile radio communication service or radio communication service to mobile stations on land vehicles in Canada or Mexico; except that sections 201 to 205 of this

title shall, except as otherwise provided therein, apply to carriers described in clauses (2), (3), and (4) of this subsection.

47 U.S.C. § 153

Definitions

(50) Telecommunications
The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(53) Telecommunications service
The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

47 U.S.C. § 203

Schedules of charges

(a) Filing; public display
Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier

shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

> (1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.
> (2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates
No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal
The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date.

Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations
In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

47 U.S.C. § 214

Extension of lines or discontinuance of service; certificate of public convenience and necessity

(a) Exceptions; temporary or emergency service or discontinuance of service; changes in plant, operation or equipment
No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line: Provided, That no such certificate shall be required under this section for the construction, acquisition, or operation of (1) a line within a single State unless such line constitutes part of an interstate line, (2) local, branch, or terminal lines not exceeding ten miles in length, or (3) any line acquired under section 221 of this title: Provided further, That the Commission may, upon appropriate request being made, authorize temporary or emergency service, or the supplementing of existing facilities, without regard to the provisions of this section. No carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby; except that the Commission may, upon appropriate request being made, authorize temporary or emergency

discontinuance, reduction, or impairment of service, or partial discontinuance, reduction, or impairment of service, without regard to the provisions of this section. As used in this section the term "line" means any channel of communication established by the use of appropriate equipment, other than a channel of communication established by the interconnection of two or more existing channels: Provided, however, That nothing in this section shall be construed to require a certificate or other authorization from the Commission 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.

(b) Notification of Secretary of Defense, Secretary of State, and State Governor

Upon receipt of an application for any such certificate, the Commission shall cause notice thereof to be given to, and shall cause a copy of such application to be filed with, the Secretary of Defense, the Secretary of State (with respect to such applications involving service to foreign points), and the Governor of each State in which such line is proposed to be constructed, extended, acquired, or operated, or in which such discontinuance, reduction, or impairment of service is proposed, with the right to those notified to be heard; and the Commission may require such published notice as it shall determine.

(c) Approval or disapproval; injunction

The Commission shall have power to issue such certificate as applied for, or to refuse to issue it, or to issue it for a portion or portions of a line, or extension thereof, or discontinuance, reduction, or impairment of service, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. After issuance of such certificate, and not before, the carrier may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, extension, acquisition, operation, or discontinuance, reduction, or impairment of service covered thereby. Any construction, extension, acquisition, operation, discontinuance, reduction, or

impairment of service contrary to the provisions of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, the State commission, any State affected, or any party in interest.

(d) Order of Commission; hearing; penalty
The Commission may, after full opportunity for hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier, party to such proceeding, to provide itself with adequate facilities for the expeditious and efficient performance of its service as a common carrier and to extend its line or to establish a public office; but no such authorization or order shall be made unless the Commission finds, as to such provision of facilities, as to such establishment of public offices, or as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier which refuses or neglects to comply with any order of the Commission made in pursuance of this subsection shall forfeit to the United States $1,200 for each day during which such refusal or neglect continues.

(e) Provision of universal service

> (1) Eligible telecommunications carriersA common carrier designated as an eligible telecommunications carrier under paragraph (2), (3), or (6) shall be eligible to receive universal service support in accordance with section 254 of this title and shall, throughout the service area for which the designation is received—
>
> > (A) offer the services that are supported by Federal universal service support mechanisms under section 254(c) of this title, either using its own facilities or a combination of its own facilities and resale of another carrier's services (including the services offered by another eligible telecommunications carrier); and

(B) advertise the availability of such services and the charges therefor using media of general distribution.

(2) Designation of eligible telecommunications carriers
A State commission shall upon its own motion or upon request designate a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the State commission. Upon request and consistent with the public interest, convenience, and necessity, the State commission may, in the case of an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated by the State commission, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the State commission shall find that the designation is in the public interest.

(3) Designation of eligible telecommunications carriers for unserved areas
If no common carrier will provide the services that are supported by Federal universal service support mechanisms under section 254(c) of this title to an unserved community or any portion thereof that requests such service, the Commission, with respect to interstate services or an area served by a common carrier to which paragraph (6) applies, or a State commission, with respect to intrastate services, shall determine which common carrier or carriers are best able to provide such service to the requesting unserved community or portion thereof and shall order such carrier or carriers to provide such service for that unserved community or portion thereof. Any carrier or carriers ordered to provide such service under this paragraph shall meet the requirements of paragraph (1) and shall be designated as an eligible telecommunications carrier for that community or portion thereof.

(4) Relinquishment of universal service

A State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall permit an eligible telecommunications carrier to relinquish its designation as such a carrier in any area served by more than one eligible telecommunications carrier. An eligible telecommunications carrier that seeks to relinquish its eligible telecommunications carrier designation for an area served by more than one eligible telecommunications carrier shall give advance notice to the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) of such relinquishment. Prior to permitting a telecommunications carrier designated as an eligible telecommunications carrier to cease providing universal service in an area served by more than one eligible telecommunications carrier, the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall require the remaining eligible telecommunications carrier or carriers to ensure that all customers served by the relinquishing carrier will continue to be served, and shall require sufficient notice to permit the purchase or construction of adequate facilities by any remaining eligible telecommunications carrier. The State commission (or the Commission in the case of a common carrier designated under paragraph (6)) shall establish a time, not to exceed one year after the State commission (or the Commission in the case of a common carrier designated under paragraph (6)) approves such relinquishment under this paragraph, within which such purchase or construction shall be completed.

(5) "Service area" defined
The term "service area" means a geographic area established by a State commission (or the Commission under paragraph (6)) for the purpose of determining universal service obligations and support mechanisms. In the case of an area served by a rural telephone company, "service area" means such company's "study area" unless and until the Commission and the States, after taking into account recommendations of a Federal-State Joint Board instituted under section 410(c) of this title, establish a different definition of service area for such company.

(6) Common carriers not subject to State commission jurisdiction
In the case of a common carrier providing telephone exchange service and exchange access that is not subject to the jurisdiction of a State commission, the Commission shall upon request designate such a common carrier that meets the requirements of paragraph (1) as an eligible telecommunications carrier for a service area designated by the Commission consistent with applicable Federal and State law. Upon request and consistent with the public interest, convenience and necessity, the Commission may, with respect to an area served by a rural telephone company, and shall, in the case of all other areas, designate more than one common carrier as an eligible telecommunications carrier for a service area designated under this paragraph, so long as each additional requesting carrier meets the requirements of paragraph (1). Before designating an additional eligible telecommunications carrier for an area served by a rural telephone company, the Commission shall find that the designation is in the public interest.

47 U.S.C. § 405

Petition for reconsideration; procedure; disposition; time of filing; additional evidence; time for disposition of petition for reconsideration of order concluding hearing or investigation; appeal of order

(a) After an order, decision, report, or action has been made or taken in any proceeding by the Commission, or by any designated authority within the Commission pursuant to a delegation under section 155(c)(1) of this title, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration only to the authority making or taking the order, decision, report, or action; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 155(c)(1) of this title, in its discretion, to grant such a reconsideration if sufficient reason therefor be made to appear. A petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or

action complained of. No such application shall excuse any person from complying with or obeying any order, decision, report, or action of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for reconsideration shall not be a condition precedent to judicial review of any such order, decision, report, or action, except where the party seeking such review (1) was not a party to the proceedings resulting in such order, decision, report, or action, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for reconsideration or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: Provided, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission, or designated authority within the Commission, shall take such action within ninety days of the filing of such petition. Reconsiderations shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or designated authority within the Commission believes should have been taken in the original proceeding shall be taken on any reconsideration. The time within which a petition for review must be filed in a proceeding to which section 402(a) of this title applies, or within which an appeal must be taken under section 402(b) of this title in any case, shall be computed from the date upon which the Commission gives public notice of the order, decision, report, or action complained of.

(b)

(1) Within 90 days after receiving a petition for reconsideration of an order concluding a hearing under section 204(a) of this title or concluding an investigation under section 208(b) of this title, the Commission shall issue an order granting or denying such petition.

(2) Any order issued under paragraph (1) shall be a final order and may be appealed under section 402(a) of this title.

Regulations

47 C.F.R. §1.2

Declaratory rulings.

(a) The Commission may, in accordance with section 5(d) of the Administrative Procedure Act, on motion or on its own motion issue a declaratory ruling terminating a controversy or removing uncertainty.

(b) The bureau or office to which a petition for declaratory ruling has been submitted or assigned by the Commission should docket such a petition within an existing or current proceeding, depending on whether the issues raised within the petition substantially relate to an existing proceeding. The bureau or office then should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a docketed petition for declaratory ruling will be 30 days from the release date of the public notice, and the default filing deadline for any replies will be 15 days thereafter.