NOT YET SCHEDULED FOR ORAL ARGUMENT

United States Court of Appeals
for the District of Columbia Circuit

No. 12-1124

THE CONFERENCE GROUP, LLC,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION; and
UNITED STATES OF AMERICA,
Respondents

CISCO WEBEX, LLC,
Intervenors for Petitioner

VERIZON and VERIZON WIRELESS,
Intervenors for Respondents

Petition for Review of a Decision of the
Federal Communications Commission

INITIAL BRIEF OF INTERVENOR FOR PETITIONER CISCO WEBEX, LLC

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NOVEMBER 6, 2012

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Intervenor in Support of Petitioner, Cisco WebEx LLC ("WebEx"), through counsel and pursuant to D.C. Circuit Rule 28(a)(1), respectfully submits the following Certificate as to Parties, Rulings and Related Cases:

I. PARTIES AND AMICI

WebEx concurs with and adopts, as though fully set forth herein, Petitioner's description of the parties and amici in this case.

II. RULINGS UNDER REVIEW

WebEx concurs with and adopts, as though fully set forth herein, Petitioner's description of the rulings under review in this case.

III. RELATED CASES

WebEx concurs with and adopts, as though fully set forth herein, Petitioner's description of related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, WebEx hereby provides its corporate disclosure statement.

WebEx is a limited liability company organized and existing under the laws of the State of Delaware. WebEx is a wholly owned subsidiary of Cisco Systems, Inc. ("Cisco"). As relevant to this litigation, WebEx provides advanced online collaboration services that include integrated online, video, and audio components.

WebEx's address is 3979 Freedom Cir., Santa Clara, CA, 95054.

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Cisco	Cisco Systems, Inc.
FCC or Commission	Federal Communications Commission
FWD	Free World Dialup
InterCall Order	*Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731 (2008)
InterCall Recon. Order	*Petitions for Reconsideration and Clarification of the InterCall Order*, Order on Reconsideration, 27 FCC Rcd. 898 (2012)
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JURISDICTIONAL STATEMENT

WebEx concurs with Petitioner that this Court's subject-matter jurisdiction arises from the statutory grant of jurisdiction over final orders of the Federal Communications Commission ("FCC" or "Commission").[1]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Petitioner has aptly catalogued a litany of substantive and procedural infirmities that infect the *Orders*,[2] and WebEx does not repeat them here. WebEx does, however, focus on what is potentially their most significant infirmity. Prior to the *Orders*, the Commission had distinguished "telecommunications services," which are highly regulated, from "information services," which are not, by asking whether the telecommunications and advanced features provided by a service are "functionally integrated." In the *Orders*, the Commission sometimes appears to be applying that standard. But the Commission also twice described in dicta the line between telecommunications and information services as depending on whether a service could be used "with or without accessing" all features. If the Commission actually intended to adopt such a standard, that would amount to an abrupt and

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1 *See* 47 U.S.C. § 402(a) and 28 U.S.C. §§ 2342(1) & 2344.

2 As indicated in Petitioner's brief, the orders at issue in this appeal are (1) *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd. 10731 (2008) ("*InterCall Order*") (JA-___) and *Petitions for Reconsideration and Clarification of the InterCall Order*, Order on Reconsideration, 27 FCC Rcd. 898 (2012) ("*InterCall Recon. Order*") (JA-___) (together with the *InterCall Order*, the "*Orders*").

unexplained departure from prior precedent that would convert many services that have been operating as information services into telecommunications services.

Accordingly, WebEx focuses on the Commission's possible shift from a "functional integration" standard for distinguishing between telecommunications and information services to a "with or without accessing" standard. Whatever the merits of petitioner's broader attack, the Commission plainly erred to the extent it adopted a "with or without accessing" standard without following the proper procedures for changing a rule and without providing an adequate justification for changing its standard.

STATUTES AND REGULATIONS

All applicable statutes, etc. are contained in the Initial Brief for Petitioner.

STATEMENT OF FACTS

WebEx is an online collaboration platform. It offers a feature-rich service that allows customers to engage in online-video meetings, exchange documents, share desktop contents, share applications, and edit documents in real time. Because an online collaboration would hold little value if participants could not speak to each other, WebEx's service includes an integrated audio component as well. While engaged in a meeting, participants can see who else is participating, where they are located, and who is speaking. WebEx's parent company, Cisco

Systems, Inc. ("Cisco"), filed comments on the Petitions for Reconsideration of the *InterCall Order*.

The *Orders* addressed a service—InterCall's—that differs significantly from WebEx's service, as InterCall's service provides only audio bridging and does not include any of the other advanced capabilities described above. As discussed below, however, WebEx, based on language in both *Orders*, is concerned that the *Orders* may have adopted a classification standard that, if given precedential value, would lead to improper future classification decisions. Accordingly, WebEx has intervened in this appeal.

WebEx lacks information sufficient to comment on Petitioner's business or its universal service contributions, but WebEx otherwise concurs with and adopts Petitioner's description of the procedural history that preceded the *Orders*.

Both *Orders* classified InterCall's offering as a telecommunications service—which means, among other things, that InterCall must contribute to the federal Universal Service Fund ("USF"). But both *Orders* presented vague and conclusory analyses to support those findings. In particular, the Commission outlined two potential bases for a telecommunications classification: (1) InterCall's service exhibited the fundamental characteristics of telecommunications, and the additional features provided by InterCall (muting, recording, etc.) did not alter that character; or (2) a customer could "conduct its

conference call[s] with or without accessing" the offering's additional features.[3] The former represents a straightforward application of existing standards; the latter a revolutionary standard that calls into doubt classifications of a substantial portion of the information-technology industry. As detailed herein, this failure to announce a coherent standard violates the Commission's obligation to clearly explain the basis for its decision. And to the extent the "with or without accessing" language represents a new integration standard, the Commission has reversed existing precedent.

Yet, at no point during the InterCall proceedings did the Commission: (1) provide notice that it was considering a modification to any standards; (2) provide notice of this specific modification to its standards; (3) seek comment on modifications to any standards; or (4) acknowledge or respond to Cisco's request, in comments on the Petitions for Reconsideration, that the Commission clarify that the *InterCall Order* did not modify existing law.

SUMMARY OF ARGUMENT

Because of the Commission's vague analysis, it is impossible to determine which functional-integration standard the *Orders* applied. Moreover, to the extent the Commission *did* attempt to apply a new standard, it failed to provide adequate notice, seek comment from interested parties, or provide any analysis—much less

[3] *See InterCall Recon. Order*, 27 FCC Rcd. at 904 ¶ 13; *InterCall Order*, 23 FCC Rcd. at 10735 ¶ 13.

the requisite "reasoned analysis"—to support its decision. Accordingly, any effort to adopt a new functional-integration standard would be invalid under the Administrative Procedure Act ("APA").[4]

I. The Commission's Vaguely Worded Orders Cast Doubt on the Standard Applicable to a Broad Array of Information Services. A host of telecommunications regulatory obligations turn on the classification of an offering as a "telecommunications service" or an "information service." Frequently, providers combine telecommunications and information services into a single, functionally integrated offering. In a 1998 Report to Congress, the Commission refused to split such services into their component parts for classification purposes, choosing instead to classify functionally integrated offerings as information services. Subsequently, the Commission made clear in its 2002 *Cable Modem Order*—which the Supreme Court affirmed— that a functionally integrated offering is an information service, regardless of whether consumers actually use all of the offering's components.

The *Orders* may constitute a straightforward application of the functional-integration standards announced in these Commission decisions. On the other hand, the *Orders*' "with or without accessing" language threatens to convert a single, functionally integrated offering into a telecommunications service if a

[4] 5 U.S.C. §§ 500, *et seq.*

customer is merely able to use the telecommunications components without accessing the information-service components of the offering. The Commission's failure to clearly articulate the basis for its decision renders the *Orders* arbitrary and capricious. Moreover, the Commission could not apply its "with or without accessing" standard without reversing its existing precedent.

II. Despite Potentially Reversing Longstanding Precedent, the Commission Failed to Provide Notice, Seek Comment from Interested Parties, or Set Forth a Reasoned Analysis to Support Its Decision. Before implementing a substantive modification to a well-defined statutory interpretation, the FCC must provide notice, seek comment from interested parties, and set forth a reasoned analysis for its decision. The Commission failed at each step. Indeed, the Commission simply (1) sought general comment on InterCall's petition for review of USAC audit findings, and (2) sought general comment on the Petitions for Reconsideration of the *InterCall Order*. Moreover, the FCC provided *no* analysis—much less "reasoned" analysis—to support its decision insofar as it changed the governing standard. Indeed, the "with or without accessing" language simply appeared in the *InterCall Order* with no explanation. And despite receiving request for clarification of that standard, the *InterCall Recon. Order* restated the same language without explanation or justification.

Accordingly, WebEx respectfully requests that this Court, if it denies Petitioner's request to vacate the *Orders*, make clear that they cannot be upheld on the theory that an information service should be treated as regulated telecommunications merely because it is capable of being used without accessing the enhanced features.

STANDARD OF REVIEW

Though an arbitrary and capricious standard applies to APA review of an agency's actions, the Court need not defer to an agency's "conclusory or unsupported suppositions."[5] Furthermore, to extent the *Orders* adopted a new functional-integration standard, the APA requires notice and comment, and failure to comply requires reversal and remand.[6]

ARGUMENT

I. THE COMMISSION'S VAGUELY WORDED INTERCALL ORDERS CAST DOUBT ON THE CLASSIFICATION STANDARD APPLICABLE TO A BROAD ARRAY OF INFORMATION SERVICES.

Before addressing the *Orders*' flawed analysis, one must understand the statutory backdrop against which they were issued. The applicability of a number of industry-wide regulatory requirements—including USF contributions—hinge on

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[5] *McDonnell Douglas Corp. v. U.S. Dept. of the Air Force*, 375 F.3d 1182, 1186-87 (D.C. Cir. 2004).

[6] *See UPMC Mercy v. Sebelius*, 793 F. Supp. 2d 62 (D.D.C. 2011) (finding agency decision arbitrary and capricious because it failed to follow requisite notice-and-comment procedures).

classifying a particular offering as an "information service" (less regulated) or as a "telecommunications service" (heavily regulated).[7] Both Congress and the Commission have sought to "free" enhanced services "from regulatory oversight," which has caused such services to see "exponential growth."[8]

According to their statutory definitions, both information services and telecommunications services involve "telecommunications," which is the transmission of information "without change in the form or content… as sent and received."[9] A "telecommunications service" is simply "the offering of 'telecommunications' for a fee directly to the public…."[10] Put differently, "the heart of telecommunications is transmission,"[11] and if an offering involves only a "transparent transmission path," it is telecommunications.[12] On the other hand, if "telecommunications" is used to offer not mere transmission but rather "a

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7 *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers").

8 *In re Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11524 ¶ 45 (1998). Because this Report to Congress addresses many issues raised by Senator Stevens, among others, it is frequently described—and will hereinafter be referred to—as the "*Stevens Report*."

9 47 U.S.C. § 153(50).

10 *Id*. § 153(53).

11 *Petition for Declaratory Ruling that Pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307, 3312 ¶ 9 (2004) ("*Pulver.com Order*").

12 *Stevens Report* at 11521 ¶ 41.

capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information," the offering is an information service.[13]

The Commission's regulatory classification decisions have a profound impact on a provider's regulatory burden. For nearly a decade and a half, providers have relied on a standard that classified functionally integrated services as information services even if a user could conceivably utilize only the transmission portions of the service. To the extent the *Orders* attempt to adopt a standard that *bases* a telecommunications classification on this contingency, the Commission would be reversing this long-standing precedent.

A. The Standard for Determining Functional Integration Impacts the Regulatory Classification of Numerous Services that Integrate Telecommunications and Information Services.

The Commission has on numerous occasions directly addressed the classification of offerings that integrate telecommunications and information-service components. For example, in the *Stevens Report*, the Commission addressed the regulatory treatment of offerings that provide users an information-service and "as an inseparable part of that service transmits information supplied or requested by the user."[14] For classification purposes, the Commission declined to

[13] 47 U.S.C. § 153(24).

[14] *Stevens Report* at 11529 ¶ 56.

separate the information-service and transmission components, finding that such an approach would (1) cause every information service—which by definition utilizes "telecommunications"—also to be classified as a telecommunications service, and thus (2) conflict with Congress's clear intent to separate telecommunications services and information services into separate categories.[15] Indeed, the Commission focused on the end-user's perceptions, stating, "[a]n offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components."[16] The Commission further indicated that the distinction turns on whether a consumer receives a "single information service," or whether "the consumer is receiving two separate and distinct services."[17]

Subsequently, the Commission expanded this analysis when it considered the classification of cable-modem broadband-Internet access services.[18] There, the Commission found that the classification decision "turns on the nature of the functions that the end user *is offered*."[19] Furthermore, the Commission considered

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15 *Id*. at ¶ 57.

16 *Id*. at 11529-11530 ¶ 58.

17 *Id*. at 11530 ¶ 60.

18 *See generally Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 (2002) ("*Cable Modem Order*").

19 *Id*. at 4822 ¶ 38 (emphasis added).

arguments that cable-modem service should be broken into telecommunications and information service components. The Commission, however, rejected those suggestions, stating that cable modem services' telecommunications component was "part and parcel of cable modem service…."[20] Importantly, the Commission further found that an offering can be an information service "regardless of whether subscribers use all of the functions provided as part of the service…."[21] The *Cable Modem Order* has served as the foundation for multiple subsequent information-service classifications, such as wireline and wireless broadband Internet access.[22]

Based on these Commission findings, a functionally integrated offering is an information service (1) when, from the consumer's perspective, the offering consists of a single information service, and (2) regardless of whether a consumer could conceivably utilize the offering without accessing the information-service components. On the other hand, if the offering is a bundle of two or more

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[20] *Id*. at 4823 ¶ 39.

[21] *Id*. at 4822 ¶ 38.

[22] *See Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, Declaratory Ruling, 22 FCC Rcd. 5901, 5909 ¶¶ 20-21 (2007) (citing *Cable Modem Order* in classifying wireless broadband Internet access as an information service) ("*Wireless Broadband Order*"); *Wireline Broadband Internet Access Order*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, 14862 ¶ 12 (2005) (citing *Cable Modem Order* in classifying wireline broadband Internet access as an information service) ("*Wireline Broadband Order*")

functionally "separate and distinct services," each service is classified independently.

Subsequently, the Commission has wrestled with the determination of whether an offering possesses the requisite "functional integration" of information service and telecommunications components to be classified as a single information service.[23] Illustrating the Commission's existing approach to classification decisions is the Commission's 2004 *Pulver.com Order*.[24] There, Pulver.com provided a service, Free World Dialup ("FWD"), that allowed users to engage in voice communications over the Internet. The Commission classified the offering as an information service, citing the following factors: (1) FWD used, but did not provide, transmission; (2) the service allowed users to see which other users were online—a function divorced from pure transmission; and (3) the service offered a number "computing capabilities," such as determining other users' locations, accessing voicemail, creating user names and passwords, and a process for inviting other members to communicate.[25] From the end user's perspective, these enhanced features—as well as pure transmission—were all part of a single integrated offering, and the Commission classified it an information service.

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[23] *See Regulation of Prepaid Calling Card Servs.*, Declaratory Ruling and Report and Order, 21 FCC Rcd. 7290, 7295-7296 ¶ 15 (2006) ("*Prepaid Calling Card Order*").

[24] *Pulver.com Order*, 19 FCC Rcd. 3307.

[25] *Id*. at 3313-3314 ¶ 11.

The Commission's approach to determining "functional integration" has profound consequences upon the regulatory burden of the entire telecommunications industry, as a large number of services, including most of the broadband Internet access market, constitute integrated offerings. And as discussed below, the *Orders* do not clearly announce the applicable standard. The *Orders* may leave the integration standard untouched. But they may also threaten—without notice, comment, or any reasonable explanation—to undermine the Commission's existing standard, upon which the industry has relied for nearly a decade and a half.

B. The Orders' Failure to Explain the Applicable Functional-Integration Standard Casts Doubt on Numerous Information-Service Classifications.

In both *Orders*, the Commission found that InterCall's additional features were not "sufficiently integrated" to warrant information-service treatment.[26] Furthermore, both *Orders* indicated that InterCall's services exhibited the "fundamental character" of a telecommunications service, and that, though InterCall offered additional components, "[m]erely packaging … services together" was not enough to convert the offering to an information service.[27]

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[26] *See InterCall Recon. Order*, 27 FCC Rcd. at 903 ¶ 13; *InterCall Order*, 23 FCC Rcd. at 10735 ¶ 13.

[27] *InterCall Recon. Order*, 27 FCC Rcd. at 904 ¶ 12; *InterCall Order*, 23 FCC Rcd. at 10735 ¶ 13.

WebEx will not rehash Petitioner's substantive and procedural criticism of this conclusion. However, at a minimum—and in a vacuum—this language could be viewed as a straightforward application of the existing functional-integration standard.

That language, however, was not drafted in a vacuum. To the contrary, the Commission also asserted that InterCall provided a telecommunications service because users could conduct a conference call "with or without accessing" InterCall's additional features. This "with or without accessing" standard would stand in stark contrast to the "regardless of … use" standard set forth in the *Cable Modem Order*. Indeed, such a standard would require a complete reversal of the current rule that an offering is an information service if the consumer is *offered* a single, functionally integrated service, even if an end-user could conceivably forego usage of the information-service components. Instead, an integrated offering would be split into its component parts whenever a consumer could *possibly* utilize the offering "without accessing" the information-service components.

Moreover, such a standard would require reevaluation of other service classifications, including WebEx's service. As described above, WebEx provides a feature-rich service that allows customers to collaborate online, share files and applications, see who is participating as well as speaking, view each other's

desktops, and edit documents in real time. Users are offered a single, integrated service that incorporates all these elements, as well as voice communications, which are, to quote the *Cable Modem Order*, "part and parcel" of the offering. Indeed, today users cannot use voice services independently of WebEx's online collaboration service. Furthermore, this service is significantly more advanced than the relatively simple service—consisting of only voice communications—that the Commission classified as an information service in the *Pulver.com Order*. Thus, WebEx's service falls within the definition of information service.

Yet, it is theoretically possible that a user or set of users—despite paying for WebEx's enhanced features—could choose to ignore those features and engage in plain old telephone conversation using WebEx's service. Under a "with or without accessing" integration standard, WebEx, despite clearly offering an information service, could arguably be considered a telecommunications service. This is a result the Commission has consciously and consistently avoided, at least until it released the *Orders*.

Moreover, the impact of such a standard would extend to broader services such as wireline and wireless broadband Internet access. An Internet user could conceivably deploy his or her wireline or wireless broadband connection solely for transmission purposes—the hallmark of a telecommunications service—even though the service allows far more robust capabilities. Under a "with or without

accessing" standard, many broadband-Internet-access offerings, currently classed as information services, may be reclassified as telecommunications services, because a consumer can use his or her broadband connection "with or without accessing" any information-service components.

The Commission appears to derive its "with or without accessing" language from a misapplication of the *Prepaid Calling Card Order*. There, prepaid calling cards allowed users to access a menu that provided options to use telecommunications services such as long-distance phone calls, or information services such as checking sports scores. The Commission found that the cards did not constitute a single integrated service, but rather a bundle of separate telecommunications services and information services.

However, the telecommunications-service classification of menu-driven prepaid calling cards had nothing to do with whether a consumer was *capable* of using telecommunications without accessing information-service components. Rather, there simply was no functional integration among the various services users could access using the prepaid calling cards.[28] Indeed, because users had to choose one among many services to use at any given time, it was *impossible* for a

[28] *See Prepaid Calling Card Order*, 21 FCC Rcd. at 7295-7296 ¶ 15 ("[T]here simply is no functional integration between the information service features and the use of the telephone calling capability with menu-driven prepaid calling cards").

consumer to use telecommunications and information services in an integrated fashion.[29] Using the *Stevens Report*'s terminology, prepaid calling card customers were offered not a "single service," but rather multiple "separate and distinct services" bundled together. This actual lack of integration—not any kind of "with or without accessing" test— led the Commission to apply separate classifications to each service accessible through the prepaid calling cards.[30] Thus, the Commission cannot properly have derived a "with or without accessing" standard from the *Prepaid Calling Card Order*.

II. The Commission's Vague Functional-Integration Standard Is Arbitrary and Capricious, and Any Attempt to Adopt a "With or Without Accessing" Standard Violated the APA.

The *Orders*' vague application of the functional-integration principle violated the Commission's duty to set forth a reasoned analysis for its decision. And to the extent it modified the functional-integration standard, the Commission needed to provide public notice, seek comments, and set forth a reasoned explanation. The Commission failed in all respects.

A. The Commission Failed to Provide an Adequate Explanation for the Orders' Decision

The *Orders* highlight the rationale for requiring agencies to provide reasoned explanations for their decisions. The Supreme Court has stated that

[29] *Id*. ("The customer may use only one capability at a time…").

[30] *Id*. at 7296 ¶ 17 ("[T]he menu-driven prepaid calling cards discussed above offer telecommunications services").

> If administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive.[31]

Furthermore, courts have found that, for "judicial review to be meaningfully achieved …, the agency tribunal must present a full and reasoned explanation of its decision."[32] Without a reasoned explanation, a reviewing court cannot determine whether the agency has engaged in a proper "application of the law to the found facts."[33] Without that determination, a court cannot decide whether the agency's decision resulted from a "logical and rational" process.[34]

Here, the Commission has not adequately explained which functional-integration standard it applied to reach its decisions in the *Orders*. As a result, this Court can only "guess at the theory underlying" the Commission's decisions, and it will be forced to "chisel that which must be precise from what the [Commission] has left indecisive." Moreover, the Commission has essentially failed to identify the "law" it applied to the "facts" presented in the InterCall proceedings. As a

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[31] *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947), *quoted by Rapoport v. S.E.C.*, 682 F.3d 98, 104 (D.C. Cir. 2012) (reversing S.E.C. decision for failure to provide reasoned explanation).

[32] *In re Sang-Su Lee*, 277 F.3d 1338, 1342 (Fed. Cir. 2002).

[33] *See id.*

[34] *See id*. (citing *Allentown Mack Sales and Serv., Inc. v. N.L.R.B.*, 522 U.S. 359, 374 (1998).

result, no one—including this Court—can determine whether the Commission engaged in a "logical and rational" application of the Commission's existing functional-integration standard, or adopted a revolutionary new standard potentially impacting broad segments of the information-technology industry, all without notice, comment, or reasoned analysis. Thus, the Commission failed to provide an adequate explanation for its decisions.

B. Adopting a "With or Without Accessing" Standard Would Require Notice and Comment, Which the Commission Failed to Provide and Seek.

Under the Administrative Procedure Act ("APA"), if an agency adopts a "substantive change" to a regulation, notice and comment are required before the modified rule can take effect.[35] A rule modification is "substantive" when it has an "adverse impact" on an affected party.[36] Furthermore, when an agency "gives a rule a sufficiently definite interpretation," the agency cannot "fundamentally modif[y] that interpretation" via adjudication, but rather must engage in "notice and comment rulemaking" as prescribed by "Section 553 of the APA…."[37] That section requires that the "notice of proposed rulemaking shall be published in the

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[35] *See Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995).

[36] *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 255 (3d Cir. 2011), as amended (Mar. 7, 2012) (internal citations omitted).

[37] *Torch Operating Co. v. Babbitt*, 172 F. Supp. 2d 113, 124-25 (D.D.C. 2001) (citing *Alaska Prof'l Hunters Ass'n v. F.A.A.*, 177 F.3d 1030, 1036 (D.C. Cir. 1999)).

Federal Register," and that the notice include "either the terms or substance of the proposed rule or a description of the subjects and issues involved."[38] Notice is exempted only when (1) the agency issues "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or (2) when the agency "for good cause finds… that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."[39] Once the agency gives proper notice, it must "give interested persons an opportunity to participate in the rule making…."[40]

As discussed above, a "with or without accessing" standard would represent a "substantive" change to "definitive interpretations" of the Commission's rules. Prior to the *Orders*, the Commission clearly classified integrated offerings as information services, regardless of whether customers actually used all components of the offering. A "with or without accessing" regime would turn this standard on its head, finding a telecommunications service if it is *possible* for a consumer to use an integrated offering without accessing the information-service components. Accordingly, to extent it wished to adopt this standard, the Commission was required to publish notice of this pending change in the Federal Register and seek comment from interested parties.

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[38] 5 U.S.C. §§ 553 (b)(1), (3).

[39] *Id*. §§ 553 (b)(A), (B).

[40] *Id*. § 553(c).

Yet, the Commission did nothing of the sort. The Commission's notice to the public in this proceeding consisted of (1) a Public Notice that measured—excluding boilerplate filing instructions—all of two paragraphs seeking general comment on InterCall's petition for review of USAC's decision to classify InterCall's revenue as toll teleconferencing review;[41] and (2) another two paragraphs seeking comment on the two petitions for reconsideration of the *InterCall Order*.[42] Neither Public Notice mentioned any intent to modify the functional-integration standard, and neither sought comment on any such modification.

Furthermore, the Commission's announcement of the "with or without accessing" standard cannot possibly be considered an "interpretive rule" or "general statement of policy." This exception applies only to agency actions that "explain ambiguous language, or remind parties of existing duties—not create new law."[43] The new standard would stand in direct conflict with existing Commission precedent and threatens to burden industry participants with substantial regulatory

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41 *Comment Sought on InterCall, Inc.'s Request for Review of a Decision by the Universal Service Administrative Company and Petition for Stay*, Public Notice, 23 FCC Rcd. 1895 (2008).

42 *Comment Sought on Petitions for Reconsideration and Clarification of the Commission's InterCall Order Filed by Global Conference Partners, A+ Conferencing Ltd., Free Conferencing Corporation, and the Conference Group*, Public Notice, DA No. 08-1875, 2008 WL 18949 (2008).

43 *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992).

requirements that did not previously exist. Thus, the new standard would reflect "new law" and extends far beyond explaining ambiguous language or reminding parties of existing duties.

Accordingly, any Commission attempt to modify its functional-integration standard violated the APA, as the Commission did not provide notice in the Federal Register or seek comment from interested parties.

C. The Commission Failed to Provide any Reasoned Analysis for Adopting a "With or Without Accessing" Standard.

Beyond its general failure to explain the basis for its decisions, the Commission also failed to explain any shift from its prior functional-integration standard to a standard based on whether a service can be used "with or without accessing" advanced features. The Supreme Court has plainly held that "an agency changing its course … is obligated to supply a reasoned analysis for the change …."[44] Indeed, a court need not defer to an agency's "conclusory or unsupported suppositions."[45] This Court has explained that "the Commission is bound to provide an explanation when it departs from a clear precedent."[46] Where the Commission provides "no such explanation," that failure "compels the conclusion

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[44] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

[45] *McDonnell Douglas Corp. v. U.S. Dept of the Air Force*, 375 F. 3d 1182, 1186-87 (D.C. Cir. 2004).

[46] *See Orion Commc'ns Ltd. v. FCC.*, 131 F.3d 176, 181 (D.C. Cir. 1997).

that the Commission acted arbitrarily and capriciously…."[47] And the Commission may not "concoct[] a new rule in the guise of applying the old."[48]

The *Orders* do not even attempt to analyze the "with or without accessing" standard. The *InterCall Order* simply drops the standard into a sentence just prior to the conclusion that InterCall's enhanced features "are not sufficiently integrated into the offering to convert the offering into an information service."[49] Then, despite requests from Cisco to confirm that the *InterCall Order* did "not call into question the information service classification of services that are functionally integrated,"[50] the *InterCall Recon. Order* reiterated the "with or without accessing" standard, again without a scintilla of explanation, much less a "reasoned analysis."[51] Accordingly, no outside party, including this Court, can possibly determine whether the shift in the Commission's standard resulted from rational decision-making, rendering the decision arbitrary and capricious.

The Commission's reference to "whiteboarding" in the *InterCall Recon. Order* highlights the Commission's lack of reasoned analysis. Whiteboarding

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47 *Id.*

48 *Southwestern Bell Tel. Co. v. FCC*, 28 F.3d 165, 173 (D.C. Cir. 1994).

49 *InterCall Order* at 10735 ¶ 13.

50 *Petition for Partial Reconsideration and Clarification of the InterCall Order of Global Conference Partners; Petition for Reconsideration of A+ Conferencing, Ltd., Free Conferencing Corporation, and the Conference Group*, CC Docket No. 96-45, Comments of Cisco Systems Inc., at 6 (Sept. 8, 2008).

51 *InterCall Recon. Order* at 904 ¶ 13.

generally refers to an application that allows multiple users in remote locations to collaborate and modify the contents of a computer screen, as though they were in a room working on a whiteboard. The *InterCall Recon. Order*, without explanation, applies the *Prepaid Calling Card Order*—albeit in dicta—to find that whiteboarding technologies would not qualify as information services.[52] However, whiteboarding, which integrates a number of different information-service and telecommunications components into a single offering that allows remote collaboration, is a far cry from a calling-card menu that allows users to access separate and distinct services. Yet, the Commission simply concludes, without explanation, that whiteboarding would be telecommunications. This kind of conclusory decision-making is flatly prohibited by *State Farm* and its progeny.

Accordingly, to the extent the Commission attempted to adopt a new functional-integration standard in the *Orders*, its decision was arbitrary and capricious because it failed to provide the requisite reasoned analysis.

CONCLUSION

WebEx respectfully requests that the Court, if it does not grant Petitioner's request to vacate the rulings at issue in this appeal, make clear that they cannot be upheld on the theory that an information service should be treated as a

[52] *Id.*

telecommunications service merely because it is capable of being used without accessing the enhanced features.

Respectfully submitted,

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Dated: November 6, 2012

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE CONFERENCE GROUP, LLC, Petitioner, v. FEDERAL COMMUNICATIONS COMMISSION and THE UNITED STATES OF AMERICA, Respondents.	No. 12-1124

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Circuit Rule 32(a)(2)(B)(i) because this brief contains 5,219 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Rule 32.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 in Times New Roman, Font Size 14.

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CERTIFICATE OF SERVICE

I, Brandi Streauslin, hereby certify that, on November 6, 2012, I caused the foregoing Initial Brief of Intervenor for Petitioner to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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