

In the Matter of)
)
Public Safety and Homeland Security Bureau) WT Docket No. 96-86
Seeks Comment on Petition for Rulemaking)
Filed by the National Telecommunications and)
Information Administration to Revise the Rules)
for Wireless Priority Service)

Christi Shewman
Gary L. Phillips
David L. Lawson
AT&T SERVICES, INC.
1120 20th Street, NW, Suite 1000
Washington, DC 20036

Scott D. Delacourt
Katy M. Ross
Daniel P. Brooks
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006

August 28, 2018

TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	PRESCRIPTIVE RULES ARE NOT NEEDED TO ENSURE THAT NS/EP COMMUNICATIONS NEEDS ARE MET.....	3
III.	FEDERAL LAW DOES NOT PROHIBIT WPS PROVIDERS FROM OFFERING PRIORITY ACCESS AND PREEMPTION OF VOICE AND DATA SERVICES.	6
IV.	THE COMMISSION SHOULD REFRAIN FROM INITIATING A RULEMAKING PROCEEDING UNTIL DHS COMPLETES ITS ONGOING DISCUSSIONS WITH THE FIRSTNET AUTHORITY.....	10
V.	CONCLUSION	11

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Public Safety and Homeland Security Bureau)	WT Docket No. 96-86
Seeks Comment on Petition for Rulemaking)	
Filed by the National Telecommunications and)	
Information Administration to Revise the Rules)	
for Wireless Priority Service)	

COMMENTS OF AT&T

AT&T Services, Inc., on behalf of itself and its affiliates (collectively, “AT&T”), submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Public Notice* seeking comment on a Petition for Rulemaking filed by the National Telecommunications and Information Administration (“NTIA”) (“NTIA Petition”) requesting that the FCC initiate a proceeding to revise the Wireless Priority Service (“WPS”) rules.¹

I. INTRODUCTION AND SUMMARY

AT&T has a long history of facilitating communications for continuity of government and supporting public safety. AT&T was among the first to provide WPS services, and it continues to provide such services today through its WPS contract with the Office of Emergency Communications of the Department of Homeland Security (“DHS/OEC”). AT&T is one of many wireless providers that enable eligible National Security and Emergency Preparedness (“NS/EP”) users to obtain priority access to available radio channels when necessary to initiate

¹ Public Safety and Homeland Security Bureau Seeks Comment on Petition for Rulemaking Filed by the National Telecommunications and Information Administration to Revise the Rules for Wireless Priority Service, *Public Notice*, WT Docket No. 96-86, DA 18-845 (rel. Aug. 13, 2018) (“*Public Notice*”). WPS is now the more commonly used term for “Priority Access Service” (“PAS”), and these terms are used interchangeably herein.

calls during emergencies. WPS is a significant component in facilitating NS/EP user communications during times of congestion, and DHS/OEC has an important role in ensuring continuity of government operations during emergencies or crises.

Moreover, when Congress determined to create a single, interoperable Nationwide Public Safety Broadband Network for first responders and created the First Responder Network Authority (“FirstNet Authority”) under NTIA to establish that network, AT&T answered the call. Today, in partnership with the FirstNet Authority, AT&T is constructing and managing America’s first high-speed wireless broadband network for our Nation’s first responders—FirstNet. Today, pursuant to AT&T’s contract with the FirstNet Authority, we are providing FirstNet services to public safety entities, offering priority access and preemption capabilities, voice and data, to eligible first responders over the FirstNet Authority’s Band 14 spectrum as well as AT&T’s licensed spectrum.

The NTIA Petition asks the FCC to initiate a rulemaking to update the WPS rules, proposing a broad range of substantive changes and administrative and technical updates to the existing rules in Appendix B to Part 64. Today, the WPS rules provide baseline operating protocols for WPS, with WPS providers and DHS/OEC having the flexibility to customize the capabilities offered and terms of service pursuant to contract. Under this regime, all parties have dynamically adapted to changing technology and circumstances. The Commission should not hamper this well-functioning process with prescriptive new substantive rules. If the Commission proceeds with a rulemaking in response to the NTIA Petition, it should employ a light touch in developing any new WPS rules.

The NTIA Petition also raises the question of whether priority access and preemption of both voice and data services are currently allowed under the WPS rules. While federal law

currently does not prohibit priority access and preemption, the Commission may wish to clarify this point if there is confusion. Finally, this Petition for Rulemaking has been released amid ongoing collaboration between DHS/OEC and the FirstNet Authority. The Commission should wait to revise the WPS rules until these discussions are complete to ensure that any new rules will not impair the utility of either program. AT&T's longstanding support for communications for public safety and continuity of government communications improves emergency response efforts and, ultimately, helps save lives. The Commission should take care in this proceeding to preserve the ability of carriers to offer the capabilities needed by our Nation.

II. PRESCRIPTIVE RULES ARE NOT NEEDED TO ENSURE THAT NS/EP COMMUNICATIONS NEEDS ARE MET.

To ensure continuity of government communications, voluntary WPS providers such as AT&T develop capabilities and service offerings to make available priority wireless communications in emergency situations. The details of these offerings can best be addressed contractually, as has been done since the creation of WPS. The Commission should not impose new substantive rules that would limit WPS flexibility and innovation.

The mobile wireless services landscape is competitive,² and the robust state of competition is sufficient to ensure that NS/EP users receive the services they need from WPS providers. AT&T, which has a contract with DHS to provide WPS, frequently develops product offerings and capabilities in response to pressures brought to bear by its competitors. Just as in the market for consumer services, competition drives innovation in the public safety

² See, e.g., *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Twentieth Report, 32 FCC Rcd 8968, ¶ 4 (2017) (“[W]e consider a number of facts and characteristics of the provision of mobile wireless services, which taken together, indicate that there is effective competition.”).

marketplace. The healthy state of wireless competition means that DHS and WPS providers can negotiate to establish the optimal terms and capabilities of the WPS offering. Indeed, many of NTIA's requested changes to the WPS regime can be, and historically have been, addressed contractually, rather than through the imposition of new rules. For example, AT&T already has implemented voice preemption capabilities for WPS users.

A contractual solution is preferable to a regulatory solution for many reasons. First, contractual solutions give the parties flexibility. Under a contract, WPS providers can develop customized offerings based on their unique networks and capabilities. Second, contractual solutions can adapt more easily than rules as technology changes. As the NTIA Petition acknowledges, there have been a number of significant changes in the wireless landscape since the establishment of WPS.³ Rigid rules may restrict the ability of WPS providers to continually enhance their capabilities and offerings as a competitive market demands. Finally, proceeding with rules raises the risk of requiring extensive network changes with no possibility of reimbursement from DHS. Under a contract, the parties can negotiate over the technical and economic feasibility of innovations and upgrades and, where appropriate, the terms of reimbursement for development and implementation costs. The most practical solution for making sure WPS users and providers are aligned – and public safety communications needs are met – continues to be contractual.

The superiority of a contractual approach applies with equal force to network reliability. As NTIA notes, “[s]ervice providers have in some cases voluntarily provided redundant and geographically-dispersed critical network elements.”⁴ The Commission should not develop

³ NTIA Petition at 4.

⁴ *Id.* at 12-13.

WPS-specific mandates on network reliability, as the Commission already has rules that address those issues for the commercial networks used to provide WPS.⁵ The Commission regularly reviews and refines its views in this area and would welcome input from DHS.⁶ WPS-specific rules on network resiliency would be duplicative, could limit WPS providers' options for hardening their networks, and could foreclose the potential for reimbursement from DHS for such network upgrades.

Information disclosure may also be addressed through the contracting process. The NTIA Petition proposes that WPS providers be required to provide call detail records for WPS calls as well as similar information regarding video, data, and information services, seemingly modeled after the FCC's customer proprietary network information ("CPNI") rules.⁷ As an initial matter, the Commission's CPNI rules are oriented to protecting consumer privacy and are thus a poor model for an information disclosure requirement. Moreover, application of these rules to broadband data and other information services, as proposed by NTIA, has a fraught history. While securing information necessary or useful for evaluating the performance and effectiveness of WPS and to protect the service from abuse is a meritorious objective, a simpler and more flexible approach would be to specify the information necessary for monitoring in the contracting process.

⁵ See 47 C.F.R. Part 12.

⁶ See, e.g. *Public Safety and Homeland Security Bureau Seeks Comment on 911 Network Reliability Rules*, Public Notice, PS Docket No. 13-75, DA 18-612 (rel. Jun. 13, 2018).

⁷ NTIA Petition at 14. See 47 C.F.R. § 64.2010. In addition, Section 222 of the Communications Act governs telecommunications carriers' protection and use of information obtained from their customers or other carriers. See 47 U.S.C. § 222.

III. FEDERAL LAW DOES NOT PROHIBIT WPS PROVIDERS FROM OFFERING PRIORITY ACCESS AND PREEMPTION OF VOICE AND DATA SERVICES.

Nothing in the Communications Act or the Commission's rules prohibits WPS providers from offering priority access and preemption of voice and data services in their private contractual arrangements with WPS users. NTIA claims in its Petition that the "[c]urrent WPS rules do not permit NS/EP calls to preempt other in-progress calls."⁸ NTIA also requests that "[f]or voice services within, or potentially within, the Commission's jurisdiction – such as VoIP – the Commission should declare that if a WPS provider offers priority or preemptive access to any such service in accordance" with the Commission's WPS rules, "it will be safeguarded against claims of unlawful discrimination under the Communications Act."⁹ While it may be beneficial for the Commission to issue clarifying guidance in this regard, there is no current prohibition on these practices.

NTIA's claim that the current WPS rules do not allow for preemption of in-progress calls stems from a misreading of Section 2.c of the Commission's WPS rules, which provides that WPS "does not preempt calls in progress."¹⁰ As NTIA recognizes,¹¹ however, the Commission's current WPS rules merely provide baseline policies and procedures for service providers who have voluntarily elected to provide Wireless Priority Service.¹² The rules reflect that service

⁸ NTIA Petition at 5.

⁹ *Id.* at 10.

¹⁰ 47 C.F.R. Part 64, App. B § 2.c.

¹¹ *See, e.g.*, NTIA Petition at 2.

¹² *See, e.g.*, 47 C.F.R. Part 64, App. B § 1; *The Development of Operational, Technical and Spectrum Requirements For Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service*, Second Report and Order, 15 FCC Rcd 16720, ¶ 4 (2000) ("*Second R&O*") ("If carriers choose to offer PAS, we are requiring them to adhere to uniform operating

providers who have elected to provide Wireless Priority Service are *required* to prioritize NS/EP calls but are *not required* to preempt or degrade in-progress public communications. This does not mean, however, that WPS providers are *prohibited* from offering preemption of in-progress calls through their individual service contracts with WPS users. The Commission’s WPS rules contain no such explicit prohibition.

Moreover, preemption of in-progress calls on behalf of NS/EP users does not violate Section 202 of the Communications Act. Section 202 makes it unlawful for any common carrier to “make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services” or “to make or give any undue or unreasonable preference or advantage” or give “any undue or unreasonable prejudice or disadvantage” in connection with the provision of communications services.¹³ The Commission has already considered the potential applicability of Section 202 to call prioritization offered under WPS in its 2000 decision adopting the WPS rules.¹⁴ Recognizing that “carriers offering PAS should receive some protection from liability for violations of the Communications Act,” the Commission expressly held that “providing priority access to authorized NSEP users in accordance with our PAS rules will be *prima facie* lawful under the Communications Act and not unreasonable discrimination or an unreasonable preference.”¹⁵ The Commission reasoned that Section 202 “does not prevent carriers from treating users differently,” but rather “bars only *unjust* or *unreasonable*

protocols concerning the number of priority levels and the priority level for particular NSEP users.”).

¹³ 47 U.S.C. § 202(a).

¹⁴ See *Second R&O* ¶¶ 22-24.

¹⁵ *Id.* ¶¶ 22, 23.

discrimination.”¹⁶ Thus, “[c]arriers may differentiate among users so long as there is a valid reason for doing so.”¹⁷ In the case of prioritization of NS/EP calls, the Commission concluded that such differentiation is warranted given the needs of NS/EP personnel to respond quickly and effectively during emergency and disaster situations.¹⁸ The Commission also observed that the relatively limited number of persons with priority access would “cause only a minimal effect on the general wireless user.”¹⁹

The same arguments showing that call prioritization does not violate the Communications Act apply to preemption of in-progress calls. As the Commission recognized in the *Second R&O*, “in emergency situations, non-NSEP customers simply are not ‘similarly situated’ with NSEP personnel” because they “are attempting to save and protect lives and property, restore order, and restore critical services.”²⁰ Thus, their ability “to communicate without delays during emergencies is essential.”²¹ Service providers therefore “do[] not violate the Communications Act by offering federal users the ability to” access the wireless network during emergency situations – regardless of whether such access is provided via prioritization or preemption.²² As with prioritization, preemption also has a negligible effect on non-NS/EP users.

NTIA also voices concern that “[a]llowing provision of next generation voice, data, and video . . . information services on a priority basis presents [Section 202] liability concerns.”²³

¹⁶ *Id.* ¶ 23.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* ¶ 32.

²⁰ *Id.* ¶ 23.

²¹ *Id.*

²² *Id.*

²³ NTIA Petition at 9.

This concern is unfounded because Section 202 only applies to Title II services. NTIA is presumably referring to voice over Internet protocol (“VoIP”) services when it mentions “next generation voice” services. Although the Commission has not classified VoIP as an information or telecommunications service, the Commission to date has not applied Section 202 to VoIP services. Data and IP-based video services are likewise not subject to Section 202 as they are treated as Title I “information services” under the Communications Act. Information services writ large – whether broadband Internet access service (“BIAS”) or other services – are exempt from Section 202.

Prioritization and preemption of data traffic similarly do not violate the specific laws governing BIAS providers. As NTIA recognizes in its Petition, the FCC has “determined that such offerings are information services largely exempt from its jurisdiction.”²⁴ Although the Commission requires BIAS providers to disclose information regarding their prioritization and preemption of data traffic on behalf of NS/EP users pursuant to the transparency rule,²⁵ such practices are not explicitly prohibited under the Commission’s rules.

NTIA’s concern regarding potential WPS provider liability under Section 5 of the Federal Trade Commission (“FTC”) Act is similarly misplaced.²⁶ Section 5 prohibits “unfair or deceptive acts or practices in or affecting commerce.”²⁷ Prioritization and preemption of data traffic on behalf of NS/EP users are not “unfair” acts or practices under Section 5 because such

²⁴ *Id.* at 9 (citing *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311 (2018)).

²⁵ 47 C.F.R. § 8.1(a) (requiring BIAS providers to “publicly disclose accurate information regarding the network management practices, performance characteristics, and commercial terms of its broadband internet access services”).

²⁶ *See* NTIA Petition at 9-11.

²⁷ 15 U.S.C. § 45(a)(1).

practices do not harm consumers. Instead, they advance critical public safety objectives by enabling NS/EP personnel to quickly and effectively respond to emergency situations and disasters while creating only minimal disruption to non-NS/EP users. Prioritization and preemption of data traffic are also not “deceptive” acts or practices under Section 5 given that such practices would be adequately disclosed to consumers.²⁸

In sum, nothing under the Commission’s rules, the Communications Act, or the Federal Trade Commission Act prohibits WPS providers from offering priority access and preemption of voice and data services. To the extent that the record in this proceeding reflects any confusion in this regard, the Commission may wish to consider issuing a declaratory ruling clarifying WPS providers’ rights and obligations under the current rules.

IV. THE COMMISSION SHOULD REFRAIN FROM INITIATING A RULEMAKING PROCEEDING UNTIL DHS COMPLETES ITS ONGOING DISCUSSIONS WITH THE FIRSTNET AUTHORITY.

As NTIA recognizes in its Petition, DHS/OEC and the FirstNet Authority “are collaborating to ensure that the goals of both the WPS and FirstNet can be met.”²⁹ Because the outcome of this collaboration will ultimately inform the administration of public safety and emergency communications efforts more broadly, the Commission should refrain from revisiting its WPS rules until any outstanding coordination issues between DHS and the FirstNet Authority are resolved.

²⁸ In any case, to the extent that NTIA continues to harbor concerns regarding potential WPS provider liability under Section 5, such concerns should be addressed to the FTC as the agency responsible for interpreting and enforcing Section 5 of the FTC Act, not the FCC. *See* NTIA Petition at 10-11 (suggesting that the Commission issue non-binding recommendations that the FTC forgo enforcement actions and deny complaints under Section 5 with respect to WPS participants offering service in accordance with the Commission’s WPS rules).

²⁹ NTIA Petition at 19 n.42.

Congress established the FirstNet Authority to ensure that all first responders would have access to a dedicated communications network during emergency situations and large-scale events. The Middle Class Tax Relief and Job Creation Act of 2012 authorized and provided funding for a single, interoperable, nationwide public safety broadband network to avoid the interoperability issues that first responders have faced in the past during crises such as the terrorist attacks of September 11, 2001 and Hurricane Katrina.³⁰ Among other things, FirstNet services, provided to public safety entities in accordance with the contract between the FirstNet Authority and AT&T, provide first responders with priority access and preemption that incident commanders determine are necessary in any given case.³¹

Because some of NTIA's proposals would overlap with ongoing collaboration between DHS and the FirstNet Authority regarding the provision of WPS alongside of the first nationwide public safety mobile wireless broadband network, the Commission should refrain from initiating a new WPS rulemaking proceeding until both DHS and the FirstNet Authority indicate to the Commission that they have completed their discussions.

V. CONCLUSION

AT&T is committed to meeting the vital communications needs for continuity of government as well as for the public safety community through both its partnership with the FirstNet Authority and its provision of WPS, among other efforts. While NTIA's Petition for Rulemaking raises a variety of interesting concerns, most of them may be addressed through the existing contracting process. However, if the Commission decides a rulemaking on WPS is

³⁰ See Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96, 126 Stat. 156 §§ 6001-6303, 6413 (codified at 47 U.S.C. §§ 1401-1443, 1457).

³¹ FirstNet services are available to FirstNet users using both Band Class 14 and AT&T's licensed spectrum. These FirstNet services do not afford users priority access and preemption on third party commercial networks.

merited, it should employ a light touch, being sure to give WPS providers the flexibility to adapt and customize their WPS offerings and negotiate terms with DHS. The Commission should also be mindful of how WPS will intersect with FirstNet services and ensure that both programs can reach their goals of providing seamless and robust services to serve continuity of government and the public safety community.

Respectfully submitted,

Scott D. Delacourt
Katy M. Ross
Daniel P. Brooks
WILEY REIN LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000 – phone
(202) 719-7049 – facsimile

By: /s/ Christi Shewman

Christi Shewman
Gary L. Phillips
David L. Lawson

AT&T SERVICES, INC.
1120 20th Street, NW
Suite 1000
Washington, DC 20036
(202) 457-3090 – phone

Attorneys for AT&T

August 28, 2018