

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of
911 Governance and Accountability
Improving 911 reliability

PS Docket No. 14-193
PS Docket No. 13-75

COMMENTS OF AT&T

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The Commission has released its Policy Statement and Notice of Proposed Rulemaking (Notice) in this docket to propose new rules “designed to address failures leading to recent multi-state 911 outages.”¹ AT&T Services, Inc., on behalf of itself and its affiliated companies, (AT&T) files these comments in response.

INTRODUCTION AND SUMMARY

After the June, 2012, derecho that swept across the American Mid-West and Northeast, the Commission studied the disruptions the storm caused to the 911 ecosystem. Based on that study, the Commission promulgated new rules seeking to improve the overall reliability of 911 services using a certification process focused on certain best practices affecting, among other things, auditing critical 911 circuits and network monitoring link diversity and providing specified levels of central office backup power. These new rules (911 Reliability Rules or Part 12 Rules), codified in 47 C.F.R. Part 12, were adopted only a little more than a year ago on December 12, 2013.² Now, in the aftermath of certain so-called sunny-day outages, including one outage made the focus of an extensive Commission study, the Commission is proposing a major expansion of these 911 Reliability Rules and a sweeping extension of the Commission’s authority over the entire 911 ecosystem. The new rules represent an unprecedented intrusion by federal regulators into local and state governance of 911 systems—both legacy and IP-based systems. This proposed expansion of the rule and the intrusion into local and state governance of 911 systems is unwise, unnecessary, and, given the fact that the ink is barely dry on the new 911 Reliability Rules, premature.

¹ 911 Governance and Accountability; Improving 911 Reliability, *Policy Statement and Notice of Proposed Rulemaking*, PS Docket Nos. 14-193 & 13-75, FCC 14-186 (rel. Nov. 21, 2014) (Notice).

² Improving 911 Reliability; Reliability and Continuity of Communications Networks, Including Broadband Technologies, PS Docket Nos. 13-75 & 11-60, *Report and Order*, 28 FCC Red 17476 (2013) (911 Reliability Order).

In large measure, when it adopted the 911 Reliability Rules, the Commission began exploration of uncharted territory—i.e., having providers certify to certain best practices yet allowing the certifying parties to rely on “alternative measures to mitigate ... risk [of outages].”³ This represents a unique approach and has yet to be tested through practice. Indeed, the initial certification under these rules, which is aimed at allowing Covered 911 Service Providers to show substantial compliance towards improving the reliability of their networks, is not due until October, 2015. Neither the Commission nor the Covered 911 Service Providers actually know how well this process will work or what, if any, issues may arise with the Covered 911 Service Providers’ efforts to comply with the new rules or the Commission’s efforts to enforce them. As much uncertainty lies ahead, it is odd that the Commission is already contemplating a major expansion of these rules. On top of any other concerns we have about these proposals, therefore, we contend the expansion of the new Part 12 Rules is premature.

The Commission’s goals in this proceeding—i.e., “to prevent and mitigate large-scale disruptions of 911 service, and to improve communication and situational awareness among [911] stakeholders”⁴—are admirable. Nevertheless, we counsel caution because, among other things, it is impossible for the Commission to regulate the 911 ecosystem to a zero-defect and outage-free world, and a rush to expand the 911 Reliability Rules will be costly, burdensome, and, possibly, unworkable. The 911 Reliability Rules are already imposing considerable costs on Covered 911 Service Providers who are conducting new audits of their 911-related systems and preparing to certify to compliance with the new rules. The proposed expansion of these rules would add significant new work and costs on providers that are already racing to meet the original deadline for filing the initial certificate—a

³ 911 Reliability Order ¶ 62.

⁴ Notice ¶ 32.

certificate that would attest to *only* substantial compliance with those rules. The certificate of full compliance will not be due until October, 2016.

The proposed rules are unnecessary because the Commission has not made the case that the method used to improve the reliability of the legacy 911 system—filing reports on network disruptions impacting special 911 facilities and generating appropriate best practices through joint government-industry councils—would be insufficient to the task of making the transitioning 911 system reliable. And the Commission has not made the case that the Commission’s goals of reliability and transparency could not be achieved through alternative means, such as contract. For example, today, PSAPs⁵ are equal to the task of hiring qualified 911 system service providers and obtaining the same degree of transparency and reliability the Commission claims to be the goals of its new federal regulations. And, the 911 system service provider, in turn, can through contract require the same level of reliability and transparency from its vendors and subcontractors.

In addition to being premature and unnecessary, the proposed rules will impose new costs on all stakeholders in the 911 ecosystem. And these costs will ultimately be paid by PSAPs and end users. The rules will in all likelihood require Covered 911 Service Providers to develop new procedures, purchase new equipment, upgrade software and hire additional staff; all of this will not be incurred to improve the service they are providing, but rather just to meet new federal rules. These costs will be on top of any overlapping, but not inconsistent, state laws that would not be subject to federal preemption. Moreover, Covered 911 Service Providers will face new liability risks (in tort, contract, and regulatory enforcement), which, if they do

⁵ Unless otherwise expressly stated, throughout these comments, the term “PSAP” will include public safety answering points, statewide default answering points, and other appropriate local emergency authorities.

not drive providers from the market, will have to be taken into account when setting prices.

Apart from being premature, unnecessary, and costly, the proposed rules raise other serious concerns. These include:

- The amended definition of “Covered 911 Service Provider” should not include providers whose sole function is to originate 911 calls.
- The amended definition of Covered 911 Service Provider should not extend new reliability obligations to text-to-911, which is only an interim solution using a best-efforts, store-and-forward service.
- The requirement to file notifications of “major changes” would not provide any usable information or tangible benefit.
- The requirement to have Covered 911 Service providers file an application to discontinue, reduce, or impair existing 911 service is unnecessary and will have the unintended consequence of driving providers from the market and, thereby, raising costs and discouraging innovation.
- The proposed certification obligation provides no demonstrable benefit for 911 service reliability and is merely costly make-work.
- The proposal to require providers to certify that they have established “appropriate alarms” is unworkable because it is impossible for providers to know *a priori* what to alarm when systems depend on millions of lines of software code.
- The proposed rule to create a 911 NOC Provider is costly and unworkable, and it raises questions concerning both tort and contract liability and concerning disclosure of carrier proprietary information.

The Commission’s assertion of legal authority for this extraordinary intrusion into the 911 ecosystem is highly questionable. Most of the grounds for legal authorities cited by the Commission—such as the 911 Act, the NET 911 Act, and

the CVAA—are clearly not applicable and provide the Commission with no legal basis for the usurpation of local authority. Even if the standard Title II authorities listed—such as Sections 201(b), 214(d), 218, or 251(c)(5)—could provide authority to impose new rules on telecommunications common carriers, they do not provide the Commission with authority over non-common carriers. In particular, the proposal to require that providers of professional support and maintenance services under contract apply to the Commission before discontinuing, reducing, or impairing their services is outside of the Commission’s jurisdiction.

DISCUSSION

A. The Commission’s proposed expansion of the Part 12 Rules is too costly, unnecessary, and not a better alternative to the existing best-practices method of improving network reliability.

Outages in the 911 ecosystem are inevitable—which is not to suggest that 911 stakeholders shouldn’t strive to reduce the number of them or take steps to limit their impact. But the Commission will not be able to regulate the 911 ecosystem to a zero-defect and outage-free state. And the regulations proposed in the Notice amount in the main to unnecessary and costly make-work that will not improve the reliability of the 911 ecosystem. Instead of a radical federal regulatory scheme, the Commission should rely on network outage reports to generate best practices in concert with other 911 stakeholders.

1. The Commission’s proposal to impose new federal regulations on the 911 ecosystem is too costly and will impose those costs on PSAPs and end users.

The proposed expansion of the 911 Reliability Rules would directly impact existing relationships the Covered 911 Service Providers have with PSAPs and third-party vendors and subcontractors by imposing new and unforeseen costs, not presently addressed by existing tariffs or contracts. At a minimum the proposed new rules will require changes in procedures, additional equipment and/or upgrades to software, and additional staffing and this this will be undertaken not to improve

service, but rather solely to meet the demands of the proposed new federal regulations. Moreover, all Covered 911 Service Providers, but in particular the proposed “911 NOC Providers,” will have to reassess their liability exposure, not only for breach of contract and tort liability, but also possible exposure to regulatory penalties arising from new and vague obligations, such as the duty “to monitor the availability of 911 services and coordinate situational awareness and information sharing” involving third-party providers and vendors and their networks and systems.⁶ Even assuming all the tariffing and contractual details can be worked out, which is not a certainty, these additional costs and delays associated with this additional regulatory oversight will have to be paid by PSAPs and, by extension, end users in the form of higher fees or taxes. And not all PSAPs are equally situated, meaning among other things, that some PSAPs may not be in a financial position to afford the costs imposed by the Commission’s proposed new regulations. And, even if PSAPs could absorb the impact of these new costs, the additional costs may very likely have unintended consequences, like slowing the ability of some PSAPs to migrate to NG911 or otherwise update or replace out-of-date facilities.

Covered 911 Service Providers will also incur additional costs trying to navigate the narrow straits between overlapping and possibly contradictory state laws and regulations. In the Notice, the Commission suggests that preemption of state laws might be necessary if they prove inconsistent or “frustrate the implementation of the Commission rules.”⁷ Nevertheless, the Commission’s proposed scheme could potentially require Covered 911 Service Providers to duplicate work in order to address parallel, but not facially inconsistent, state and federal obligations applicable to the same underlying services and transactions.

⁶ Notice, Appendix A, Proposed Rule § 12.7(b) (Proposed Rule).

⁷ Notice ¶ 28 and n.63.

These added costs would result solely by virtue of federal intrusion into areas of state and local responsibility. Because the Commission has failed to show that any of the proposed rules would have prevented the sunny-day outages highlighted in the Notice, the costs these rules would impose are made that much more unjustified. And because PSAPs are able to achieve the same results of reliability and transparency through contractual safeguards, the costs are wholly unnecessary.

2. The Commission’s goals or reliability and transparency can be achieved through contract.

The underlying assumption for the expansion of the 911 Reliability Rules appears to be the view that, with the rise of IP-based services, including NG911 services, the old world model of one network and one 911 system service provider (typically the ILEC) is giving way to the Balkanization of 911 responsibilities and with that transition comes the loss of transparency and dependability.⁸ This argument further assumes that federal regulation is needed to knit the various parts of the 911 ecosystem together to insure that PSAPs continue to obtain “rapid and responsive support if any portion of the 911 network fails.”⁹ We disagree with this assumption because today, without these federal regulations, state and local 911 governing agencies are able to obtain the same or better results through the contracting process. The 911 ecosystem is not so attenuated that PSAPs are incapable of getting the accountability, reliability, and transparency they need to provide 911 service to the public. Just as important, however, because not all PSAPs are similarly situated, federal intrusion into state and local governance of 911 operations will take control over costs and network design out of the hands of state and local officials by compelling Covered 911 Service Providers to meet new,

⁸ Notice ¶ 17.

⁹ Notice ¶ 16.

one-size-fits-all federal regulations and passing on the costs and burdens associated with them.

In its rush to adopt these new rules, the Commission fails to make the case that existing mechanisms—i.e., state laws or contracts between PSAPs and the 911 system service provider—cannot adequately address the concerns raised in the Notice. In a competitive communications market, services are provided under contract. And contracts are flexible legal documents that can address any range of rights and obligations. The kinds of obligations the Commission seeks to impose on Covered 911 Service providers by federal regulation are just the kind of concerns that should be addressed in the contract between the PSAP and the 911 system service provider. After all, the 911 system service provider is the critical point of contact between the PSAP and the 911 ecosystem, and the 911 system service provider offers its services within each state under either a tariff or a contract.¹⁰

3. In lieu of new and unworkable federal regulations, the Commission should continue to rely on the development of best practices.

In place of imposing costly, unnecessary, and burdensome regulations at the federal level, the Commission should continue to rely on data from Network Outage Reporting Service (NORS) reports and the information and conclusions drawn from post-outage studies to help the industry develop best practices—and not mandates—to address the sorts of events described in the Notice. For example, in the study conducted for the April 2014 outage, the Commission acknowledged that, without benefit of new federal regulations, the providers involved have already undertaken steps to prevent a reoccurrence of the same or similar problem.¹¹ The

¹⁰ Typically the incumbent LEC provides legacy 911 service by virtue of a tariff; however, in a post-1996 competitive environment, this service can be provided by a competitive LEC. Indeed, with respect to the April 2014 outage, Intrado was 911 system service provider for several PSAPs within AT&T's ILEC region. NG911 services are typically provided pursuant to contract.

¹¹ April 2014 Multistate 911 Outage: Cause and Impact, Report and Recommendations, PS Docket No. 14-72 at 16 (rel. October 2014) (911 Multistate Outage Report).

steps taken by those providers, and possibly other steps, could be discussed in joint-Commission-and-industry forums (e.g., CSRIC or the newly formed Optimal PSAP Architecture Taskforce¹²) to formulate appropriate best practices to assist all 911 providers to improve their operations and the reliability of their systems. This method has served the 911 ecosystem well in the past, and, in spite of its vaunted complexity, the new IP-based architecture is equally susceptible to improvement through this same process.

B. The proposed new rules have serious defects and would potentially have unintended negative consequences to the overall 911 ecosystem, including reducing the level of competition.

AT&T contends that, while well meaning, the proposed new Part 12 Rules should not be adopted. There has not been a showing that the proposed rules would have prevented any of the sunny-day outages the Commission refers to in the Notice. These rules merely impose additional costs without real benefit to the public. That said, the Commission's proposed rules have other serious shortcomings that ought to be considered in this proceeding.

1. The Commission's definition of "Covered 911 Service Provider" should not include providers whose sole function is to originate 911 calls.

In the Notice, the Commission proposes to amend its definition of Covered 911 Service Provider. As presently proposed, the obligations of the newly amended Rule 12.4 would fall equally on providers that have direct relationships with PSAPs and those that merely originate 911 calls. While we question the necessity of expanding the definition of "Covered 911 Service Provider," the Commission should nevertheless rewrite the proposed re-definition of the term to exclude providers that are merely originating 911 calls.

¹² <http://www.fcc.gov/document/fcc-announces-membership-task-force-optimal-psap-architecture>

The stated aim of Commission Rule 12.4 is to improve network reliability for 911 calls. The focus of this endeavor ought to be on those either in direct privity with the PSAP (e.g., the 911 system service provider) or those in indirect privity (e.g., the vendors and subcontractors—in privity with the 911 system service provider—that provide critical 911 databases to provide routing and location services). It is these providers that are in the best position to detect, mitigate, and resolve outages in the 911 ecosystem, as well as keep critical 911 stakeholders apprised of the status of networks and databases.

While we contend that PSAPs can obtain the necessary control, transparency, and situational awareness for their 911 operations by means of appropriate contract provisions with the 911 system service provider, who in turn can require it of vendors and subcontractors, any rule the Commission might adopt in this regard should not impose obligations on those providers whose sole function is to originate 911 calls because they are incapable of providing situational awareness for outages occurring on third-party networks and databases and cannot provide PSAPs with critical information on mitigating the effects of those outages. Subject to the criticisms of the proposed rule creating the 911 NOC Provider (below), we note that originating providers can always alert the 911 system service provider and the Commission of outages on the originating provider's own network that impact 911 special facilities. But the obligations imposed by the Part 12 Rules on originating providers should be circumscribed by the limitations of those providers to offer useful information on outages impacting third-party operations.

2. The Commission's definition of "Covered 911 Service Provider" should not extend Part 12 obligations to text-to-911, which is an interim, best-efforts, store-and-forward service.

The Commission also proposes to change the definition of "Covered 911 Service Provider" in Commission Rule 12.4(a) to include any entity that provides

text-to-911.¹³ This simple change would bring within the ambit of the rule a non-voice service that is not designed to emergency communications standards of reliability. The Commission should not amend this definition to extend the Part 12 Rule obligations of reliability to any services that were not specifically designed for emergency communications.

In December, 2012, the four nationwide wireless carriers entered into a voluntary agreement with the National Emergency Number Association (NENA) and APCO International (APCO) to use off-the-shelf SMS texting services for an interim text-to-911 service.¹⁴ Subsequently, the Commission codified that obligation and extended it to other CMRS providers and providers of interconnected texting services, including over-the-top providers.¹⁵

The SMS texting service is a best-efforts, store-and-forward service that cannot be held to the reliability standards applicable to legacy voice services or to IP-based voice services, like interconnected Voice over IP (VoIP). The Commission was well aware of the limitations of this service when it adopted the Text-to-911 Order but was nevertheless willing to use it for emergency messages in spite of its shortcomings as a stopgap texting service before the introduction of true NG911 texting services, which could be designed to meet the high standards usually imposed on emergency communications. By amending the definition of Covered 911

¹³ Proposed Rule § 12.4(a)(4)(i)(A).

¹⁴ See Letter from Terry Hall, APCO International, Barbara Jaeger, NENA, Charles W. McKee, Sprint Nextel, Robert W. Quinn, Jr, AT&T, Kathleen O'Brien Ham, T-Mobile USA, and Kathleen Grillo, Verizon, to Julius Genachowski, Chairman, Federal Communications Commission, and Commissioners McDowell, Clyburn, Rosenworcel and Pai; PS Docket 11-153, PS Docket No. 10-255 (Dec. 6, 2012). (Carrier-NENA-APCO Agreement). A copy of the Carrier-NENA-APCO Agreement is attached as Appendix C to Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment, PS Docket Nos. 11-153 & 10-255, *Further Notice of Proposed Rulemaking*, 27 FCC Red 15659 (2012).

¹⁵ Facilitating the Deployment of Text-to-911 and Other Next Generation 911 Applications; Framework for Next Generation 911 Deployment, PS Docket Nos. 11-153 & 10-255, *Second Report and Order and Third Further Notice of Proposed Rulemaking*, 29 FCC Red 9846 (2014) (Text-to-911 Order).

Service Provider to include text-to-911, the Commission is unfairly and unreasonably imposing standards of reliability on SMS texting that covered texting providers cannot meet without a complete and standardized redesign of the service, which is not contemplated by the Text-to-911 Order and would be a practical impossibility.¹⁶ In the alternative, the Commission should clarify that the reference to “text-to-911” in the amended definition does not include best-effort, store-and-forward services like SMS or MMS texting.

3. The Commission should not adopt proposed rule 12.5(a), requiring notifications of “major changes,” because the proposal would not provide any usable information or tangible benefit and would impose unnecessary delays and costs.

In the Notice, the Commission proposes several changes to the existing Part 12 Rules, including a change that would require Covered 911 Service Providers to notify the public of “major changes in any covered 911 system service provider’s network architecture or scope of 911 services that are not otherwise covered by existing network change notification requirements.”¹⁷ The Commission’s proposal is aimed at major changes to network architecture and to the scope of 911 services. Under the proposed rule, a notice would be required for a change in 911 architecture that “affects the primary geographical routing or logical processing of” selected 911 elements, including their “functional equivalent capabilities,” and that “affects the availability of backup routing or processing capabilities” for those same 911 elements.¹⁸ Moreover, the proposed rule would require notification of a change in “the allocation of primary responsibility with respect to provision of any of the

¹⁶ See Text-to-911 Order ¶ 91.

¹⁷ Notice ¶ 50.

¹⁸ Proposed Rule § 12.5(a)(1)(i) & (ii).

capabilities or services described in 47 C.F.R. § 12.4(a)(4)(i) affecting more than one state.”¹⁹

The Commission should not adopt this proposal, because it would not presently appear to provide any usable information or tangible benefits to the 911 ecosystem, it would unnecessarily delay implementation of beneficial improvements to the 911 system, and it would impose unnecessary costs on providers, PSAPs, and end users. Moreover, the Commission has offered no evidence that the past absence of such notifications has had any deleterious effects on public safety.²⁰ In short, this proposal would appear to be little more than costly make-work.

The primary objection to this proposal is that nothing in the history of the 911 ecosystem suggests the failure to provide public notice of the sort contemplated by the new rule has had any adverse impact on the 911 service. Within the four corners of the Notice itself, the Commission lists only four outages that raised the Commission’s concerns, and the Commission does not offer any evidence that these outages were caused by the lack of such notifications or might have been avoided had Covered 911 Service Providers provided them.²¹ In short, this new rule is a solution in search of a problem.

Under the rule as proposed, the Commission will exempt “any covered 911 service provider’s network architecture or scope of 911 services that are ... otherwise covered by existing network change notification requirements.”²² This suggests that the new rule is a logical extension of the notice of network change rules codified in 47 C.F.R. § 51.325 et seq. But the notice of network change rule is

¹⁹ Proposed Rule § 12.5(a)(1)(ii). The rule has three express exceptions: (1) changes initiated by the PSAP; (2) changes already covered under section 251 of the Act; and, (3) emergency changes.

²⁰ We would be more amenable to a global network change notification requirement if it were shown to address a real need for 911 stakeholders.

²¹ Notice ¶¶ 21 – 25.

²² Notice ¶ 50.

required by statute and the requirement is imposed on incumbent LECs, not telecommunications carriers in general.²³ At the time that Section 251(c)(5) of the Act was adopted, the fear was that incumbent LECs had “sufficient ‘control over network standards to harm competition’ and the ‘requisite size and market power to change their networks in a manner that stymies competition.’”²⁴ The 911 ecosystem, while competitive, is different. Providers in that space have no monopoly incentive to impair transmission or routing of 911 calls or otherwise impair the interoperability of networks and facilities. And there is no evidence in the record to suggest that providers are failing to notify PSAPs when they introduce changes that would directly impact PSAP’s systems or that they have been implementing changes to their facilities or networks that have impaired either the connectivity or the interoperability of their systems with those of third parties. In short, the present-day absence of a public notification process is not adversely affecting 911 calling.

The record also lacks evidence that PSAPs, should they so desire, are incapable of addressing notification in their contracts with 911 system service providers.²⁵ State governments and agencies are fully capable of handling the contracting process, including posting a detailed request for proposal (RFP), setting service level commitments, evaluating the bids received on the RFP, and executing contracts that provide them with the transparency and reliability they might

²³ 47 U.S.C. § 251(c)(5).

²⁴ See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; et al., CC Docket Nos. 96-98, 95-185, & 92-237; and NSD File No. 96-8; and IAD File No. 94-102, *Second Report and Order and Memorandum Opinion and Order*, 11 FCC Rcd 19392 ¶ 170 (1996) (Second Local Competition Order).

²⁵ The proposed new rules do not distinguish between legacy 911 services provided under tariff by incumbent LECs and NG911 services provided under contract. The new rules apply equally to both; yet, there is no justification for imposing new rules on legacy systems that are entirely locally supported.

require, such as prior notification of network changes that would impact PSAP operations and systems.

PSAPs engage 911 system service providers for their expertise and know-how in building, maintaining, and operating the complex systems that support emergency services. This includes the ability of 911 system service providers to evaluate and hire reliable and competent subcontractors and vendors. Because the market for these services is competitive, the providers working in this system are highly motivated to ensure that they are providing reliable services through the equipment, software, and contractors and vendors they employ. In short, because providers want the 911 business, they have every incentive to build and maintain a reliable service and to ensure the compatibility of any planned network changes with the third-party networks and databases that rely on and interconnect with them, regardless of what role they play in the 911 call flow.²⁶ And, through contractual arrangements, PSAPs are wholly capable of holding these providers accountable for failing to meet service-level commitments or notification obligations or any other requirements set out in RFPs and subsequent agreements.

An examination of the proposed rule suggests the rule does nothing more than require a 60-day prior notice of a covered change. It doesn't provide a mechanism for evaluating whether the change is good or bad or whether it meets with the approval of those actually impacted, if any. It simply imposes an ineffectual, pro forma hurdle to the process of maintaining 911 services that would clearly add costs to the process and delay improvements in service without producing any tangible benefit. For example, because the proposed rule would

²⁶ See Second Local Competition Order, ¶ 170 (The Commission refuses to impose disclosure requirements on competitive LECs because they have “powerful economic incentives’ for maintaining compatibility with incumbent local exchange networks.”) Likewise, participants in the 911 ecosystem are economically motivated to make sure their networks, equipment and other facilities are compatible.

require notice of a change involving the allocation of primary responsibility with respect to provision of any of the 12.4(a)(4)(i) capabilities or services affecting more than one state, a Covered 911 Service Provider would have to give notice when changing database vendors merely because its existing vendor's database is in one state and its new vendor's database is in another, or to give notice because an existing vendor has decided for its own internal business reasons to move the locations of the vendor's service centers from states A and B to states X and Y. Such notifications, especially at the federal level, provide no value to the public, and the Notice provides no valid justification for it.

The Commission asserts that the public has “a vested interest in understanding changes that may affect its access to 911.”²⁷ At a minimum, this assertion suggests that the public already has an idea of how 911 is provisioned today, which is unrealistic. Moreover, it suggests that the public cares about such arcane information as the names of vendors or subcontractors or the location of their facilities or the geographic routing or logical processing of calls. And it further suggests that the general public would be in a better position to judge how to manage the 911 Network than the 911 engineers and PSAPs actually responsible for that network. None of which is true. There is no need to publicize changes to the 911 ecosystem that are otherwise transparent to the general public. Notification to the general public is only necessary when it directly impacts how the end user will access emergency services.²⁸ And these sorts of notifications are best made in the impacted local community, not filed in Washington, D.C.²⁹

²⁷ Notice ¶ 50.

²⁸ Obviously, the public needs to be informed of new 911 features and functions available to them in their locale (e.g., Text-to-911). But this sort of information is usually provided through local campaigns, not by means of a filing at the FCC.

²⁹ This compares favorably with Commission Rule 68.110(b) that requires that, “[i]f ... changes [in the communications facilities, equipment, operations or procedures of a provider of wireline telecommunications] can be reasonably expected to render any customer's terminal

The Commission should also consider the implications of making such notifications public, including the possibility that people intending to harm the country's critical telecommunications infrastructure might be able to use the information to unlawful and harmful ends. Plus, depending on the Covered 911 Service Provider's customer, the notification of the sort contemplated by the new rule could require or lead to the inadvertent disclosure of CPNI in violation to Section 222 of the Act.

The proposed notification requirement is an unnecessary and costly imposition. The contract governing the relationship between the PSAP and the 911 system service provider can address any questions concerning what notice of architectural changes or changes in scope of service the PSAP believes is important to it.

4. The Commission should not obligate non-telecommunications common carriers to undergo an application to discontinue, reduce, or impair service.

The Commission advises that, because “incumbent 911 service providers that have historically taken responsibility for reliable 911 call completion have undertaken a public trust[,] ... they are not entitled to [make decisions about their businesses and pursue new and different lines of service] in a manner that endangers the public or leaves stakeholders uninformed with respect to the functioning of the combined network.³⁰ Consequently, the Commission is proposing that all Covered 911 Service Providers “file a public notification with the Commission and receive approval from the Commission” to discontinue, reduce, or

equipment incompatible with the communications facilities of the provider of wireline telecommunications, or require modification or alteration of such terminal equipment, or otherwise materially affect its use or performance, the customer shall be given adequate notice in writing, to allow the customer an opportunity to maintain uninterrupted service.” As with this rule, any notice to the public should be limited to changes that are not transparent to the end user.

³⁰ Notice ¶ 53.

impair 911 services.³¹ The Commission wants its new Section 214-like application and approval process to apply “only when entities seeking to discontinue, reduce, or impair existing 911 service are not already required to obtain approval under other existing Commission rules.”³² Under the rule as proposed, the Commission’s application-and-approval process would apply equally to entities seeking to terminate agreements to provide “technical support or maintenance” for “911 network components or customer premises equipment (CPE).”³³ The Commission’s proposal is over broad, unnecessary, and not supported by the record. Moreover, the Commission’s plan may have the unintended consequence of reducing competition in the marketplace and, thereby, adversely impacting the quality and cost of 911-related services.

Extending Section 214-like obligations to non-common carriers or to parties providing non-telecommunications services is unnecessary, because avenues already exist to address these concerns. These relationships in the 911 ecosystem are governed by contract, and there are mechanisms available in contract to address such contingencies as discontinuing service and the like. Typically parties to such agreements have provisions covering the term of service, the requirement for notification in case of unilateral termination, and the contingency mechanism when finding substitute providers proves challenging. There is nothing in the record that suggests that this contracting method is either unavailable or insufficient. In the Notice, the Commission does not cite one example of a PSAP left in the lurch or 911 service imperiled due to a provider’s decision to discontinue, reduce, or impair a 911-related service.

³¹ Proposed Rule § 12. 5(b).

³² The Commission expressly disclaims any intent “to create duplicative obligations for entities that are already subject to Section 214(a) and associated authorization requirements.” Notice n.121.

³³ Proposed Rule § 12.5(b)(1)(ii).

Unfortunately, the Commission’s proposal might have the unintended consequence of forcing entities to exit the business or rethink entering it. Businesses in a competitive market need to respond to changes in the marketplace, as well as to their own particular financial situation. Knowing that the success of their business judgments and plans will hinge on essentially the unbridled discretion of the Commission undoubtedly will cause 911-related entities to question the wisdom of entering in or staying in the affected lines of business. Businesses need to know with reasonable certainty going into these arrangements that they will have the necessary flexibility to protect and foster their business goals and to provide value to their shareholders. The Commission’s proposed Section 214-like process undermines that confidence and may ultimately make 911 less reliable, less cost-effective, and less innovative by virtue of its unintended, albeit predictable, effect of reducing or eliminating competition for 911 and NG-911 services.

5. The Commission should not adopt proposed rule 12.6, requiring certification of capability, because it amounts to unnecessary and ineffective paperwork.

The Commission proposes that certain entities intending to provide one or more of the capabilities listed in section 12.4(a)(4) of the new rules should file a certification with the Commission.³⁴ The proposed certification would cover three elements: (1) technical and operational competence; (2) reliability and security risk analysis; and (3) adherence to Commission rules, including the annual certification

³⁴ These certain entities are those providers seeking to offer the proposed Rule 12.4(a)(4) capabilities but were not providing them before November 21, 2014. The Rule 12.4(a)(4) capabilities are: “call routing, automatic location information (ALI), automatic number identification (ANI), location information services (LIS), text-to-911, or any other capability required for delivery of 911, E911, or NG911, or the functional equivalent of any of those capabilities, to a public safety answering point (PSAP), statewide default answering point, or appropriate local emergency authority as such entities are defined in 47 C.F.R. § 64.3000(b), whether directly or indirectly as a contractor or agent to any other entity.”

process covered in Commission rule 12.4(c). The aim of the rule is to make the covered entities “publicly acknowledge their responsibilities and certify their preparedness to implement relevant best practices and comply with existing Commission rules applicable to the 911 capabilities they provide.”³⁵

The Commission has not made the case that the proposed certification process would address any known failure in the 911 ecosystem or make that system more reliable. First, there is no evidence that any outages cited by the Commission in its Notice or otherwise were caused by new entrants that were technically or operationally incompetent or that failed to conduct reliability and security risk analyses of any network components. The fact that an outage occurred is not evidence that the network or database provider failed to conduct appropriate tests and analyses.

Second, regardless of the details surrounding any specific outages cited in the Notice, there is no evidence that the 911 ecosystem generally is being taken over by fly-by-night operators or that new entrants are failing to conduct laboratory and field tests and analyses of their 911 systems, or that any such alleged failures to test and analyze have resulted in any outages, including those chronicled in the Notice.

Third, it is unclear how “publicly acknowledging responsibilities” in and of itself makes 911 systems more reliable.

Fourth, with respect to existing Commission rules, either providers are obligated by the Act to abide by Commission’s rules or they are not. If a provider is not obliged to follow Commission rules, it is difficult to see why or how that provider would consent to them by means of this proposed rule or how the Commission can by regulation impose that obligation on it.

³⁵ Notice ¶ 59.

And, fifth, as long as human beings are involved in providing 911 services, there will be occasional system failures or temporary outages—and the proposed certification process won't eliminate them. In this competitive marketplace, participants in the 911 ecosystem are fully motivated to provide reliable 911 service. Even apart from the profit motive, these participants rely on 911 services for themselves and their loved ones. Outages—"sunny day" or otherwise—in the 911 systems do not arise from some cavalier attitude toward safety and reliability; they arise because humans are fallible and even their best efforts cannot eliminate all defects and errors. The Commission seems dead set on trying to regulate the 911 ecosystem to a zero-defect and outage-free state. But this is a foolish goal that fails to recognize the limits of human endeavors.³⁶

In spite of the dedication and detailed attention of the hard working men and women, failures in the 911 ecosystem will happen. And when they do, all involved learn valuable lessons and seek to apply those lessons to the networks and supporting systems with the aim of avoiding similar outages in the future. This same process has supported the development and improvement of legacy 911 systems and can be applied with equal merit to NG911 systems. The proposed certification rule adds nothing to 911 system reliability and certainly cannot eliminate defects in man-made systems or prevent any outages.

³⁶ To this last point, the Commission should consider one highly technical venture: space exploration. No one doubts that the entities involved in manned space exploration are highly trained or that they conduct detailed and repetitive inspections, tests, and analyses. Yet, the history of space exploration is full of glitches and failures, even after more than 55 years. Apart from those glitches and failures that merely delayed launches or curtailed missions, manned space exploration has seen post-launch engine failures, parachute problems, fuel leaks, tile damage, unintentional explosions, and spacesuit leaks. See: http://en.wikipedia.org/wiki/List_of_spaceflight-related_accidents_and_incidents. Some of these events caused both astronaut and non-astronaut injuries and fatalities.

The history of unmanned space operations is similar. Even though hundreds of millions of dollars are at stake and countless hours of review, testing, and analyses were conducted, glitches and failures still took place and continue to take place. See: http://en.wikipedia.org/wiki/Category:Satellite_launch_failures.

The sole purpose of this proposed certification rule appears to be a way of assessing forfeiture penalties on providers after an outage or to leverage the threat of such penalties into settlements and “voluntary contributions to the federal treasury.” Even if the provider was in fact technically and operationally capable and had conducted appropriate reliability and security risk analyses, the threat of a post-outage notification of apparent liability (NAL) could be used to pressure a provider to settle on the assertion that the outage itself is proof of incompetence or a failure to analyze or test. Rational providers might calculate that future outages will lead directly to stiff penalties or high-dollar settlement payments, resulting in increased costs of service without any tangible benefit to PSAPs or the general public. Or they might decide that the potential price is simply too high and decide to exit the business or to refrain from entering it, which will reduce competition in the marketplace and drive costs higher still.

Instead of trying to regulate providers to a zero-defect 911 system, the Commission should continue to rely on the development and use of best practices derived from post-outage, root-cause analyses. After all, improving network reliability through this means is the whole point of the Commission’s Disruptions to Communications rules and the Network Outage Reporting System (NORS).³⁷ By means of these reports, which include a root-cause analysis, the Commission and industry, working in partnership, can develop best practices aimed at “avert[ing] future outages with similar causes.”³⁸ Indeed, the Commission’s own study of the

³⁷ 47 C.F.R. Part 4. The aim of the Part 4 rules is the development of best practices that could help providers make their networks more reliable and either eliminate the source of an outage or reduce the duration of any outage that might occur. Best practices are not mandates. Mandates imply a one-size-fits-all approach; while best practices depend on the applicable circumstances and require analysis of numerous factors to determine if they are appropriate to the individual’s situation. See New Part 4 of the Commission’s Rules Concerning Disruptions to Communications, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 16830 ¶ 14 (2004).

³⁸ New Part 4 of the Commission’s Rules Concerning Disruptions to Communications, ET Docket No. 04-35, *Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 16830

April 2014 Multistate 911 Outage reflects the providers' willingness to learn from their experience and to implement new practices to avert similar incidents in the future—all without the imposition of the Commission's proposed new rules.³⁹

6. The Commission should not require Covered 911 Service Providers to certify that they have established appropriate alarms for network failures because providers cannot truthfully certify that they have alarmed their systems for every eventuality.

The Commission is proposing to enlarge the Annual Reliability Certification provisions of Rule 12.4 by adding a new obligation under “Network Monitoring” and adding a new subsection, “Database and Software Configuration and Testing.”⁴⁰ These proposed provisions appear to be in contemplation of the 911 Multistate Outage Report that highlighted the role played by a “preventable software coding error in Intrado’s equipment” and the failure of the Internet Protocol Selective Router (IPSR) to “issue any major or critical alarm” for the April, 2014, outage.⁴¹ Given this background, the Commission’s desire to address these issues seems reasonable. Nevertheless, the rules themselves still need to make sense and be susceptible to compliance. The changes proposed to section (c) of Commission Rule 12.4 raise concerns about the ability of providers to certify and comply.

With respect to Network Monitoring, the Commission proposes that Covered 911 Service Providers certify that they have “[e]stablished appropriate alarms for network failures that would be reasonably likely to result in a disruption of 911 service within a 911 Service Area, and procedures designed to ensure that such

¶ 14 (2004) (“With the information provided by these [Final Service Disruption] reports, the Network Reliability Council, other carriers, and manufacturers were able to understand the root cause of each outage and determine whether an existing best practice adequately addressed the cause of that outage or whether a new best practice, or standard, had to be developed to avert future outages with similar causes.”).

³⁹ 911 Multistate Outage Report at 16-17.

⁴⁰ Proposed Rule § 12.4(c)(3) & (4).

⁴¹ See 911 Multistate Outage Report at 12-13.

alarms quickly bring such network failures to the attention of appropriate personnel.”⁴² With respect to the services and systems involved in the April, 2014, outage, we suspect that the providers involved had intended to do just that and they probably would have certified to it before the outage, had they been required to do so. So it is difficult to see how certification per se adds to the reliability of networks.

Also, when dealing with software, particularly software necessary for handling complex systems and involving millions of lines of code, it is simply not possible to anticipate and to alarm for every possible failure. Instead of relying on this certification process, this sort of failure would seem more appropriate to the tried-and-true method of root-cause analysis leading to the issuance of a best practice. Using Intrado as an example, it chose to “[c]reate an alarm ‘based on percentage of successful calls processed on a given ECMC [Emergency Call Management Center] compared to total calls for that ECMC over a 15-minute sample period.’”⁴³ Whether this is an appropriate response and whether it should be proposed generally to other providers as a best practice is best left to the deliberative process in Communications Security Reliability and Interoperability Council (CSRIC) or some other forum. But the Commission’s proposed addition to the Network Monitoring section of Rule 12.4(c) sets up certifying providers for failure and non-compliance. We recommend that the Commission not adopt this proposal.

7. The Commission should not require Covered 911 Service Providers to certify that they have ensured the reliable operation of software and databases.

We are equally concerned with the Commission’s proposal to adopt the language of subsection (c)(4)(i)(B) to the new “Database and Software Configuration

⁴² Proposed Rule § 12.4(c)(3)(i)(D).

⁴³ Multistate 911 Outage Report at 16.

and Testing” provision. Under that subsection, Covered 911 Service Providers would have to certify that they have “[i]mplemented reasonable measures to *ensure* that any software or database used by the Covered 911 Service Provider to provide 911, E911, or NG911 capabilities ... is designed, configured, and tested to *ensure* reliable operation.”⁴⁴ This verbiage appears calculated to fail.

The word “ensure” means “to guarantee” or “to make certain.”⁴⁵ And in the proposed rule, the Commission uses the term twice. While providers might be able to certify that they have taken reasonable measures to design, configure, and test their software to be reliable, they cannot guarantee that it will be reliable.⁴⁶ And no one could. While we assert that the Commission should not adopt this rule at all, it certainly should not the rule as proposed. If the Commission chooses to adopt this rule, it should at least re-write the rule to eliminate any obligation, express or implied, to guarantee or to certify a guarantee that software is designed, configured, and tested to be reliable.⁴⁷

⁴⁴ Proposed Rule § 12.4(c)(4)(i)(B).

⁴⁵ See Dictionary Dot Com: <http://dictionary.reference.com/browse/ensure?s=t>

⁴⁶ Proposed Rule § 12.4(c)(4)(i)(A) also uses the word “ensure.” But, unlike Proposed Rule 12.4(c)(4)(i)(B), Proposed Rule 12.4(c)(4)(i)(A) asks the provider to certify that it has implemented reasonable measures to ensure that its IP-based architecture is “geographically distributed, load balanced, and capable or automatic reroutes.” These are finite obligations to which the provider can certify—i.e., “yes,” there are more than one database or call processing facility in more than one geographic location; “yes,” the 911 architecture is dynamically distributed among multiple active databases or call processing facilities; “yes,” the system is capable of automatic reroutes in the event of a failure.

⁴⁷ For example, the Commission can simply rewrite it to read: Implemented reasonable measures to design, configure, and test any software or database used by the Covered 911 Service Provider to provide 911, E911, or NG911 capabilities—such as call routing, automatic location information (ALI), automatic number identification (ANI), location information services (LIS), text-to-911, or the functional equivalent of those capabilities—to be reliable.

8. The Commission should reconsider the proposal to create a 911 NOC Provider with monitoring and coordination duties because it is costly and unworkable.

In view of the possibility of another 911 outage affecting multiple jurisdictions and service providers, the Commission is considering improvements to overall situational awareness during outages by creating “a central clearinghouse for obtaining and disseminating critical information.”⁴⁸ Under the rule as presently proposed, the Commission envisions appointing the entity responsible for transporting 911 traffic to PSAPs as the “911 NOC Provider,” which would “monitor the availability of 911 services” and “coordinate situational awareness and information sharing.”⁴⁹ The Commission expects the role of the 911 NOC Provider would be assumed for the most part by incumbent LECs, presumably because incumbent LECs typically provide PSAPs transport of 911 calls and associated information and because the Commission believes they occupy “the best position to maintain comprehensive situational awareness, even as SSPs and vendors have come to provide component pieces of those networks.”⁵⁰ Other Covered 911 Service Providers—i.e., entities that provide call routing, ALI, ANI, LIS, text-to-911, or “any other capability required for delivery of 911, E911, or NG911, or the functional equivalent of any of those capabilities”—would have a corresponding duty to communicate “all reasonably available information regarding the cause and scope of a disruption” to the 911 NOC Provider and to respond to requests from the 911 NOC Provider “for such information.”⁵¹ The Commission’s proposal has superficial appeal because keeping PSAPs apprised of outages impacting them, especially information on how to mitigate the impact of an outage, has practical merit. But the Devil is in the details, and the proposed rule presents troubling issues.

⁴⁸ Notice ¶ 65.

⁴⁹ Proposed Rule § 12.7(b).

⁵⁰ Notice ¶ 67

⁵¹ Proposed Rule § 12.7(b)(2).

As mentioned, the Commission is proposing that the role of the 911 NOC Provider be assigned to the entity “responsible for transport of 911 calls and associated information” to the PSAP.⁵² Today, in the world of TDM-based telephony, this entity would typically be the incumbent LEC. With the roll out of IP-based systems and NG911, it may be less likely that an incumbent LEC would play that role. Either way, however, the Commission’s belief that the entity providing transport would have “the best position to maintain comprehensive situational awareness” seems misplaced. Without endorsing the idea of a 911 NOC Provider or the Commission’s plans for improving situational awareness during 911 outages, we suggest that the better entity for this role would be the entity that owns or operates the selective router or, for NG911, its IP equivalent.⁵³ Entities merely providing the transport piece of the 911 ecosystem are not in a position to perform the functions assigned to them in the proposed rule—i.e., monitoring the availability of 911 services and coordinating situational awareness and information. The 911 NOC Provider must at a minimum have more than a transport role.

While the concept of a 911 NOC Provider may have some appeal, we see serious issues with the rule as presently proposed. For one, the rule is vague. For example, the rule requires the 911 NOC Provider to “monitor the availability of 911 services ... [which] include events resulting in a complete loss of 911 service, as well as events that substantially impair service quality or public access to 911 without a complete loss of service, including disruption of automatic location information (ALI), automatic number identification (ANI), location information services (LIS), or any other services that locate callers geographically” but fails to expressly limit the

⁵² Proposed Rule § 12.7(a).

⁵³ This entity is typically in contractual privity with the PSAP and has the relationship with both the PSAP and the database providers that might make coordinating situational awareness possible, as well as making it more likely that the entity would have some idea that there is a disruption in 911 services.

duty to monitor to the 911 NOC Provider’s own facilities or those of its vendors and subcontractors.⁵⁴ The rule should clarify that the 911 NOC Provider is only responsible for monitoring for the availability of 911 services to the degree that it can acquire *actual* knowledge of the status of such availability by virtue of its position in the 911 ecosystem. Above, we noted that an entity merely providing the transport function to the PSAP would not likely be able to detect when 911 service on third-party facilities are disrupted, including disruptions, in part or in whole, to ALI, ANI, and LIS. But, to the degree that any entity can perform this function (e.g., the operator of the selective router or the IP equivalent thereof), that entity should not be held accountable either for an alleged failure to monitor or an alleged failure to coordinate based on its monitoring function *unless* the entity can by monitoring its own facilities, and those of its vendors and subcontractors, obtain actual knowledge of degradations in 911 service or disruptions to 911 access.⁵⁵ And the rule should make this point clear.

The proposed rule also relies on vague standards and open-ended responsibilities, making compliance exceedingly difficult and unnecessarily exposing providers to enforcement actions. For example, unlike the Commission’s Part 4 Disruptions to Communications Rules, which provide calculable thresholds for reporting disruptions, the 911 NOC Provider rule requires the 911 NOC Provider to monitor and coordinate around 911 service disruption events that “substantially impair service quality or public access to 911 without a complete loss of service.”⁵⁶ Reasonable people might well disagree on what constitutes a

⁵⁴ Proposed Rule § 12.7(b).

⁵⁵ While there are issues surrounding the 911 NOC Provider’s proposed coordination role when other Covered 911 Service Providers communicate outage information, in this section we mean only to discuss the failure to coordinate when that failure springs from the allegation that the provider failed to monitor for service disruptions.

⁵⁶ Proposed Rule § 12.7(b).

substantial impairment. This lack of clarity would in all likelihood lead to over reporting—i.e., every blip and bump on the 911 ecosystem visible to the 911 NOC Provider—driving up costs for providers and PSAPs alike.

The rule also uses catch-all language that further complicates compliance. For example, the 911 NOC Provider must monitor for “events that substantially impair service quality or public access to 911 without a complete loss of service, *including* disruption of automatic location information (ALI), automatic number identification (ANI), location information services (LIS), *or any other services that locate callers geographically.*”⁵⁷ Here the list of events that might impair service quality or access to 911 is open-ended. The 911 NOC Provider is left guessing as to what other events besides disruptions to ALI, ANI, and LIS the Commission or third parties might after the fact believe also substantially impair quality and access and is left guessing as to what other services might be deemed capable of locating callers.

In addition to being vague, the rule will obviously impose additional costs on the entity fulfilling the 911 NOC Provider role. These costs would include whatever new expenditures might be necessary to help monitor the 911 ecosystem and coordinate dissemination of information among the stakeholders (e.g., additional staffing, new equipment, and added document retention). Moreover, providers would justifiably be concerned about increased liability exposure both to the 911 stakeholders and to regulators. The mere threat of possible court actions for liability arising out of the acts or failures to act during a disruption, as well as potential increased regulatory enforcement actions, will certainly drive up the cost of services. Moreover, because these potential liabilities may be hard to calculate and thereby anticipate for purposes of assessing the cost of services provided, this

⁵⁷ Proposed Rule § 12.7(b) (emphasis supplied).

potential future exposure may dissuade entities from entering the business or persuade entities already in the business to leave it. Either way these costs have to be recovered, and no mechanism presently exists for recovering them, nor does the Commission propose any.

Another shortcoming of the rule is that it places the 911 NOC Provider in the middle between PSAPs and third-party providers as a coordinator of information—information that is either proffered by third-party providers or obtained from third parties upon request from the 911 NOC Provider. This puts those providers—i.e., both 911 NOC Providers and third-party providers—in a difficult position. First, the parties involved may be competitors and, as competitors, they may be reluctant to share carrier proprietary information with another competitor.⁵⁸ Or, providers may just be reluctant to be truly forth-coming about the nature, extent, or cause of an outage to a third party competitor because of concern that the information will make providers look bad in the marketplace. Second, the requirement to coordinate information obtained from third parties raises the risk of miscommunications. Either the 911 NOC Provider could misunderstand what information was provided it or, in relaying the information provided, it might inadvertently misstate or mischaracterize the facts or inadvertently omit a critical fact. It may be one thing when the 911 NOC Provider is communicating information that it derives from its own employees or the employees of its own vendors or subcontractors and entirely another thing when it involves third parties not in privity with the 911 NOC Provider.

Along these same lines, performing the role of a coordinator of situational awareness and information will require the 911 NOC Provider to maintain detailed records of all its transactions and communications. Such additional document

⁵⁸ See 47 U.S.C. § 222.

creation and record retention will be essential in protecting the 911 NOC Provider from possible liability to third parties and regulatory enforcement actions. Even though the proposed rule doesn't specifically call for the creation, collection, and retention of records for the federal government, the effect will be as though it did. Consequently the Commission should apply the same standard applicable to the Paperwork Reduction Act (PRA) and evaluate the rule to make sure that it is "necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility."⁵⁹ Unfortunately, however, given the complexities of this role and the limitations that ought to apply to it, the rule and the information that it demands that the covered entity create and maintain would not appear to have any practical utility.

In addition to the questions of vagueness and the imposition of unnecessary and yet-unaccounted for costs, this rule adds more work on providers at a time when their focus should be on restoring service to acceptable levels. Providers in the 911 ecosystem are already under significant burdens to report outages to the Commission (and in some cases, state regulatory bodies) during disruptions to communications of all stripes, including those affecting 911 special facilities.⁶⁰ Adding more regulatory obligations during outages makes no sense if the Commission's aim is to "promot[e] safety of life and property through the use of wire and radio communications," because safety is best promoted by eliminating outages to the 911 system as quickly as possible and reducing the impact of such outages on all concerned. Continuing to pile regulatory obligations on providers during outages impairs the ability of those providers to respond quickly to outages and, therefore, is counterproductive.

⁵⁹ See 47 U.S.C. § 3506(c)(2)(A)(i).

⁶⁰ See 47 C.F.R. § 4.5(e).

C. Legal Authority

In an effort to bolster its case for its proposed exercise of extraordinary jurisdiction over the entire 911 ecosystem, the Commission cites a wide array of laws.⁶¹ Yet, the Commission's case for legal authority to enact the proposed regulations, especially against non-common-carrier entities, is highly questionable. Instead of trying to bite off too much authority, the Commission—and indeed all the shareholders in the 911 ecosystem—would be better served if the Commission were to return to basics by promoting 911 reliability through the tried-and-true best practices method that has served the legacy 911 system so well.

The Commission's assertion that, by cobbling together the 911 Act,⁶² the NET 911 Act,⁶³ and the CVAA,⁶⁴ it can lay claim to sufficient legal authority to enact the proposed regulations is not credible. Each of these statutory provisions has a narrow focus and purports to authorize the Commission to adopt regulations in limited circumstances. These laws do not bestow sweeping authority to the Commission over the entire 911 ecosystem.

The 911 Act, for example, gives the Commission the authority to designate 911 as the universal emergency telephone number, which is consistent with the Commission's plenary and exclusive authority over the North American Numbering Plan, including abbreviated dialing patterns like 9-1-1. The 911 Act also directs the Commission to give all impacted by this nationwide numbering designation time to conform to it. Nothing in this act could be read as remotely authorizing the Commission to exercise the powers at issue in this Notice.

⁶¹ Notice ¶¶ 76-80.

⁶² 47 U.S.C § 251(e)(3).

⁶³ New and Emerging Technologies 911 Improvement Act of 2008 (NET 911 Act), PL 110–283, 122 Stat 2620 (2008).

⁶⁴ 47 U.S.C. § 615c(g).

The NET 911 Act gives the Commission authority to enact regulations, but these regulations are limited to implementing the aim of the act, which is to require IP-enabled voice service providers to offer 911 and E911 service to their subscribers; that is, the focus is on requiring IP-enabled originating voice service providers to offer the service and to facilitate their being able to offer the service.⁶⁵ The NET 911 Act simply does not authorize regulations of the sort proposed in the Notice.

And while the CVAA does authorize the Commission to enact regulations, that express authorization is limited to implementing the recommendations of the Emergency Access Advisory Committee (Advisory Committee) with respect to technologies and methods “by which to enable *access* to emergency services by individuals with disabilities.”⁶⁶ Nothing in the Notice suggests that the proposed regulations are the product of the Advisory Committee’s recommendations to enable access to 911 by the disabled community, or that the proposed regulations are consistent with the types of recommendations contemplated by the act itself.⁶⁷ The aim of the act is to facilitate access by the disabled community to 911 services and prevent impediments to that access that impact the disabled community in particular. There would be no need for a special act if the impediments listed in it impacted everyone equally, as would be the case in an outage.

Without commenting on the validity of the Commission’s claims of authority under the traditional Title II provisions listed in the Notice—such as Sections 201(b), 214(d), 218, or 251(c)(5) (see discussion of Section 251(c)(5) above)—we note

⁶⁵ See Implementation of NET 911 Improvement Act of 2008, WC Docket No. 08-171, *Report and Order*, 23 FCC Rcd 15884 ¶ 1 (2008) (“[T]o effectuate the statutory requirement that providers of interconnected voice over Internet Protocol (interconnected VoIP) service *provide* 911 and enhanced 911 (E911) service in full compliance with our rules, Congress mandated that the Commission issue regulations in this time frame that, among other things, *ensure* that interconnected VoIP providers have access to any and all capabilities they need to satisfy that requirement.”) (emphasis added).

⁶⁶ 47 U.S.C. § 615c(c). Note: the Advisory Committee’s recommendations are supposed to be the product of a national survey. Nothing in the Notice suggests that the results of that national survey are the basis for the Commission’s proposed Part 12 regulations.

⁶⁷ See 47 U.S.C. § 615c(c)(1)-(8).

that, even if these provisions might arguably support a claim of authority to enact some of the proposed regulations for telecommunications common carriers, they would not form the statutory basis for imposing them on everyone else in the 911 ecosystem. This is particularly true of, but not limited to, the Commission's attempt to regulate the business of people providing technical support or maintenance for network components or customer premises equipment (CPE).⁶⁸ The Commission has not and cannot make a colorable claim that based on either the Act or the Commission's own prior rulings, the Commission has the authority to inject itself into the private contracts governing non-regulated professional services, including contracts for support and maintenance services of network components and CPE, and thereby require that one party to a professional services agreement to apply to the Commission to discontinue, reduce, or impair that party's service.

Nothing in the Notice suggests that prior sunny-day outages have been caused, in whole or in part, by parties to such support and maintenance contracts seeking to discontinue, reduce, or impair the services provided to PSAPs. Moreover, there is no evidence that, in the event that parties to such support or maintenance contracts were to seek to discontinue, reduce, or impair their service, PSAPs would be unable to find suitable substitute service providers. In brief, there is no evidence that the market for these services is not fully competitive.

In addition to the questionable grounds for the exercise of authority to enact these sweeping Part 12 Rules, the rules as proposed are arbitrary and capricious. For example, as part of its proposal, the Commission plans on exempting "PSAPs or governmental authorities to the extent that they provide 911, E911, or NG911 capabilities" from the obligations imposed on Covered 911 Service Providers.⁶⁹ The rationale for this exemption is not self-evident, especially as the risks to the overall

⁶⁸ See Proposed Rule 12.5(b)(1)(ii).

⁶⁹ Proposed Rule § 12.4(a)(4).

reliability of the 911 ecosystem would logically appear to be equally jeopardized by PSAPs and governmental authorities providing “any ... capability required for delivery of 911, E911, or NG911, or the functional equivalent of any of those capabilities.”⁷⁰ This exemption is arbitrary and capricious and, what’s more, the exemption would tend to rebut the necessity for the proposed Part 12 Rules as an admission that some providers are fully capable of operating without them.

CONCLUSION

No one doubts that, by proposing to expand the Part 12 Rules and extend federal control over the entire 911 ecosystem, the Commission hopes to improve the reliability of 911 networks. But the proposal in the Notice is wrongheaded. Instead of trying to do the impossible—i.e., regulate the 911 ecosystem to a zero-defect and outage-free state—the Commission should rely on the tried-and-true method of using NORs reports to help develop best practices in concert with industry. Most of the rules proposed in the Notice would not have prevented the sunny-day outages that caught the Commission’s attention. Instead, most of the rules will merely be costly make-work that will have to be paid for by PSAPs and end users and that will have the unintended consequence of leaving PSAPs with fewer choices among providers and driving up costs as existing providers leave the market and potential providers decide not to enter it. In short, the rules may in the long run leave the 911 ecosystem worse off, not better off.

⁷⁰ Proposed Rule § 12.4(a)(i).

AT&T respectfully requests that the Commission consider these comments in its deliberations on this matter.

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