Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
New Part 4 of the Commission's Rules	)	ET Docket No. 04-35
Concerning Disruptions to Communications	)	

PETITION FOR RECONSIDERATION OF THE UNITED STATES TELECOM ASSOCIATION

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PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.429, the United States Telecom Association (USTA)[1] respectfully requests that the Commission reconsider its August 19 decision[2] to require wireline carriers to report as outages those events in which a DS3 that is part of a protection scheme switches to protect mode and eliminate that requirement.[3] The new obligation imposes heavy burdens on carriers without any countervailing consumer benefit, was adopted without proper notice, as required by the Administrative Procedure Act, and is contradicted by the Commission's own rules. For those reasons, USTA files this Petition for Reconsideration and requests that the Commission grant USTA's previously filed Petition for Partial Stay,[4] pending reconsideration.

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[1] USTA is the nation's oldest trade organization for the local exchange carrier industry. USTA's carrier members provide a full array of voice, data and video services over wireline and wireless networks.

[2] *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, ET Docket No. 04-35, FCC 04-188, 19 FCC Rcd 16830 (rel. Aug. 19, 2004) (Service Disruption Order).

[3] *See* Service Disruption Order, 19 FCC Rcd at 16898-16899, ¶134 (*stating*, "We therefore require that DS3s that switch to protect be counted in DS3 outage minutes until such time as the DS3s are restored to normal service, including protection.").

[4] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, USTA Petition For Partial Stay, ET Docket No. 04-35, filed Nov. 19, 2004. USTA

I. Introduction and Summary

The Commission's Service Disruption Order adopted a number of reporting obligations. Among the changes adopted, for the first time, the Commission will require carriers to report as service outages occasions when a DS3 that is part of a SONET ring switches to protect mode.

It should be understood that SONET rings are engineered for just such an eventuality. When a DS3 simplex event involving a SONET ring occurs, there is no outage; instead, within milliseconds of detecting a continuous stream of errors, the SONET electronic equipment switches over to alternate electronics or an alternate fiber facility, depending on the nature of the occurrence, and begins what is a called a DS3 simplex event. DS3 simplex events are transparent to customers and neither cause nor result in any service degradation.[5]

While there is no impact on customers from DS3 simplex events, the burden on carriers required to report such events for the first time is substantial and costly. USTA gathered sworn statements from a representative set of its members that describe the burdens in detail. Two types of burdens are imposed: first, some carriers will be forced to spend significant sums to modify their network management systems to meet the new

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attached six affidavits to its Petition for Partial Stay, which are incorporated here by reference: Affidavit of Archie McCain, BellSouth Telecommunications (BellSouth Affidavit); Declaration of Robin Howard, Verizon (Verizon Declaration); Affidavit of Ray Luke, SBC Communications (SBC Affidavit); Affidavit of James Roberts, ALLTEL Corporation (ALLTEL Affidavit); Affidavit of Cassandra Guinness, Frontier and Citizens ILECS (Frontier Affidavit); Affidavit of Dennis Kilburg, Iowa Telecommunications Services (Iowa Telecom Affidavit).

[5] *See* BellSouth Affidavit, ¶9.

requirements. For instance, USTA member Iowa Telecommunications Services, Inc. (Iowa Telecom) estimates that it will incur expenses of as much as $16 million to reconfigure its network to accommodate the new DS3 simplex event reporting requirement.[6] Another USTA member, Frontier and Citizens ILECs (Frontier) estimates that it will cost more than $16 million to reconfigure the Frontier network to comply with the new requirement.[7]

A second substantial cost burden is caused by the sheer volume of reporting that will be required of some companies. For instance, both BellSouth and Verizon expect that they will have to file 1,000 or more reports at an expense of well over $5 million each, annually.[8] SBC estimates that it will have to file approximately 3,500 DS3 simplex event reports per year.[9] ALLTEL believes that it will incur an expense of over $2 million to add new connectivity to its network to make it compliant with the new requirement and will generate approximately 200 new reports per year from only a portion of its network.[10]

Other carriers have made similar estimates. MCI, for instance, calculates that it will have to file approximately 5,000 to 8,000 new simplex reports annually,[11] Qwest

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[6] *See* Iowa Telecom Affidavit, ¶9.

[7] *See* Frontier Affidavit, ¶10.

[8] *See* BellSouth Affidavit, ¶13 and Verizon Declaration, ¶5.

[9] *See* SBC Affidavit, ¶11.

[10] *See* ALLTEL Affidavit, ¶¶7 and 8.

[11] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, MCI Comments in Support of the United States Telecom Association's

Communications (Qwest) estimates more than 2,000,[12] and Sprint "several hundreds if not thousands each month."[13] Cox Communications (Cox) estimates that it has to hire nine additional employees at an estimated additional annual cost of $658,350.[14]

These estimates are in stark contrast to the FCC's Final Regulatory Flexibility Analysis, which predicts that the sum of outage reports it will receive from all service providers (i.e., wireline, wireless, cable and satellite) as a result of all new reporting requirements specified in the Service Disruption Order will be "substantially less than 1,000" reports annually from "all reporting sources combined . . ." and concludes that "the only burden associated with the reporting requirements will be the time required to complete [the three stage] reports" with total annual costs for each carrier of only $41,600.[15] Just those companies described above will generate many thousands of reports for DS3 simplex reporting, and data gathered by USTA indicates that annual loaded labor rates alone will be in the many millions of dollars. Moreover, the FCC has

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Petition for Partial Stay, ET Docket No. 04-35, at 3, filed Nov. 26, 2004 (MCI Comments).

[12] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Qwest Corporation and Qwest Communications Corporation Petition for Partial Stay, ET Docket No. 04-35, at 4 and Declaration attached thereto, filed Dec. 13, 2004 (Qwest Stay Petition).

[13] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Sprint *Ex Parte* Letter, ET Docket No. 04-35, at 2, filed Nov. 8, 2004 (Sprint *Ex Parte* Letter).

[14] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, National Cable & Telecommunications Association *Ex Parte* Letter, ET Docket No. 04-35, filed Dec. 13, 2004 (NCTA *Ex Parte* Letter).

[15] Service Disruption Order, 19 FCC Rcd at 16944-16945, 16946-16947, Appendix D, ¶¶24 and 28.

completely ignored the upfront capital and human resource expenditures needed to update hardware and software and train staff in order to begin complying with the new rule.

USTA and its members were deprived of the opportunity to comment regarding the substantial burdens imposed by the new simplex reporting obligation because the Commission adopted it without proper notice as required by the Administrative Procedure Act. Nowhere in the NPRM did the Commission indicate that it was considering adoption of such a requirement.[16] If the Commission had provided proper notice, USTA and its members would have been able to develop a record regarding the burdens that the simplex reporting requirement imposes.

Compounding the procedural problems with the Service Disruption Order, it appears to be internally inconsistent. While paragraph 134 explicitly states that SONET ring switches to a protect-path mode must be reported, the Commission's rules define "outage" as "a significant degradation in the ability of an end user to establish and maintain a channel of communications. . . . ."[17] Because there is no degradation of service to any end user in a DS3 simplex event, the rules do not by their language actually cover simplex events, so that it is not at all clear that the Commission has taken appropriate or necessary steps to implement the reporting requirement embodied in paragraph 134.

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[16] *See generally New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Notice of Proposed Rulemaking, ET Docket No. 04-35, FCC 04-30, 19 FCC Rcd 3373 (rel. Feb. 23, 2004) (NPRM).

[17] Service Disruption Order, 19 FCC Rcd at 16923, Appendix B, §4.5(a).

II. Argument

A. The FCC's Order Will Impose Substantial and Costly Burdens Without Providing Any Countervailing Public Benefit.

Although not an outage as defined by the FCC, the switching of a DS3 in a SONET ring to protect mode would have to be reported under paragraph 134. This requirement will impose dramatic new burdens on carriers in at least two ways. First, some carriers will have to spend millions of dollars to reconfigure their network management systems to enable them to report as the Commission requires. Second, carriers will be forced to file literally thousands of new reports at a cost of many millions of dollars. In its Final Regulatory Flexibility Analysis, the FCC estimates that the total annual costs for each carrier would be only $41,600 to comply with all portions of the new reporting obligations, not just DS3 simplex reporting.[18] The FCC significantly underestimates the costs of compliance.

1. The DS3 Simplex Reporting Obligation Will Require Some Carriers To Reconfigure Their Network Management Systems at Great Expense.

Three companies that would be obligated by the new reporting requirement to retrofit their network management functions submitted statements explaining in detail the expenses they will incur to come into compliance and the time that it will take them to do so. Frontier and Citizens ILECs (Frontier) has more than 1,000 unmanned central offices and Frontier's alarms for DS3 simplex events generally are not transmitted beyond the

[18] *See* Service Disruption Order, 19 FCC Rcd at 16944-16945, Appendix D, ¶24.

office in which the electronics are located.[19] Due to the unmanned central offices and local alarming, Frontier does not know or record the exact moment when a DS3 simplex event begins. Currently, each office is checked on a regular basis and during this inspection, a technician would see the alarm and make necessary adjustments. Frontier estimates that it would cost more than $16 million to reconfigure its network to make it possible for DS3 simplex events to send alarms to Frontier's network operations center (NOC).[20] This does not include the costs of hiring or training new employees to monitor the additional alarms that would be necessary. Absent network reconfiguration, which would take about a year to accomplish, Frontier would have to hire thousands of new employees to monitor DS3 simplex alarms in each central office on a 24 hour basis.[21]

Iowa Telecom would need to purchase and deploy an element management system on some of its transport systems to monitor and report network elements and equipment failures. It also would have to redesign and upgrade fiber terminals that are not supported by a new element management system so that data could be collected and reported in an efficient manner. Iowa Telecom estimates that it will incur expenses as high as $16 million to reconfigure its network to accommodate the new requirements.[22] Iowa Telecom has limited resources to make these transport and switching improvements in the next few years and, even under the most favorable circumstances, it would take the company three to five years to comply with the DS3 simplex event reporting

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[19] *See* Frontier Affidavit, ¶9.

[20] *See id*., ¶10.

[21] *See id*., ¶12.

[22] *See* Iowa Telecom Affidavit, ¶¶ 8-12.

requirement.[23] In addition, the company would need to hire and train additional network reliability staff to comply with just the new DS3 simplex rule.[24]

Based upon detailed consideration of the new simplex reporting requirements, ALLTEL has determined that in order for it to be compliant, ALLTEL will require new and additional connectivity throughout its network to determine when a redundant path has been activated and to recognize this in real time at the NOC. ALLTEL estimates that this alone will take approximately one year and cost over $2 million. Additional costs include various software and hardware upgrades, licensing fees and NOC modifications, as well as additional analysts dedicated to FCC reporting.

2. DS3 Simplex Reporting Will Drastically Increase the Number of Reports Filed Annually By All Wireline Carriers.

In its Final Regulatory Flexibility Analysis, the FCC estimates that the sum of all new reporting obligations, for all service providers, "will be substantially less than 1,000 annually."[25] The FCC significantly underestimates the total number of reports that will be generated as a result of the DS3 simplex reporting obligation alone. Described below are the experiences and expectations of eight companies, six of which each anticipate reporting 1,000 or more (in some cases, many thousands) simplex events themselves every year.

For instance, BellSouth currently files about 20 outage reports each year. It estimates that, as a result of the new rules, this number would rise to at least 150 reports

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[23] *See id*.

[24] *See id.*, ¶11.

[25] Service Disruption Order, 19 FCC Rcd at 16946-16947, Appendix D, ¶28.

without the inclusion of DS3 simplex events. Based on an analysis of six months of historical data, BellSouth estimates that the number of DS3 simplex events that would have to be reported under the FCC's new reporting rules would be approximately 1,011 per year.[26] Of these, only 0.3% to 0.4% would escalate to true customer-affecting outages. BellSouth expects that the average DS3 simplex event would require 72 hours of labor to process.[27] Multiplying this figure by the 1,011 projected annual events yields 72,792 hours, or approximately 36 man-years, of labor,[28] which would result in additional annual estimated costs to BellSouth of $5.82 million[29] to treat DS3 simplex events as reportable disruptions.

When a DS3 simplex event occurs, BellSouth schedules a repair in an expeditious manner. Because service is not interrupted or degraded during a DS3 simplex event, restoration activities typically are scheduled to take place during the next available maintenance window along with other critical activities that place service at risk. BellSouth's maintenance windows typically are late at night or early in the morning each day of the week, including weekends. BellSouth schedules restoration activities for simplex events involving electronics during normal maintenance periods because these activities pose a greater risk to service than the possibility that the DS3 simplex event could escalate to an "outage" caused by a second failure. By comparison, BellSouth promptly schedules restoration activities for facility damage (typically caused by

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[26] *See* BellSouth Affidavit, ¶12.

[27] *See id*., ¶13.

[28] *See id*.

[29] *See id*.

construction and farming activities involving digging equipment) that results in DS3 simplex events on a priority basis instead of during a normal maintenance window.

BellSouth handles true "outage events" in its network – those that affect customer service – on an emergency basis. It has established a rigorous set of processes to first restore service, then analyze the root cause of the outage, and finally to take steps to prevent future recurrence of the outage anywhere in its network. The amount of effort that is devoted to an outage is proportional to the seriousness of the event, and FCC reportable outages are among those events that receive a maximum effort, with a significant amount of labor and urgency devoted to each outage.

Like BellSouth, Verizon filed only a small number of reports in 2003, but would see that number rise dramatically under the new simplex reporting regime. In 2003, Verizon filed a total of 19 final outage reports pursuant to 47 C.F.R. § 63.100.[30] Verizon estimates that with the addition of the DS3 simplex reporting requirement, it would have to file 1,000 additional outage reports, thus increasing the number of annual reports Verizon files by 5000% and 7000%.[31] Verizon estimates that compliance with the new DS3 simplex reporting requirement would cost approximately $5.5 million annually.[32] Much of this cost would be due to the sheer volume of reportable events, which would require additional man-hours for monitoring, performing root-cause analysis, and filing reports. Among other things, the new requirement to report DS3 simplex events would force

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[30] *See* Verizon Declaration, ¶3.

[31] *See id*.

[32] *See id*., ¶5.

Verizon to direct personnel to manually search for and count the number of DS3s on a particular network to determine the number of DS3 minutes required for the Commission's formula of reportable events.[33]

As with other carriers, Verizon has a corporate policy that follows NRIC Best Practice 6-5-0693 and 6-5-0697 which addresses performing work on in-service equipment or high-risk operations during low traffic periods. Therefore, unless the failure risk of a simplex event is so significant as to warrant immediate restoration, restoration of a DS3 simplex event to a two-path operation is routinely deferred until a time of day when traffic is low.[34] Therefore, as Verizon notes in its declaration, the company must choose between following an established NRIC Best Practice that recommends restoring duplex ability at a time with less customer traffic or restore it more quickly, at the risk of causing greater customer disruptions, in order to reduce FCC reportable events.

Because of the high concentration of SONET rings in its network, SBC Communications Inc. (SBC), would have an even larger increase in reports than BellSouth or Verizon. SBC estimates that it currently files an average of 33 outage reports per year and that it would have to file approximately 3,500 DS3 simplex events reports per year under the new requirements.[35] SBC projected DS3 simplex data by manually gathering data from August 2004 and extrapolating it to a yearly estimate.

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[33] *See id*.

[34] *See id*., ¶6

[35] *See id*. *See also* SBC Affidavit, ¶11.

SBC currently captures all DS3 events via multiple network monitoring systems. SBC personnel immediately respond to the trouble condition and determine what corrective action is needed. Since the circuit is designed to minimize the impact to the customer's service when a simplex situation occurs, corrective action is usually deferred to a low traffic, off-hours maintenance window. As noted here, and by other carriers in this filing, carriers have instituted procedures for performing repairs during maintenance windows based upon best practices developed by the FCC's own Network Reliability and Interoperability Council (NRIC). For example NRIC Best Practice 6-6-8087, recommends that service providers and network operators should restrict network access "to specific time periods (such as time of day, maintenance windows, outside critical times) for high risk users (vendors, contractors, etc.) for critical assets (e.g., systems that cannot be accessed outside of specified maintenance windows due to the impact on the business)." The DS3 simplex reporting requirement will have the perverse effect of encouraging companies to perform repairs during peak times, in order to reduce reporting burdens, thereby increasing the likelihood of a true customer affecting event.

It is important to note that delaying corrective action allows time to effectively analyze the trouble condition, develop a corrective action plan, gather resources, and minimize customer impact. All of this occurs without impacting the customer's service; and because traffic is being routed over the protect path, the customer is not even aware the circuit has gone into simplex mode. The risk of creating a service-affecting condition is greatest during the corrective action. Repairing non-service affecting DS3s during a maintenance window minimizes the potential of causing service-impacting outages. Determining the best time to resolve a DS3 simplex event depends on a combination of

many factors, such as the customer's usage pattern, the availability of established maintenance windows, and the proximity of the event to weekends and holidays. The additional resources and expense associated with treating DS3 simplex events as outages would cause an undue burden on SBC resources and have the potential effect of increasing the likelihood of an actual customer service disruption. The additional reporting requirements associated with the DS3 events also will stress SBC's network monitoring systems, adding manual steps and activities to otherwise mechanized systems.

Like the RBOCs, ALLTEL will face at least a 50-fold increase in reports, based solely on the need to report DS3 simplex events. ALLTEL utilizes DS3 and SONET Rings within the ALLTEL Inter-exchange Network (AXN) for data, toll and long distance transport, and additionally for local transport rings and facilities. To estimate the number of additional reports created by the obligation to file when a portion of the network goes into protect mode, ALLTEL extrapolated nine months of data out to one year.[36] Furthermore, this estimate is based solely on the AXN infrastructure that has intelligent connectivity to the central NOC. While the remaining loops are alarmed, they are without detailed alarm intelligence and therefore no historical information on simplex events is available. To establish a baseline for comparison, last year ALLTEL Wireline filed a total of 4 FCC Outage reports. Based on the AXN network data, ALLTEL believes that 200 additional reports would have been generated during the year as a result of the simplex reporting requirement alone. Of these events, only 10 would result in

[36] *See* ALLTEL Affidavit, ¶7.

actual outages that would have affected customers and even then most would not have met FCC outage parameters. ALLTEL is unable at this time to estimate how many more reports would be generated company-wide by the simplex requirement if it had been able to capture past data from the remainder of the local network, but believes it to be proportionately as high as the AXN simplex count.[37]

Several other carriers have reported similar expectations of dramatic and burdensome expected increases in reports under the new requirements. Qwest, which supports USTA's Petition for Partial Stay,[38] indicates that its local operating company expects to report at least 804 DS3 simplex events and its long distance affiliate expects to report 1,606 DS3 simplex events.[39] This means that Qwest would file reports for well over 2,000 DS3 simplex events.

Sprint has echoed similar concerns to the FCC on DS3 simplex reporting. Sprint estimates that DS3 simplex events "could number in the several hundreds if not thousands each month."[40] Sprint notes, "[o]nce communications are switched to the protect path, Sprint is instructed by its customers whose traffic is affected to wait until a pre-designated "maintenance window" to move the traffic back to the primary path. Such maintenance usually occurs sometime after midnight when traffic flows are minimal. As

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[37] *See id*.

[38] *See New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Comments of Qwest Communications International Inc. Regarding USTA Petition for Partial Stay, ET Docket No. 04-35, at 1, filed Nov. 24, 2004 (Qwest Comments).

[39] *See* Qwest Stay Petition and Declaration attached thereto at 2.

[40] Sprint *Ex Parte* Letter at 2.

a result, even if what caused Sprint to switch traffic from the primary path to the protect path is remedied in a few minutes, Sprint would not be able to return the traffic to the primary path for several hours. And this in turn could trigger an "outage report" regardless of the fact that no outage had occurred and the end user's ability to establish a "channel of communications" was unaffected."[41]

MCI also supports USTA's Petition for Partial Stay and provides the FCC with additional evidence demonstrating that the FCC has grossly underestimated the number of reports that will be filed annually. MCI estimates that "the number of new [DS3 simplex] reports it will be required to file as a result of [the DS3 simplex] requirement will exceed 5,000 and could be as high as 8,000, with an annual cost approaching one million dollars."[42]

Cox has also expressed concern "regarding the rule requirement to report the failure of DS3 circuits, regardless of customer impact."[43] Cox estimates that "it would be forced to hire nine additional employees simply to comply with the new reporting requirements. This is equivalent to four percent of Cox's corporate engineering personnel and would result in an estimated additional annual cost of $658,350."[44] Cox also notes that in its experience on outage reporting, the Commission's "estimate of an average five hours per outage event significantly understates the amount of time

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[41] *Id.*

[42] MCI Comments at 3.

[43] NCTA *Ex Parte* Letter at 1-2.

[44] *Id* at 2.

generally required" to complete the reporting process.[45] As with the other carriers noted above, Cox's "current practice is to generally wait for the low traffic maintenance window part of the day to repair non-service affecting DS3s. This practice was adopted in order to reduce the possibility of a customer impacting outage occurring due to potentially risky maintenance actions."[46]

Qwest and Sprint both have requested that the FCC reconsider on its own motion the DS3 simplex requirement.[47] In addition, Qwest and MCI have filed comments supporting USTA's petition for partial stay.[48] More recently, Qwest has asked the FCC to stay the DS3 portion of the rule.[49] Clearly this is an issue of utmost importance to the broadest range of wireline carriers.

B. The Commission Did Not Provide Proper Notice Of The DS3 Simplex Reporting Requirement.

The Commission's decision in paragraph 134 of the Order requiring reporting of DS3 simplex events violates the Administrative Procedure Act (APA). The APA allows the Commission to promulgate new rules or changes to existing rules only after proper notice and opportunity for comment. *See* 5 U.S.C. § 553(b). The APA's notice requirement "does not simply erect arbitrary hoops through which federal agencies must

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[45] *Id.*

[46] *Id.*

[47] *See* Qwest *Ex Parte* Letter at 8; *see also* Sprint *Ex Parte* Letter at 1.

[48] *See generally* Qwest Comments and MCI Comments.

[49] *See* Qwest Stay Petition.

jump without reason."[50] The APA's "notice requirement 'improves the quality of agency rulemaking' by exposing regulations 'to diverse public comment,' ensures 'fairness to affected parties,' and provides a well-developed record..."[51]

The Commission seems to have adopted the DS3 simplex reporting requirement in passing. Nowhere in the NPRM is there any indication that the Commission was considering adoption of such an obligation. While the NPRM put parties on notice of the proposed 1,350-minute threshold for DS3 outages and the Commission's intent to count only working DS3s, neither the text of the NPRM nor the Proposed Rules in its Appendix A refer to any proposal to establish a reporting requirement for DS3 simplex events.[52]

The Commission's "utter failure to comply with notice and comment cannot be considered harmless if there is any uncertainty at all as to the effect of the failure."[53] The Commission's lack of notice prevented USTA and other interested parties from developing a record on the burdens that would follow from requiring reporting of DS3 simplex events. In *Sprint v. FCC*, as in this proceeding, "the Commission provided inadequate notice that it was considering a change in reporting requirements, which . . . are more burdensome than the initial rule."[54] The D.C. Circuit held that without notice

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[50] *Sprint v. FCC*, 315 F.3d 369, 373 (D.C. Cir. 2003) (*Sprint*).

[51] *See id*. (*citing Small Refiner Lead Phase-Down Task Force v. United States EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983)).

[52] *See* NPRM, 19 FCC Rcd at 3396-3397, ¶¶47-48; *see also* NPRM, 19 FCC Rcd at 3409, Appendix A (Proposed Rule 47 C.F.R. §4.9.(f)).

[53] *See Sprint*, 315 F.3d at 375 (*citing Sugar Cane Growers Cooperative v. Veneman*, 289 F.3d 89 (D.C. Cir. 2002) (*Sugar Cane Growers*)).

[54] *Sprint,* 315 F.3d at 375.

petitioners were not afforded the opportunity to present their evidence, in clear violation of the APA.[55]

The Commission cannot simply set forth a conclusory statement of the basis and purpose of a rule without having first published a notice of the proposed rule and taking account of the major comments on the proposed rule because to do so would eviscerate the requirements of section 553 of the APA.[56] Had the Commission adhered to the APA and issued proper notice, such issues could have been addressed comprehensively. The "utter failure" of the Commission "to afford proper notice and comment was not harmless."[57] By proceeding without issuing proper notice, the Commission severely constrained USTA's and others' ability to propose solutions that would have enabled the Commission to proceed in a balanced, less burdensome fashion. Furthermore, as discussed below, compounding the failure to afford adequate notice and comment, the Commission did not actually amend its outage rules to include DS3 simplex events.

In addition to the Commission's failure to comply with the APA regarding the reporting requirement for DS3 simplex events, the Commission similarly failed to comply with the Regulatory Flexibility Act[58] regarding how such a reporting requirement would impact small businesses and other small entities. Not only was there no notice in the NPRM that the Commission was considering adoption of a DS3 simplex reporting requirement, but there was also no request for comment on this matter in the Initial

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[55] *See id*.

[56] *See Sugar Cane Growers*, 289 F.3d at 96-97.

[57] *Id.*

[58] *See* 5 U.S.C. §601 *et seq*.

Regulatory Flexibility Analysis (IRFA), which was incorporated in the NPRM. No small business or entity could have addressed the impact of a DS3 simplex reporting requirement on it in response to the IRFA without some knowledge that this was a reporting requirement under consideration by the Commission.

C. A DS3 Simplex Event Does Not Constitute an Outage Under the Commission's Own Definition.

By the FCC's own definition of an "outage," the switching to protect of a DS3 in a SONET ring is not an "outage." The FCC defines the term "outage" as "a significant degradation in the ability of an end user to establish and maintain a channel of communications as a result of failure or degradation in the performance of a communication provider's network."[59] When a DS3 is part of a protection scheme such as a SONET ring, it will switch to a protect path within a fraction of a second when there is a failure in the primary path. Although the Commission correctly recognized that in such an event, "the communication services being provided over the DS3 will not be immediately affected," it nonetheless ordered that DS3s that switch to protect be counted in DS3 outage minutes until the DS3s are restored to normal service.[60]

The Commission analogizes this situation to a twin-engine airplane losing power in one engine, arguing that if one engine fails the plane continues to fly but in an impaired state.[61] This is not an apt analogy because, unlike the twin engines of an airplane, the two paths of a SONET ring are not designed to carry the same traffic

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[59] Service Disruption Order, 19 FCC Rcd at 16923, Appendix B, §4.5(a).

[60] Service Disruption Order, 19 FCC Rcd at 16898-16899, ¶134.

[61] *See id*.

simultaneously but to re-route traffic. A SONET ring's protection scheme is engineered to minimize the impact on customer service. The design of the circuit is synchronous, and, therefore, customers experience no impact on service when a circuit switches to simplex mode. In other words, a DS3 simplex event is a non-customer-affecting event.

The requirement in paragraph 134 ignores the fact that there is no impact on the customer, no call failure, and no service degradation when a DS3 in a SONET ring switches to protect. When this occurs, the customer is still able to establish and receive communications without any deterioration or impairment of service.[62] In fact, the customer has no knowledge that the circuit has gone into simplex mode. DS3s that are part of a protection scheme such as a SONET ring are designed to switch to protect mode when one path of a SONET ring fails. This network configuration is deliberate and is intended to avoid a true "outage" in which a customer's service is affected. By using SONET rings and redundant facilities in networks, telecommunications service providers are able to minimize service-affecting outages. Thus, the switching of a DS3 in a SONET ring to protect mode is not an "outage" under the Commission's own definition.[63]

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[62] *See* International Engineering Consortium, on-line tutorial regarding SONET rings, http://www.iec.org/online/tutorials/sonet/index.html at 6 (*stating* "Multiple [add/drop multiplexers (ADMs)] can be put into a ring configuration for either bidirectional or unidirectional traffic. The main advantage of the ring topology is its survivability; if a fiber cable is cut, the ADMs have the intelligence to send the services affected via an alternate path through the ring without interruption.")

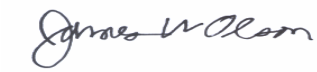
[63] *See* Service Disruption Order, 19 FCC Rcd at 16856, ¶48. Nor does the switching to protect of a DS3 in a SONET ring fall under the definition of "communications disruptions" found in 47 C.F.R. § 63.100(c) because it is not a customer-affecting event.

III. Conclusion

As demonstrated above, USTA members will suffer substantial economic harm if required to report DS3 simplex events with no countervailing public benefit being achieved. Therefore, the Commission should reconsider its decision to require wireline carriers to report as outages those events in which a DS3 that is part of a protection scheme switch to protect mode and eliminate that requirement.

Respectfully submitted,

United States Telecom Association



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