

Before the
Federal Communications Commission
Washington, D.C. 20554

DEC 22 11 20 AM '04

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

ORDER GRANTING PARTIAL STAY

Adopted: December 20, 2004

Released: December 22, 2004

By the Commission:

1. Before the Commission for consideration is the "Petition for Partial Stay" (hereinafter, "USTA Petition" or "Petition") filed on November 19, 2004 by the United States Telecom Association (USTA)¹ and Comments in Support of the Petition ("MCI Comments") filed on November 26, 2004 by MCI. The USTA requests a stay of the enforcement of the provisions of paragraph 134 of the *Report and Order* in this proceeding.² The *Report and Order* adopted revised mandatory outage-reporting requirements and extended those requirements to include cable, satellite, and wireless communications providers, as well as to wireline communications providers, which were previously subject to such requirements.³ The *Report and Order* also addressed major communications infrastructure failures and adopted a reporting requirement for any outage that lasts at least 30 minutes and affects 1,350 or more DS3 minutes.⁴ USTA objects to paragraph 134 of the *Report and Order*, which states:⁵

When a DS3 is part of a protection scheme such as a SONET ring, it will frequently switch to a protect-path within seconds of a failure in the primary path. The communication services being provided over the DS3 will not be

¹ The USTA is a trade organization representing local exchange carriers (LECs). USTA Petition at 1.

² *Id.* For the text of paragraph 134, see *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order*, FCC 04-188, released August 19, 2004 (hereinafter, "*Report and Order*"), at ¶ 134.

³ The *Report and Order* also moved the outage-reporting rule from section 63.100 to new Part 4 of our rules.

⁴ A DS3 is a unit of communications capacity that can be used to carry hundreds of different services. The services that are actually carried can vary from moment to moment. *Report and Order*, *supra* note 2, at ¶ 143. DS3 circuits have a data rate of approximately 44.7 megabits per second. *Id.* at ¶ 128 n.353. "DS3 minutes" are defined as the mathematical result of multiplying the duration of an outage, expressed in minutes, by the number of previously operating DS3 circuits that were affected by the outage, Section 4.7(d) of the Commission's Rules, to be codified at 47 C.F.R. § 4.7(d) (2005).

⁵ *Report and Order*, *supra* note 2, at ¶ 134.

immediately affected, *but they will no longer be protected*. Unfortunately, we have had a number of network outages reported where there are multiple failures on a SONET ring at different points in time, in one case five months after the initial failure.⁶ The second failure that occurs before the first failure is repaired causes the loss of all communications services being provided over the DS3. 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. . . . Protected communications services are not restored to normal until both the primary and protect DS3s operate properly. In this same regard, if protection DS3s should fail while the primary DS3s are still working, services would not be immediately affected but the failed DS3 minutes are still counted toward the reportable trigger due to the loss of protection.

2. The USTA refers to the switching of a DS3 that is part of a protection scheme, such as a Synchronous Optical Network (SONET) ring, as a "DS3 simplex event,"⁷ and argues that such events should not be considered to be communications disruptions or outages. It claims that the requirement to report DS3 simplex events that exceed the 30-minute/1350-DS3-minute criteria was adopted without adequate public notice and poses an inequitable burden on communications providers. USTA also contends that a DS3 simplex event is not an "outage," as that term is defined in the Commission's rules.⁸ It states, therefore, that it intends to file a petition for reconsideration of this requirement and requests a stay of the enforcement of this requirement pending the Commission's decision on reconsideration.

3. As the USTA states, to warrant the grant of a stay, a moving party ordinarily must satisfy a four-prong test that:⁹ (a) it is likely to prevail on the merits; (b) it likely would suffer irreparable harm absent a stay; (c) no harm would be caused to third parties if a stay were granted; and (d) grant of a stay would serve the public interest. For reasons explained below, we find that the USTA has failed to satisfy the first prong of this test and, therefore, we deny its Petition. Nevertheless, we believe that the public interest would be best served by developing a full record pertaining to the issue of "DS3 simplex events." We particularly wish to investigate the burden that could be imposed on communications providers if they are required to report on DS3 simplex events that are repaired within the maintenance window but exceed the 30-minute / 1350-DS3-minute criteria. We therefore, on our own motion, grant a partial stay of the enforcement of the provisions of paragraph 134 of the *Report and Order* to the extent that it applies to DS3 simplex events that are restored to full service within five days of their discovery

⁶ Under the *current* 63.100 reporting scheme the initial failure was not reported because there was no loss of voice service to end users (footnote in original).

⁷ We shall use this same terminology hereinafter in this Order.

⁸ USTA Petition at 2. An "outage" is defined in the Commission's rules 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 communications provider's network." *Report and Order*, Appendix B at § 4.5(a).

⁹ See *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958).

as reportable outages.¹⁰ The stay will remain in effect until our investigation is complete. In any event, however, DS3 simplex events that are not restored within five days of becoming reportable outages must be reported as DS3 outages.¹¹

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4. *Likelihood of Prevailing on the Merits.* USTA argues that the Commission did not provide proper notice of the DS3-simplex reporting requirement, that DS3 simplex events do not constitute "outages," and that it is likely to prevail on these arguments.¹² We disagree. The *Notice of Proposed Rulemaking* in this proceeding specifically stated, "Rather than collect information that is limited specifically to 'special services,' . . . we propose to directly address the underlying issue and collect information on the potential impact on all communications services of major infrastructure failures."¹³ The *Notice* further explained:¹⁴

[a]s a consequence, we propose to establish additional outage-reporting criteria that would apply to failures of communications infrastructure components having significant traffic-carrying capacity. . . . We believe that the threshold reporting criterion for such infrastructure outages should be based on the number of DS3 minutes affected by the outage. . . . Specifically, we propose to require the reporting of all outages of at least 30 minutes duration that potentially affect at least 1,350 DS3 minutes. We propose to count only working DS3s in this measure, by which we mean those *actually carrying some traffic of any type* at the time of a failure. . . .

It is indisputable that when a DS3 operates in simplex mode (*i.e.*, bearer path without a protect path), it is carrying traffic. It is also true that when a DS3 operates in duplex mode (*i.e.*, bearer path plus protect path), both circuit paths provide information simultaneously. The traffic on the protect path, however, is ignored until such time as the bearer path becomes disabled. The purpose of this design is to achieve greater assurance of the continuity of communications in the event that communications along one of the paths is disrupted. We thus also regard the protect path as a traffic-carrying path. Therefore, we conclude that paragraphs 46-47 of the *Notice* sufficiently notified the public that DS3 simplex events could become subject to the kind of outage-reporting requirements adopted by the *Report and Order*. This conclusion is reinforced by the actual wording of the proposed rule, which defines "DS3 minutes" as "the mathematical

¹⁰ We note in this regard SBC's statement that "[i]t would be an exceptional circumstance that would result in a DS3 simplex event ever lasting longer than five days" (USTA Petition, Affidavit of Ray M. Luke, SBC, at 4) and BellSouth's statement that "restoration activities for electronics are typically *scheduled* to take place *during the next maintenance window* along with other critical activities that place service at risk. BellSouth's maintenance windows are typically late at night or early in the morning each day of the week, including weekends" (USTA Petition, Affidavit of Archie McCain, BellSouth, at 4) (emphasis in original).

¹¹ Of course, simplex events that subsequently degenerate into failures of *both* the primary and the protect paths are independently reportable as outages subject to the 1,350 DS3-minute reporting trigger.

¹² USTA Petition at 5-9.

¹³ *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Notice of Proposed Rulemaking*, FCC 04-30, released February 23, 2004 ("*Notice*"), at ¶ 46.

¹⁴ *Notice* at ¶ 47 (emphasis added).

result of multiplying the duration of an outage, expressed in minutes, by the number of previously operating DS3 circuits that were affected by the outage.”¹⁵

Grant of Partial Stay *Sua Sponte*

5. Through affidavits and a declaration attached to the USTA Petition, BellSouth, Verizon, SBC, ALLTEL, Frontier and Citizens ILECs, and Iowa Telecom claim that the requirement to report DS3 simplex events as outages will impose substantial additional burdens and costs on communications providers with no corresponding benefit. BellSouth states that when a DS3 simplex event occurs:

a repair is scheduled in a judicious manner. . . . [R]estoration activities . . . are typically scheduled to take place *during the next maintenance window* along with other critical activities that place service at risk. BellSouth’s maintenance windows are typically late at night or early in the morning each day of the week, including weekends. Restoration activities for simplex events involving electronics are scheduled 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. In comparison, restoration activities for facility damage (typically caused by construction and farming activities involving digging equipment) that result in a DS3 simplex event are scheduled promptly on a priority basis instead of being scheduled during a normal maintenance window.

BellSouth essentially argues that, if all DS3 simplex events were treated as priority-basis outages, they would generate approximately 1,011 outage reports annually, even though true DS3 simplex “outages” occur only three to four times a year.¹⁷ As a result, BellSouth estimates that it would incur additional labor costs of 36 man-years, or \$5.82 million, for treating as reportable outages those DS3 simplex events that are repaired during its maintenance windows.¹⁸

6. Similarly, Verizon estimates that the requirement to report as outages all DS3 simplex events would result in its filing an additional 1,000 outage reports annually.¹⁹ Verizon stresses that, like BellSouth, it maintains a policy that unless the risk of failure of the simplex element is so significant as to warrant immediate restoration, restoration of a simplex DS3 event to a two-path (“duplex”) operation routinely is deferred until a time of day when traffic is low.²⁰ It asserts that this policy adheres to NRIC Best Practices.²¹ SBC states that it, too, usually defers corrective action for DS3 simplex events to low-traffic, maintenance windows.²² If all DS3 simplex events were treated as outages, SBC states it would need to implement new methods and

¹⁵ *Id.* Appendix A, § 4.7(d) (emphasis added). This definition was adopted without change. See Report and Order, *supra* note 2, Appendix B, § 4.7(d), to be codified at 47 C.F.R. § 4.7(d) (2005).

¹⁶ USTA Petition, Affidavit of Archie McCain, BellSouth, at 4 (emphasis in original).

¹⁷ *Id.* at 5.

¹⁸ *Id.* at 5-6.

¹⁹ USTA Petition, Declaration of Robin Howard, Verizon, at 2.

²⁰ *Id.* at 3.

²¹ *Id.* at 3-4.

²² USTA Petition, Affidavit of Ray M. Luke, SBC, at 3-4.

procedures, would be required to report approximately 3,500 DS3 simplex events annually, and would incur an additional 315,000 man-hours (over 150 employees) in labor costs.²³

7. ALLTEL states that the DS3 simplex event reporting requirement would require it to file at least 200 additional reports annually and that it would have to install at least \$2 million in electronic monitoring equipment throughout its network in order to comply with the requirement that a Notification be filed within two hours of the onset of the outage.²⁴ Frontier and Citizens ILECs state that, to comply with the two-hour reporting requirement, they would need to spend \$16 million for network reconfigurations and additional hardware and software, plus additional labor costs.²⁵ Iowa Telecom declares that it, too, would have to redesign its network to comply with DS3 simplex event reporting requirement, a project that it estimates would take three to five years and \$16 million to complete.²⁶ Finally, in its comments, MCI estimates that the requirement would result in its having to file between 5,000 and 8,000 outage reports annually, with an annual cost approaching one million dollars.²⁷

8. Although these cost and burden estimates have not been supported with sufficiently comprehensive showings, we do believe that a more complete record should be developed on this issue. As we understand the arguments, the cost and burden estimates are based almost exclusively on inclusion as outages of those DS3 simplex events that are routinely corrected within the communications providers' normal maintenance windows. No persuasive argument has been advanced as to why DS3 simplex events that extend beyond the maintenance window should not be counted as outages. In the worst case scenario, this window might last as long as five days.²⁸ We also take cognizance of, but reject, the contentions that substantial network reconfiguration will be needed to comply with the two-hour Notification requirement. The two-hour Notification requirement runs from the time that the communications provider reasonably becomes aware pursuant to normal business practices that a reportable outage has occurred. Communications providers are not required to reconfigure their networks or to add any monitoring equipment that might alert them more quickly to the onset of an outage although, in most cases, it would not be inappropriate for them to consider doing so.

9. As a consequence, we have decided to grant a partial stay of the provisions of paragraph 134 of the *Report and Order* insofar as it requires the reporting as outages of DS3 simplex events that are corrected within five days of their discovery. The stay shall continue in effect until our investigation of this matter is completed. DS3 simplex events that extend beyond this five-day window must be reported as outages.²⁹

²³ *Id.* at 5-6.

²⁴ USTA Petition, Affidavit of James J. Roberts, ALLTELL, at 2-3.

²⁵ USTA Petition, Affidavit of Cassandra K. Guinness, Frontier and Citizens ILECs, at 3.

²⁶ USTA Petition, Affidavit of Dennis R. Kilburg, Iowa Telecom, at 4.

²⁷ MCI Comments at 3.

²⁸ USTA Petition, Affidavit of Ray M. Luke, SBC, at 4.

²⁹ Of course, simplex events that subsequently degenerate into failures of *both* the primary and the protect paths are independently reportable as outages subject to the 1,350 DS3-minute reporting trigger.

Ordering Clauses

10. Accordingly, IT IS ORDERED that the "Petition for Partial Stay" filed on November 19, 2004 by the United States Telecom Association IS DENIED.

11. IT IS FURTHER ORDERED that the provisions of paragraph 134 of *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, ET Docket No. 04-35, *Report and Order*, FCC 04-30, released August 19, 2004, ARE STAYED to the extent set forth in paragraph 9, above, pending resolution of our investigation into the matters discussed hereinabove.

12. IT IS FURTHER ORDERED on our own motion for good cause found, pursuant to Section 553(d)(1),(3) of the Administrative Procedure Act, 5 U.S.C. Section 553(d)(1),(3), and Section 1.103(a) of the Commission's Rules, 47 C.F.R. Section 1.103(a), that the effective date of this Order and of the stay is the date upon which this Order is released by the Commission.³⁰

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁰This Order addresses Commission rules that are currently pending but are expected to become effective on January 3, 2004, hence the need for putting the Order into effect immediately.