

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

New Part 4 of the Commission's Rules
Concerning Disruptions to Communications

Comments—Public Safety and Homeland
Security Bureau Seeks Comment on Whether
the Commission's Rules Concerning
Disruptions to Communications Should Apply
to Broadband Internet Service Providers and
Interconnected Voice over Internet Protocol
Service Providers

ET Docket No. 04-35
WC Docket No. 05-271
GN Docket Nos. 09-47, 09-51, 09-137

COMMENTS OF AT&T INC.

AT&T Inc. and its affiliates (AT&T) respond to the Public Safety and Homeland Security Bureau's (Bureau) July 2, 2010, *Public Notice*¹ released in the above-docketed matter. In anticipation of the Commission's issuing a notice of proposed rulemaking, the Bureau is seeking comments on "whether, and if so how, the Commission should expand its Part 4 rules so that they also apply to interconnected VoIP [voice over IP] service providers and broadband ISPs [Internet service providers]."²

A. The Outage Reporting Rules Should Not Be Expanded

1. *The burdens of expanding the Commission's Part 4 rules outweigh their putative benefits.*

In its 2004 *Report and Order*, the Commission enlarged an existing network-outage reporting program applicable to wireline telecommunications carriers and placed the applicable regulations in Part 4 of the Commission's rules.³ In particular, the Commission expanded the

¹ *Public Notice*, DA 10-1245 (July 2, 2010) (*Public Notice*).

² *Id.*, p. 2.

³ *Report and Order*, 19 FCC Rcd at 16830 (2004) (*Report and Order*).

pool of providers submitting data on network disruptions,⁴ and simultaneously sought to simplify the criteria used to report outages and the mechanism for inputting that data into the Commission's Network Outage Reporting System (NORS) database.⁵

As required by the Regulatory Flexibility Act of 1980 (RFA),⁶ the Commission conducted an analysis of the potential impact of its new and amended network outage regulations on affected entities, including information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁷ The fundamental goals of the PRA include—

- Minimizing the paperwork burden resulting from the collection of information by or for the Federal Government;
- Ensuring the greatest possible public benefit from such information; and
- Improving the performance of agency missions by reducing the information collection burdens on the public.⁸

To accomplish these goals, the PRA, among other things, requires the agency to “certify . . . that each collection of information submitted to the Director [of the OMB] for review under section 3507. . . is necessary for the proper performance of the functions of the agency, including that the information *has practical utility*;”⁹ The PRA defines practical utility as “mean[ing] the ability of an agency to use information, particularly the capability to process such information in a timely and useful fashion.”¹⁰

The PRA also requires an agency to estimate, and seek comment upon, the impact its proposed reporting obligations will have on the entities that are required to report. In the case of

⁴ In addition to wireline providers, the Commission now requires cable TV, satellite, and wireless providers to file network outage reports. *Report and Order*, 19 FCC Rcd at 16833-34 para. 2.

⁵ Under the former Part 63 rules, reporting entities were required to report outages when at least 30,000 customers were affected for 30 minutes or more. Among other thresholds, the Commission adopted a new Common Matrix that triggered the reporting obligation for outages of at least 30 minutes in duration and involving 900,000 or more potential “user-minutes” affected per outage. *Report and Order*, 19 FCC Rcd at 16857-58 paras. 49-51.

⁶ See 5 U.S.C. § 601 *et seq.*

⁷ See 44 U.S.C. § 101 *et seq.*

⁸ 44 U.S.C. § 3501.

⁹ 44 U.S.C. § 3506 (c) (emphasis added).

¹⁰ 44 U.S.C. § 3502 (11).

the revised network disruption reporting requirements of 2004, the Commission opined that “that in the usual case, the only burden associated with the reporting requirements will be the time required to complete the Notification, and the Initial and Final Reports.”¹¹ The Commission estimated that the total time for a reporting entity to complete these reports “would be significantly less than 5 hours.”¹² And that the total number of annual reports would only climb from around 126 outage reports in 2003 to a number “substantially less than 1,000.”¹³ In short, the Commission projected only a minor increase in the paperwork burden on reporting entities.

Although the Commission claimed in 2004 that expanding its outage reporting requirements was intended to “ensur[e] the reliability and security of the Nation’s telecommunications networks and infrastructure, which also serves the public’s homeland security needs,”¹⁴ there is no evidence that the expanded requirements have played any meaningful role in furtherance of that goal.¹⁵ Indeed, other than a single, unsupported footnote claiming that the “Commission uses the outage information submitted pursuant to Part 4 of its rules to, *inter alia*, address communications system vulnerabilities and help prevent future disruptions,”¹⁶ the *Public Notice* offers no explanation of how the Commission has ever used

¹¹ *Report and Order*, 19 FCC Rcd at App. D, para. 28.

¹² *Id.*, at 16913 para. 168 (“(the Notification + the Initial Report + Final Report: 15 minutes + 45 minutes + 2 hours = 3 hours)”).

¹³ *Id.*

¹⁴ *Report and Order*, 19 FCC Rcd at Appendix D – Final Regulatory Flexibility Analysis (FRFA), ¶ 26.

¹⁵ In the *Public Notice*, the Bureau noted that “[t]he National Broadband Plan (NBP) recommended that the Commission initiate a proceeding to extend the Part 4 outage reporting rules to broadband Internet Service Providers (ISPs) and to interconnected VoIP service providers.” *Public Notice*, pp. 1-2. In support of this recommendation—to “expand [FCC] outage reporting requirements to broadband service providers”—the Commission refers to the testimony of Steven R. Chabinsky, Deputy Assistant Director, Cyber Division, Federal Bureau of Investigation (FBI). FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN: CONNECTING AMERICA, Recommendation 16.6 at 321, Endnote 31 (rel. Mar. 16, 2010). Interestingly, however, this testimony never refers to the Commission or its outage reporting rules. In fact, the thrust of the testimony is to highlight the success the FBI has had in combating cyber terrorism, espionage, and crime through a *voluntary* “government/private sector partnership” led by the FBI and consisting of participants from all levels of government, industry, and academia. Statement of Steven R. Chabinsky, Deputy Director, Cyber Division, FBI, to the Senate Judiciary Committee, Subcommittee on Terrorism and Homeland Security, p. 3 (Nov. 17, 2009).

¹⁶ *Public Notice* note 1.

outage information to “ensure the reliability of the Nation’s telecommunications networks and infrastructure.”¹⁷

In addition, despite Commission assurances that its expanded reporting requirements would be minimally burdensome, just the opposite has occurred. Besides actually “completing the reports,” AT&T has had to spend considerable time determining whether an event met the threshold criteria for reporting an outage, justifying or explaining that determination both inside the company and to the Commission, and defending its determination—as well as the timeliness of the reports—to the Commission.¹⁸ Just looking at the incident management team within AT&T’s Global Network Operation Center (GNOC), AT&T estimates that it spends on a minimum an estimated 12 hours per NORS reportable outage. This is easily more than double the Commission’s estimate that the paperwork burden “would be significantly less than 5 hours.”¹⁹ And this estimate does not include time spent by AT&T’s other employee teams and vendors or upper management in the same post-outage analysis.

Moreover, notwithstanding these filings, and all of the effort and expense they entail, AT&T’s network continues to perform at near 100% reliability. Given that level of performance, any *theoretical* improvements that the NORS reporting obligation might provide are simply not

¹⁷ As part of the Part 4 regulations, reporting entities must file a Notification within 120 minutes of discovering a reportable outage. 47 C.F.R. § 4.9. In the *Report and Order*, the Commission justified this notification because it would allegedly “serve to notify the Commission that a major event has occurred and would assist in determining whether an immediate response is required and whether patterns of outages are emerging that might warrant further coordination or other action.” *Report and Order*, 19 FCC Rcd at 16870 para. 73. The Commission asserted that this Notification would also alert the DHS (Department of Homeland Security) of a significant outage. Yet, AT&T, along with 51 other members of private industry, already works with the DHS through the Network Coordinating Center (NCC) on network outage events on an around-the-clock basis, 365 days a year, as well as providing so-called “all hazard” event coordination in the event of a catastrophic incident (e.g., hurricane, earthquake). In light of this pre-existing information sharing process with the NCC, it is hard to see what added benefits are derived from the additional burden of alerting the Commission through the network disruption reporting scheme.

¹⁸ Rather than producing any purported network reliability benefits, the reporting obligations have been the source of industry confusion and aggressive enforcement action by the Commission. In fact, since 2007, the Commission has collected \$1,940,000 from reporting entities for alleged infractions of these rules. *See, Verizon Consent Decree*, 22 FCC Rcd 13356 (2007); *T-Mobile Consent Decree*, 23 FCC Rcd 5092 (2008); *Windstream Consent Decree*, 24 FCC Rcd 5458 (2009); *Bluegrass Consent Decree*, 25 FCC Rcd 1301 (2010); and *Centennial Consent Decree*, 25 FCC Rcd 1309 (2010). This is an odd result for a new mandatory process that was intended “to streamline compliance with the reporting requirements through electronic filing with a ‘fill in the blank’ template and by simplifying the application of that rule.” *New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Notice of Proposed Rulemaking, 19 FCC Rcd 3373 para. 1 (2004).

¹⁹ *See* footnote 12 *supra*.

worth the cost imposed by the Commission. Further, there is no evidence that the NORs reporting obligations have provided any measurable improvement in any networks. Thus, for all of the burdens they impose, there is no real proof that the Commission's outage reporting requirements have produced any tangible improvement on the overall performance of AT&T's network or those of the other reporting entities.

Given the Commission's inability to demonstrate any specific "practical utility" from the existing reporting requirements, combined with the substantial burdens imposed by those requirements, the Commission will have a steep hill to climb in attempting to justify any expansion of those requirements under the PRA.²⁰ Moreover, as discussed below, there is no reason to extend those burdensome requirements to ISPs or VoIP providers because those entities already have particularly strong incentives to provide their customers with the most reliable services possible.

2. The Part 4 rules are unnecessary because ISPs and VoIP providers already have strong market-based incentives to implement best practices to ensure the reliability and security of their services.

The mandatory information collection requirements of the *Report and Order* are based largely on the belief that government compulsion is required in order for owners of competitive, inter-connected networks to employ "best practices" derived from experiences with network outages.²¹ This belief is both unsupported and incorrect. AT&T and many other providers already voluntarily participate in public-private partnerships to share information and to promulgate best practices—such as the Communications Security, Reliability, and Interoperability Council (CSRIC), which is the body created to provide recommendations to the Commission to ensure "optimal security and reliability of communications systems,"²² and the

²⁰ Office of Information and Regulatory Affairs – Office of Management and Budget: Information Collection Regarding Emergency Backup Power for Communications Assets as Set Forth in the Commission's Rules (47 CFR 12.2), Conclusion Date: 11/28/2008, *see* http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=200802-3060-019 (last checked August 2, 2010).

²¹ *Report and Order*, 19 FCC Rcd at 16851-52 para. 39.

²² *See* <http://www.fcc.gov/pshs/advisory/csrlic/>. Presumably the NORs reporting is used in the CSRIC annual review with the Commission. Because the Commission cannot share any comparative data with the industry

Network Coordinating Center (NCC), which is discussed in footnote 17 above. AT&T does so, in large part, because it is in our competitive self-interest to ensure we develop and implement procedures and practices that make our networks as reliable as they can realistically be.

In today's highly competitive communications marketplace, customers have many alternative providers from which to choose. Thus, the reliability of networks and services is an important competitive differentiator among different service providers, including ISPs and VoIP providers. Consequently, these providers are highly motivated to make sure that their networks are reliable and secure, because if they are not, these providers will lose customers to competitors. Thus, ISPs and VoIP providers are both highly incented and fully capable—working alone or in conjunction with their vendors and third-party contractors and in voluntary partnership with government—to analyze network outages, determine root causes, and institute best practices to maintain their networks.

The existing network disruption reporting obligations are the product of monopoly-era expectations about provider incentives to ensure the reliability of their networks. Such expectations are simply not valid in today's competitive environment. Considering modern marketplace realities—the complete absence of any market failure in this area and the obvious motivation of competing network providers to maintain reliable and secure networks—there is no principled reason to overlay outdated regulations on ISPs and VoIP providers by expanding the reach of Part 4 network disruption reporting rules.

B. In the Event the Commission Chooses to Expand the Part 4 Network Disruption Reporting Rules to ISPs and VoIP Providers, It Should Make Such Expanded Rules as Simple and Clear as Possible.

There is no basis for expanding the Part 4 network disruptions regulations to ISPs and VoIP providers. *First*, as discussed above, based on past experience with the Part 4 rules applicable to existing reporting entities, the purported benefits derived from those rules do not

members of CSRIC, the government's contribution is of little real value. Industry members rely on their own more in-depth analysis to generate useful information.

outweigh the considerable costs they impose. *Second*, there is no evidence of any market failure requiring regulatory intervention. That being said, if the Commission were to adopt such regulations, it ought to create simple, unambiguous, straight-forward rules that provide ISPs and VoIP providers with bright-line guidance as to their reporting obligations. The aim should be to alleviate the burdens of reporting on providers, as well as avoiding any unrealistic filing deadlines and any ambiguity in the rules and their application that could give rise to potential forfeiture penalties.

In an effort to reach this goal, there are at least four principles that the Bureau should keep in mind:

- a. Any proposed regulation should clearly define the entities obligated to file Part 4 reports;
- b. The proposed regulations should only require the reporting entity to report on outages directly impacting its own facilities—*i.e.*, facilities over which it can exercise any best-practice remedy;
- c. The threshold reporting criterion or criteria should be unambiguous and easy to apply; and
- d. Any proposed regulations should not impose unrealistic deadlines for filing reports.

1. Defining the Reporting Entities

The *Public Notice* identifies interconnected VoIP providers and broadband ISPs as the putative reporting entities of any future expansion of the Part 4 network disruption reporting rules. The Commission has codified the definition of “interconnected VoIP providers.”²³ There is no existing definition in the Commission’s rules for “broadband ISPs,” and the *Public Notice* does not suggest one. Before adopting any reporting obligations for such broadband ISPs, the Commission should—indeed, must—first propose, and seek comment on, a clear and specific definition of “broadband ISP.”

²³ 47 C.F.R. § 9.3.

2. Delimiting Impacted Facilities

The Commission has repeatedly made the point that the goal of the network disruption regulations is to ensure a reliable and secure telecommunications network by application of best practices. If these regulations are extended to include broadband ISPs and VoIP providers, then presumably the Commission has a similar goal in mind. It would, therefore, make no sense for broadband ISPs and VoIP providers to be required to report on facilities they do not control. In order to assess the root cause of an outage or to implement best practices regarding network reliability, the reporting entity needs to be in control of the facilities in question. Thus, any reporting obligations imposed on ISPs and VoIP providers must be no broader than the facilities over which those entities have control and the ability to effect best-practice remedies.

3. Defining Bright-line Standards

In the *Report and Order*, the Commission established a Common Matrix as a threshold for reporting network outages. The objective was to make reporting easier and simpler and more consistent; yet, in many respects, the Common Matrix introduced ambiguity with respect to certain outages.²⁴ Whatever threshold is applied to broadband ISPs and VoIP providers should be straight forward and clear. It should focus on service *outages* (i.e., the complete inability to use a service), not simply degradations in service, which are far too varied and subjective to support the simple bright-line reporting requirements needed here. Indeed, attempting to establish reporting thresholds around metrics like packet-loss, latency, or jitter, for example, would require inherently arbitrary judgments about how various levels of those metrics affect “quality” and would also likely require providers to implement burdensome new mechanisms for capturing such data in the first place. Anything other than simple and clear criteria for reporting network outages by broadband ISPs and VoIP providers would only serve to compound the ambiguities created by the Common Matrix.

²⁴ This is particularly true in the wireless arena with its dynamic network and its mobile subscribers.

4. *Developing Realistic Filing Deadlines*

Today's reporting scheme involves three escalating reports filed at three different points in time after the reporting entity determines that an outage meets the reporting threshold.²⁵ The first report is a notice that an outage has occurred and provides only bare-bones information. This notification has to be filed within 120 minutes of the reporting entity's determination of a reportable outage. The second report—the Initial Report—is filed within 72 hours of that determination; the third report—the Final Report—is filed within 30 days of that determination.

The Bureau should recognize that these deadlines may not be appropriate for broadband ISPs and VoIP providers, especially initially given that many such providers are not telecommunications carriers and will have had no experience with the Commission's existing reporting requirements. Instead, for the first twelve or twenty-four months that such requirements are in place, the Commission should not require *any* reporting until at least 48 hours after the outage has occurred. After these providers have gained sufficient experience with the reporting requirements, the Commission should re-evaluate whether a shorter reporting interval is warranted.

C. *The Bureau Has Not Identified Any Statutory Authority Under Which the Commission Could Require ISPs and VoIP Providers to Report Network Outages.*

In the *Public Notice*, the Bureau invited interested parties to comment on “whether the proposed collection and reporting information process would fall within specific grants of authority in Title II and/or Title III” of the Act and gave them the option of “incorporating their respective *Notice of Inquiry* pleadings in their filings in response.”²⁶ AT&T has chosen to incorporate its pleadings by reference.²⁷

²⁵ See 47 C.F.R. § 4.9.

²⁶ *Public Notice*, p. 4.

²⁷ Comments of AT&T Inc., *Cyber Security Certification Program*, PS Docket No. 10-93, Section III, C., “The Commission's Legal Authority to Establish the Proposed Voluntary Certification Program is Unclear,” pp. 23-25, July 12, 2010 (*AT&T Cyber Security Comments*).

Succinctly stated, the Bureau has not yet articulated a clear grant of authority upon which to base its proposal to require ISPs and VoIP providers to collect information on network outages on par with the present Part 4 regulations applicable to common carriers. In the *Public Notice*, the Bureau alludes to Title II and Title III of the Act; however, it does not explain how these titles confer specific authority on the Commission to undertake this program or, if necessary, how any alleged specific authority might provide the basis for a claim of ancillary authority, given that ISPs are information service providers and the Commission has never addressed the regulatory classification of VoIP providers. It is well-established that the Commission may only exercise the authority it has been granted by Congress under the Act.²⁸ This would be equally true if the outage reporting program were wholly voluntary.²⁹ Thus, before proceeding further, the Bureau should first clearly articulate the statutory grant of authority for its proposal to extend the obligations of Part 4 to ISPs and VoIP providers.

CONCLUSION

For all of the forgoing reasons, the Bureau's proposal to extend the Part 4 reporting obligations to ISPs and VoIP providers is both premature and unnecessary.

Respectfully submitted,

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²⁸ See n. 43 to *AT&T Cyber Security Comments*.

²⁹ See *AT&T Cyber Security Comments*, p. 24 (“Absent a statute conferring authority to enact the certification program, the Commission does not have authority to do so, whether it is voluntary or mandatory.”).