

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

In the Matter of)
)
The Proposed Extension of Part 4 of the) PS Docket No. 11-82
Commission's Rules Regarding Outage)
Reporting to Interconnected Voice Over Internet)
Protocol Service Providers and Broadband)
Internet Service Providers)
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COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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I. INTRODUCTION AND SUMMARY

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits the following comments in response to the Commission’s Notice of Proposed Rulemaking (“*NPRM*”) in the above-captioned proceeding.² CTIA cautions the Commission against adopting the proposed rules in the *NPRM*. Expanding the existing network outage reporting regime to wireless interconnected VoIP and broadband ISPs raises significant – and complicated – issues as to whether and, if so, how such rules should be applied to these services.³

¹ CTIA is the international association of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

² *The Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Notice of Proposed Rulemaking, PS Docket No. 11-82 (2011) (“*NPRM*”).

³ Consistent with the *NPRM*, the terms “outage” and “disruption” are treated as synonymous and used interchangeably.

First, it is not clear that broadband network outage reporting is even necessary. Broadband networks are designed to withstand failures and minimize the effect of network disruptions on end users. Moreover, the increasingly competitive marketplace in which all providers operate offers additional incentive to providers to track network outages, determine causes, quickly address problems, and develop solutions to maintain their networks on their own.

Second, the Commission's current Part 4 rules⁴ do not contemplate the unique characteristics of IP-based networks. A variety of factors must be explored before simply expanding the existing regulatory scheme to wireless VoIP providers and broadband ISPs. CTIA recommends instead that the Commission work closely with the Network Reliability Steering Committee ("NRSC") on a voluntary trial to develop best practices for reporting VoIP and broadband ISP disruptions.

Third, the majority of the proposed metrics in the *NPRM* measure quality of service, rather than loss of service. As such, the Commission contemplates unfairly imposing a higher standard on wireless VoIP providers and broadband ISPs, increasing costs for both providers and end users, and encouraging over-reporting of information that likely will only hinder the development of best practices.

Finally, it is not clear that the Commission has authority to implement the proposed rules in the *NPRM*. Even if it did, the imposition of burdensome regulations that provide no concomitant benefits contradict the recently stated goals of the Obama Administration and the Commission to streamline agency regulations and reduce burdens on American businesses.

⁴ 47 C.F.R. Part 4.

II. MANDATORY REPORTING REQUIREMENTS SHOULD NOT BE IMPOSED ON NEW BROADBAND WIRELESS TECHNOLOGIES

The Commission should not simply shoehorn wireless VoIP and broadband Internet service providers into existing outage reporting rules. The Part 4 requirements proposed in the *NPRM* were created under a vastly different regulatory regime and are tailored to legacy circuit-switched, not IP-based technologies.⁵ These rules conflict with the Commission's current emphasis on light-handed regulation and with the unique nature of next generation wireless technologies,⁶ and fail to acknowledge the fundamentally different technical and competitive environment within which wireless broadband service providers operate.

A. Packet-Switching Technology Used in Next Generation Wireless Services is Not Conducive to Outage Reporting as Proposed by the Commission

The Commission's rigid Part 4 network outage reporting rules are premised on a service provider's deployment of legacy circuit-switched telephony networks and do not provide an appropriate framework for an IP environment. Unlike traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, next generation

⁵ The Commission's current rules regarding reporting of disruptions to communications services are limited to voice and paging communications over wireline, wireless, cable, and satellite services. See 47 C.F.R. §§ 4.1-4.13. In 1992, the Commission established network outage requirements for wireline providers. *Notification by Common Carriers of Service Disruptions*, Report and Order, 7 FCC Rcd 2010 (1992). In 2004, the Commission extended these reporting requirements to providers of wireless and satellite communications. *New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, Report and Order, 19 FCC Rcd 16830 (2004).

⁶ The Bureau has previously acknowledged the technical differences between broadband communications and traditional communications. See *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*, Public Notice, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 3 (July 2, 2010) ("We are aware that networks providing high-speed Internet access experience different failure modes than traditional TDM-based communications networks.") ("*Notice*"). Moreover, in the wireless context, most current networks based on CDMA, GSM, and iDEN air interfaces are circuit-switched in nature. In contrast, next generation wireless standards, such as WiMAX and LTE, are based on packet-switching.

wireless standards rely on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Packet-switching does not rely on a specific path for data transfer, but utilizes many paths across a network. As such, disruptions along one or more parts of the communications path do not interrupt data flow, and packets are still delivered successfully.

The unique nature of Internet traffic and the manner in which broadband networks are deployed to handle such traffic means that facility disruptions will have limited, if any, impact on an end user. While the public switched telephone network (“PSTN”) is largely a point-to-point network that is susceptible to outages and congestion, wireless broadband networks allow service providers to maintain control and dynamically react to congestion or outages, allowing their networks to be self-healing. Broadband networks are designed to reroute traffic in the event that portions of the network become inoperable. For example, “smart” devices can and do automatically default to local WiFi nodes where available, even if there is no outage. So, unlike circuit switched networks, there are a number of alternate paths available to the typical wireless broadband user. As a result, an outage of a facility for broadband Internet access may in fact have no effect on the ability of the network to continue to send and receive traffic – meaning no impact on the end user.

At the same time, because Internet traffic is not dependent on a single transmission path, service providers cannot calculate or determine service outages in the same manner as circuit-switched networking, where a simple break in the connection can indicate that an outage has occurred. Indeed, for circuit switched networks, outage and quality of service reports are simply measured at the switch, which represents the central point of concentration for all traffic. For IP networks, there is no similar central point of concentration – everything happens on the edge.

Moreover, events occurring far from the edge can impact an end user's experience and connectivity. It would make little sense, therefore, for the Commission to impose the proposed, inflexible rules on wireless VoIP and broadband service providers.

B. Mandatory Reporting Requirements are Inconsistent with the Goals of the Obama Administration and Unnecessary Given the Competitive Nature of the Industry

Mandatory outage reporting requirements on wireless VoIP and Internet service providers would impose significant, unnecessary, and wasteful burdens on the broadband industry, in a manner inconsistent with the stated goals of the Obama Administration. Indeed, the President specifically recognized the need for independent agencies, including the Commission, to “reduce regulations that place unnecessary burdens on American businesses and the American people” and calls on executive agencies to “reassess and streamline regulations.”⁷ The first logical step in the process must be to ensure that no new unnecessary regulations are adopted. For rules going forward, the President requested that agencies consider the cost-saving, burden-reducing principles outlined in the recent Executive Order.⁸ Moreover, the Commission has made its

⁷ Presidential Memorandum: Regulation and Independent Regulatory Agencies (July 11, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/07/11/memorandum-regulation-and-independent-regulatory-agencies> (“Presidential Memorandum”).

⁸ Presidential Memorandum at 1. Specifically, the Executive Order mandates that agencies must, among other things: (1) propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs (recognizing that some benefits and costs are difficult to quantify); (2) tailor its regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations; (3) select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity); (4) to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt; and (5) identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public. See Executive Order, Improving Regulation and Regulatory Review (January 18, 2011), available at <http://www.whitehouse.gov/the-press->

support for the President’s Executive Order clear, identifying regulatory reform as a “top priority.”⁹ Chairman Genachowski, in fact, directed Commission staff “to follow the spirit of the Order” shortly after it was signed by the President.¹⁰

To apply expanded Part 4 outage reporting rules, created under a different regulatory regime for different network architectures, to new broadband wireless technology that already has every incentive to perform in a way that benefits consumers runs counter to the significant efforts of the Obama Administration and the Commission to encourage economic growth, innovation, competitiveness, and job creation.

Moreover, today’s highly competitive communications marketplace leaves little need for additional layers of government regulation. Customers today have a myriad of broadband Internet options and are free to choose between numerous service providers.¹¹ Quality of services and reliability of networks have become important competitive differentiators between providers of Internet services. Simply put, there is no incentive that the Commission could provide that would be greater than a service provider’s existing incentive to maintain consumer confidence in its networks.

office/2011/01/18/improving-regulation-and-regulatory-review-executive-order (“Executive Order”).

⁹ Julius Genachowski, Chairman, Federal Communications Commission, “Statement From FCC Chairman Julius Genachowski on the Executive Order on Regulatory Reform and Independent Agencies,” (July 11, 2011), *available at* http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0711/DOC-308340A1.pdf (“Genachowski Statement”).

¹⁰ *Id.*

¹¹ As noted by MetroPCS in response to the Commission’s *Notice*, consumers have a choice between six different types of broadband access in some cases: (1) connections through traditional telecommunications companies; (2) cable broadband; (3) satellite broadband; (4) wireless broadband; (5) broadband over power lines; and (6) Wireless ISPs. Comments of MetroPCS Communications, Inc., ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 4 (Aug. 2, 2010) (“MetroPCS Comments”).

C. Instead of Proscribing Mandatory Reporting Requirements for Broadband Wireless, CTIA Reiterates that the Commission Should Rely Upon Industry-Based Standards and Efforts to Develop Such Requirements

CTIA reiterates its prior recommendation that the Commission engage in meaningful efforts to work with the NRSC to launch a trial to develop best practices for reporting wireless VoIP and ISP disruptions. The NRSC has been closely involved in communications disruption reporting issues for years.¹² As such, it is the logical first step for determining the feasibility and effectiveness of outage reporting requirements for new, IP-based wireless technologies. The NRSC's consensus-based and open processes make it an ideal forum to develop and update voluntary standards and best practices that represent the best thinking of both the industry and regulators. Moreover, Section 615a-1, which the Commission relies on as a source of authority to promulgate the proposed rules, specifically considers that the Commission should engage with interested stakeholders, including public safety, industry, and the E-911 Implementation Coordination Office, to develop best practices for addressing issues such as "call handling in the event of call overflow or network outages."¹³

Absent quantification of the capabilities of broadband wireless technology, the Commission does not have the facts necessary to make appropriate determinations regarding broadband wireless outage reporting. Thus, the *NPRM* and any final rules the Commission may adopt are premature.

¹² Comments of CTIA – The Wireless Association, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 4 (Aug. 2, 2010) ("CTIA Comments").

¹³ 47 U.S.C. § 615a-1(h).

III. THE METRICS PROPOSED BY THE COMMISSION TO MEASURE OUTAGES ARE NOT BASED UPON LOSS OF SERVICE AND SHOULD BE MODIFIED

The proposed modifications to the existing Part 4 reporting obligations are operationally unsupportable and inherently ambiguous. As explained below, the reporting metrics proposed would give a distorted and inaccurate view of the actual impact of service disruption and should be withdrawn, or at least modified. Furthermore, the proposed metrics are likely to increase costs for both providers and end users. Broadband wireless service providers also may lack the ability to measure the proposed metrics in certain instances.

A. The Proposed Metrics in the *NPRM* Should Measure Loss of Service, Not Quality of Service

In the *NPRM*, the Commission recognizes that a definition of “outage” as applicable to VoIP service providers and ISPs should include a complete loss of the ability to complete calls.¹⁴ The Commission also asks, however, whether there should be a threshold based on lost or delayed packets. Particularly, the Commission suggests a concept such as “loss of generally-useful availability or connectivity.”¹⁵ Moreover, the Commission asks if it should adopt metrics proposed by the Internet Engineering Task Force (“IETF”) such as packet loss, round-trip latency, and jitter.¹⁶

CTIA has serious concerns about a regulatory scheme for VoIP service or broadband Internet service that would treat perceived or actual performance degradation as a reportable outage. Adoption of the above proposals would sharply diverge from current wireline and wireless outage reporting requirements that are based on actual loss of service to customers.

¹⁴ *NPRM* at ¶ 27.

¹⁵ *Id.*

¹⁶ *Id.* The Commission proposes thresholds of packet loss of one percent or more, round-trip latency of 100 ms or more, or jitter of 4 ms or more from the source to the destination host in order to trigger outage reporting. *NPRM* at ¶ 42.

Metrics such as packet loss, round-trip latency, and jitter, on the other hand, more accurately relate to quality of service metrics – not availability of service. Additionally, any attempt to define a level of performance degradation that would trigger a reportable event would be arbitrary. By imposing these kinds of quality of service metrics, the proposed rules assess a higher standard on VoIP service providers and ISPs than on wireline and wireless service providers today. Such a result would substantially burden broadband service providers, with no concomitant benefits.

Consumers ultimately will bear the increased costs associated with rules that propose to measure quality of service as opposed to loss of service. Because of the inherent noise, interference, and congestion in mobile radio services, wireless carriers generally do not offer quality of service guarantees to their customers, whether they use circuit-switched networks or broadband IP. Instead, carriers typically provide “best efforts” service levels. Providing the levels of broadband reliability contemplated through the mechanisms proposed in the *NPRM* will only increase the costs of wireless broadband services, making them significantly more expensive.

Similarly, the kinds of devices needed to measure packet jitter and delay across wireless networks are expensive themselves, and would require extensive integration into network monitoring systems in order to identify the kind of reportable events proposed in the *NPRM*. Indeed, until such devices are integrated, providers may not even be able to measure the proposed metrics. Implementing these capabilities into devices, however, would use significant swaths of scarce bandwidth, and dramatically reduce battery life.

B. The Proposed Metrics Will Result in Near Constant Reporting and Will Provide Little Useful Data

The significant architectural differences between broadband networks and the traditional PSTN make it significantly harder to report network disruptions. As an initial matter, attempting to base outage reporting on quality of service metrics likely will result in nearly constant reporting – thus defeating the purposes of the proposed rules. It does not follow, however, that consumers will be harmed. The design characteristics of broadband networks, as explained above, provide a unique degree of reliability and redundancy in the event of disruptions. For example, even if part of the network experiences latency issues, the network is designed to find an alternate path through the network that is not affected by any delays. The end user, therefore, remains unaffected. The proposed reporting requirements, however, would provide data on only a small piece of a much larger, complex network ecosystem, resulting in a skewed view of the source, frequency, and impact of outages.

Moreover, the unique characteristics of wireless broadband networks, proposed threshold sets,¹⁷ short timeframes for assessing outage circumstances for initial filings,¹⁸ and high costs of Commission enforcement for failure to file or inaccurate filings¹⁹ will result in significant over-reporting and a tremendous cost. As explained above, there are a number of alternate paths

¹⁷ See *supra*, note 16.

¹⁸ Under Part 4 rules, communications providers are required to submit a Notification within two hours of discovering a reportable outage. An Initial Report is due within 72 hours after discovering the outage, and a Final Report is due within 30 days after discovering the outage. See 47 C.F.R. § 4.9.

¹⁹ The Commission's *Forfeiture Policy Statement* and Section 1.80 of the Commission's rules do not establish a base forfeiture amount for failing to submit a true, complete, and accurate Final Report as required under Section 4.11 of the rules. See *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997). The Commission has, however, found that significant forfeiture may be appropriate in instances where parties have not completely and accurately described outages in full compliance with Section 4.11 of the Commission's rules.

available to the typical broadband user that prevents the user from losing broadband connectivity in the event of an outage. The proposed outage rules, however, would require reporting even in these instances where the end user experiences no loss of broadband connectivity. As a result, the proposed rules will over-report outages and provide a skewed view of the impact of outages on end users.

Furthermore, service problems that create network outages can occur anywhere in the Internet – on or off the facilities provided by the carrier responsible for filing the outage report. Again, the proposed rules will result in unnecessary over-reporting by all networks that peer with a network that is experiencing an outage, or who cannot route packets due to the loss of DNS translations.²⁰ Thus, reports submitted to the Commission will mislead consumers and policymakers as to the true reliability of the service provider responsible for the node being measured.

Additionally, the short deadlines and penalties associated with insufficient and/or late filings create strong incentives to file inaccurate and even unnecessary information, rather than to wait until the provider can file accurate, verified information concerning service outages. VoIP providers and ISPs will most certainly default to over-reporting out of an abundance of caution – a circumstance that wastes Commission as well as industry resources, and raises costs. Equally important, the proposed rules will divert valuable resources away from locating and resolving the

²⁰ Indeed, a single cable break in a key fiber route can slow the Internet throughout an entire region. See Duane Shimogawa, “Oceanic Time Warner: All Service Now Restored After Undersea Cable Break,” (July 27, 2010) *available at* <http://www.hawaiinewsnow.com/story/12877131/oceanic-time-warner-all-service-now-restored-after-undersea-cable-break?redirected=true> (A break in an undersea fiber-optic cable left around 400,000 people without Internet, phone, and TV service); *see also* Facebook Service Note: Break in Cable System Affecting Internet Service, (February 12, 2011), *available at* http://www.facebook.com/note.php?note_id=10150404277640046 (An outage in the Global Crossing Network fiber system caused by a submarine cable break in New York resulted in congestion, slow speeds, or loss of connectivity in most of the Caribbean islands).

root causes of network disruptions and will instead direct those resources towards filing unnecessary reports that, due to the nature of the information received, will be counterproductive and will most likely be withdrawn.²¹

IV. THE COMMISSION LACKS LEGAL AUTHORITY TO ADOPT MOBILE BROADBAND OUTAGE REPORTING REQUIREMENTS

The Commission has not been granted authority by Congress to impose the proposed outage reporting rules in the *NPRM* on wireless interconnected VoIP providers and ISPs. The *NPRM* asserts the authority to promulgate the proposed reporting rules under section 615a-1 of the Communications Act.²² But the *NPRM*'s assertion of authority to impose reporting rules under section 615a-1 simply goes too far. Indeed, the scope of 615a-1 contemplates only the “duty of each IP-enabled voice service provider to provide 9-1-1 service and enhanced 9-1-1 service to its subscribers”²³ It is a strain to argue that this 9-1-1 authority indicates any view by Congress that it must maintain outage reporting requirements, or any intent by Congress to delegate to the Commission authority to impose the proposed rules on wireless interconnected VoIP providers and ISPs. Moreover, section 615a-1 specifically limits the Commission’s authority to “require or impose a specific technology or technological standard” – even regarding a VoIP provider’s duty to provide 9-1-1 and enhanced 9-1-1 services.²⁴ Clearly then, the

²¹ Even in the context of wireline and wireless services, the current Part 4 rules for initial reporting of outages have proved too rigid and unworkable. It is now clear that the Commission did not foresee the vast number of reports that would be generated or the burdens associated with meeting short timeframes for assessing outage circumstances for correct filings. Instead of penalizing providers for trying to comply with unworkable rules or waiting to provide complete, accurate, and valuable information, the Commission should use this opportunity to revise the timeframes for initial filings under Part 4 of its rules for all service providers.

²² *NPRM* at ¶ 67.

²³ 47 U.S.C. § 615a-1(a).

²⁴ 47 U.S.C. § 615a-1(e)(1).

Commission’s proposed rules seeking to dictate specific quality of service metrics for reporting requirements violate section 615a-1.

Additionally, the *NPRM*’s assertion of ancillary authority to promulgate the proposed rules here fails. While courts have upheld various exercises of the Commission’s ancillary authority in the past, they have also made clear the limits of that authority. The Commission cannot simply take any action it views to be in the public interest so long as it involves the regulation of communications. Instead, the Commission’s exercise of authority must be “ancillary” to some other provision of the Communications Act that confers express substantive responsibility on the Commission. As the *NPRM* recognizes,²⁵ first, the proposed regulation must fall within the Commission’s subject matter jurisdiction. Second, the regulation must be “ancillary” to some “statutorily mandated responsibilit[y]” expressly delegated to the Commission under a substantive provision of the Act.²⁶ The *NPRM*, however, fails to meet these basic prerequisites here.

As an initial matter, the *NPRM* fails to identify any substantive provisions to which the proposed rules are ancillary. Aside from the general purpose provisions that cannot provide a basis for ancillary authority, the *NPRM* points to only a handful of specific statutory provisions, none of which provide a sufficient statutory basis for the proposed regulations.

The *NPRM* cites to section 615a-1 as a basis for ancillary authority, arguing that the proposed rules are “reasonably ancillary” to ensuring that interconnected VoIP providers are able to satisfy their 9-1-1 obligations under the Act.²⁷ Even if the Commission could show that the

²⁵ *NPRM*, at ¶ 68.

²⁶ *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010).

²⁷ *NPRM*, at ¶ 68.

proposed rules were reasonably ancillary to the separate substantive provisions of 615a-1 – which it is not at all clear that it can – to successfully rely on such a theory, the Commission would be obligated to propose a rule specifically targeted to such an end and develop a concrete factual record demonstrating that the proposed rule is needed to fulfill the Commission’s statutory responsibility.²⁸ The Commission has done neither here. The proposed rules sweep too broadly to be linked to the expressly delegated responsibility to provide 9-1-1 services, and the current record evidence does not begin to demonstrate that the proposed rules here are needed, considering the unique nature of IP networks. In fact, the Commission has failed to heed prior requests to work collaboratively with NRSC and the industry to develop the requisite record.²⁹

The *NPRM* also points to Title III provisions, all of which similarly fail to provide the requisite statutory basis for the Commission to exert ancillary authority.³⁰ Section 307(a) addresses only the grant of licenses to transmit over public airwaves – not the use of already-granted licenses.³¹ Similarly, section 309(j)(3) merely imposes a responsibility to “include safeguards to protect the public interest” and “seek to promote the purposes specified in section 1 of the Act.”³² These provisions, however, are not the type of substantive provisions

²⁸ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *American Library Ass’n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

²⁹ See Comments of Alliance for Telecommunications Industry Solutions, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 6-7 (Aug. 2, 2010); Comments of AT&T, Inc., ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 6 (Aug. 2, 2010); CTIA Comments at 4; MetroPCS Comments at 7; Comments of Verizon and Verizon Wireless, ET Docket No. 04-35, WC Docket No. 05-271, GN Docket Nos. 09-47, 09-51, 09-137, at 10 (Aug. 2, 2010).

³⁰ See *NPRM* at ¶¶ 70-71. The Commission seeks comment on potential sources of legal authority, specifically Title III provisions such as section 307(a), 309(j)(3), and 316(a)(1). The Commission also seeks comment on section 4(k) and 4(o) of the Communications Act and sections 1302(a) and (b).

³¹ 47 U.S.C. § 307(a).

³² 47 U.S.C. § 309(j)(3).

required under *Comcast*. Even if it were, section 309(j)(3) provides only the authority to “establish a competitive bidding methodology” to achieve these goals.³³ In other words, the Commission may “design” auctions under this section, but may not use this section to regulate networks or spectrum afterwards. Finally, section 316(a)(1) does not apply to rulemaking proceedings, such as the one here.³⁴ Instead, section 316(a) is only “concerned with the conduct and other facts peculiar to an individual licensee.”³⁵ The Commission cannot construe that Congress intended that this section be used as authority to modify classes of licenses through a rulemaking.

Nor can the *NPRM* rely on sections 4(k)³⁶ and (o)³⁷ of the Communications Act, or sections 1302(a) and (b).³⁸ Section 4(k) considers only the preparation of annual reports to Congress of information and data collected – it certainly does not expand in any way the Commission’s authority to collect certain types of data from specific entities. While section 4(o) does consider the use of communications in safety of life and property, the Commission has again failed to establish the required factual record to support the exercise of ancillary authority. Sections 1302(a) and (b) provide only that the Commission “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.”³⁹ To accomplish this goal, however, section 1302 provides only that the Commission utilize such

³³ *Id.*

³⁴ 47 U.S.C. § 316(a)(1).

³⁵ *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968).

³⁶ 47 U.S.C. § 154(k).

³⁷ 47 U.S.C. § 154(o).

³⁸ 47 U.S.C. § 1302.

³⁹ *Id.*

means as “price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulatory methods that remove barriers to infrastructure investment.”⁴⁰ The proposed rules, that impose unnecessary burdens on VoIP providers and ISPs in a manner that would harm infrastructure development and investment, would in fact run counter to the very purpose of section 1302. As such, the *NPRM* cannot rely on it as a basis for ancillary authority.

Finding the proper exercise of ancillary or direct authority here, under any of the proposed statutes, would only serve to “free the Commission from its congressional tether.”⁴¹ Without reference to proper provisions of the Act that expressly grant regulatory authority, the Commission’s ancillary jurisdiction would be unbounded. By failing to identify any substantive provisions to which the proposed rules would be ancillary, the *NPRM* fails to establish the requisite authority to promulgate the proposed outage reporting rules on VoIP providers and ISPs.

V. CONCLUSION

For the foregoing reasons, CTIA cautions the Commission against adopting the cumbersome regulations proposed in the *NPRM*. Not only does the Commission lack the appropriate authority to impose the proposed rules, doing so would yield counterproductive results given the inherent differences in wireless broadband networking technology and traditional communications networks. Instead of prescribing mandatory reporting requirements

⁴⁰ *Id.*

⁴¹ *Comcast*, 600 F.3d at 655 (2010).

for broadband wireless, CTIA urges the Commission to initiate a trial with the NRSC on broadband outage reporting.

Respectfully submitted,

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