

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

In the Matter of

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

PS Docket No. 11-82

COMMENTS OF AT&T INC.

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I. INTRODUCTION AND SUMMARY

When Congress enacted the Federal Telecommunications Act of 1996, the aim was both to open the telecommunications market up to competition and, over time as that market became more competitive, to eliminate regulations made unnecessary by competition. This is why the Act includes sections like sections 10 (Forbearance) and 11 (Biennial Review).¹ The aim with respect to the Internet and advanced telecommunications, however, was different. With respect to the Internet, Congress sought to promote the competitive free market that already existed and to leave the field “unfettered by Federal and State regulation.”² And, as to advanced services, Congress went as far as to empower the Commission with the authority to discard legacy telecommunications services regulations, if doing so would promote deployment of advanced telecommunications.³ By proposing to extend the Part 4 network disruption reporting obligations to interconnected voice over Internet protocol providers (VoIP Providers) and broadband Internet service providers—both Internet access providers, as well as for broadband Internet backbone providers—(ISPs), the Commission is undoing the promise of the 1996 Act and acting contrary to the authority and the express policy entrusted to it by Congress.

A. Jurisdiction

To extend the Part 4 rules to VoIP Providers and ISPs, the Commission has to have either express statutory authority or ancillary jurisdiction. If the Commission wants to make the case for ancillary jurisdiction, then it must meet the two-part test articulated in the D.C. Circuit’s opinion in *Comcast Corp. v. FCC*.⁴ Under that test, the Commission must show: “(1) the Commission’s general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective

¹ 47 U.S.C. §§ 160, 161.

² 47 U.S.C. § 230(b)(2).

³ 47 U.S.C. § 1302.

⁴ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

performance of its statutorily mandated responsibilities.”⁵ The Commission cites numerous provisions—section 615a-1, section 307(a), section 309(j)(3), section 316(a)(1), section 4(o), and section 1302—seeking to make the claim that it has either express or ancillary jurisdiction. As for extending the Part 4 rules to VoIP Providers and ISPs, however, the Commission can show neither express authority nor ancillary jurisdiction.

Contrary to its claim, section 615a-1 does not provide the Commission with express authority. This section is solely intended to obligate VoIP Providers to provide 911 Service to their customers and to give the Commission the authority to adopt regulations that give VoIP Providers access to the 911 facilities, such as trunks and routers, to meet their obligation. The intent of the statute was not to expose VoIP Providers to every sort of regulation that the Commission might dream up and associate with 911 Service. Rather the regulatory aim was to have the Commission make the capabilities needed for 911 Service available to VoIP providers by directing the owners and controllers of those capabilities (largely ILECs) to make them available on request.

Plus, any claim of ancillary jurisdiction under section 615a-1 fails because there is no express grant of authority for it to be ancillary to. And, the fact that networks are on occasion temporarily disrupted is no grounds for asserting that alleged disruptions are preventing VoIP Providers from meeting their statutory obligation to offer 911 Service.

As there is no express or ancillary jurisdiction to extend Part 4 rules to VoIP Providers, there is then no ancillary jurisdiction to extend them to ISPs either. The Commission is essentially doubling up on claims of jurisdiction is an effort to regulate a third party’s facilities because of some tenuous relation to a small fraction of a VoIP Provider’s service.

The cited Title III provisions—sections 307(a), involving the granting of station licenses; 309(j)(3), establishing competitive bidding methodology; 316(a)(1), modifying an existing license—are not a basis for jurisdiction either. In addition to the fact that these provisions would

⁵ *Id.* at p. 646.

not allow the Commission to extend the Part 4 rules to *wireline* providers, these provisions do not contemplate giving the Commission the authority to impose reporting obligations. If these provisions could be stretched to justify extending the Part 4 rules to VoIP Providers or ISPs, then the Commission's authority would effectively be unbridled.

Section 4(o) only directs the Commission to study and investigate "all phases of the problem [of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property] and the best methods of obtaining the cooperation and coordination of these systems."⁶ This directive does not contemplate general rulemaking authority. The Commission can study and investigate the "problem" without adopting on-going, open-ended regulations.

Reliance on Section 1302 is entirely misplaced as it seeks to *eliminate* legacy regulations, such as Part 4, to promote advanced telecommunications, not to *extend* them to new providers, like VoIP Provider and ISPs.

B. Unnecessary Regulations

AT&T respects and appreciates the Commission's commitment to helping providers improve the reliability and efficiency of their networks. Nevertheless, the Commission's claims of success are in this area greatly exaggerated. Quite simply, there is no way for the Commission to show that the Part 4 rules—including mandatory reporting or the frequency and number of reports—are causally related to any improvements in the efficiency and reliability of networks.

This is especially so as the service providers themselves are motivated by competition to maintain efficient and reliable networks. In a competitive free market, the assumption ought to be that the competitors—here, the service providers—have ample incentive to maintain efficient and reliable networks. And the Commission offers no evidence to rebut this presumption. In the

⁶ 47 U.S.C. § 154(o).

absence of a showing of market failure in this regard, the Commission should not intervene with unnecessary and burdensome regulations.

To this point, AT&T reminds the Commission that AT&T has argued on other occasions that the Part 4 rules as applied to common carriers are overly burdensome and unnecessarily duplicative. The initial assumption that the Commission made back in 2004—that the Part 4 rules were not particularly burdensome because they amounted to an electronic clerical function that added “significantly less than 5 hours” of work—was totally inaccurate.

C. Revising the Part 4 Rules

These burdensome rules should not be extended to VoIP Providers and ISPs, especially where the assertion of the authority to do so is so weak and is in fact contrary to stated congressional policy. If, however, the Commission were to meet its obligation of showing authority to extend these rules to VoIP Providers and ISPs, then they ought to be revised to make them less burdensome and more focused to the goal of developing “best practices.”

First, any extension should be voluntary. This will facilitate the adoption of needed processes by which VoIP Providers and ISPs can produce the information requested. And it will assist the Commission in fine tuning the information it seeks. As it is now, the Commission cannot be sure of the existence of or extent of any alleged problem, much less criteria needed to capture information concerning it.

Second, the Commission should eliminate unnecessary and duplicative reports and unreasonable reporting deadlines. As the aim of extending the Part 4 rules to VoIP Providers and ISPs is to help develop “best practices” to help maintain efficient and reliable networks over which 911 Service traffic is carried, then the only report that would address that aim would be the 30-day Final Report. The 72-hour Initial Report is often withdrawn or incorrect. Only the Final Report can be said to contribute to best practices.

And the reporting deadlines for the Notification and the Initial Report are unreasonable. If a Notification is needed, then it ought not to be due before the close of the next business day following resolution of any disruption. AT&T has also argued in other contexts that the 72-hour

Initial Report, if deemed needed at all, should not be due earlier than three business days from the resolution of the disruption. If the Part 4 rules are extended to VoIP Providers and ISPs, then these improvements ought to be taken into consideration.

As with the existing Part 4 rules, any rules made applicable to VoIP Providers and ISPs should be kept confidential. Such reports by their very nature contain confidential commercial information and information concerning the “Nation’s critical information infrastructure.”

D. Proposed Reporting Thresholds

Subject to the objections and concerns raised in these comments, AT&T proposes the following reporting threshold criteria:

VoIP Providers

All interconnected VoIP providers shall submit electronically a Final Report within 30 days of having experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: (1) of a non-redundant VoIP network element; (2) that potentially isolates subscribers’ service for at least 900,000 user minutes; or (3) potentially affects a 911 special facility (as defined in paragraph (e) of § 4.5).

Access ISPs

All [wireline/wireless] Access ISPs shall submit electronically a Final Report within 30 days of having experienced an outage of at least 30 minutes duration (1) of a non-redundant Internet Protocol switching element that they own, operate, lease, or otherwise utilize; or (2) that potentially isolates subscribers’ Internet connectivity for at least 900,000 user minutes.

Backbone ISPs

Backbone ISPs should submit a Final Report within 30 days of experiencing an outage for at least 30 minutes (1) of any non-redundant major facility (*i.e.*, PoP, Exchange Point, core router, root name server, ISP-operated DNS server, or DHCP server) that they own, operate, lease, or otherwise utilize; or (2) that potentially isolates subscribers’ Internet connectivity for at least 900,000 user minutes.

Conclusion

AT&T respectfully requests that the Commission not extend these unnecessary and unduly burdensome reporting obligations to VoIP Providers and ISPs. The legal and factual case has not been made that these regulations are needed to either facilitate the provisioning of VoIP 911 Service or to maintain efficient and reliable networks.

II. DISCUSSION

A. JURISDICTION

In its comments in response to the Bureau's July 2, 2010 *Public Notice*,⁷ AT&T noted that the Commission had articulated neither the express authority nor any ancillary jurisdiction for extending the Part 4 rules to VoIP Providers and ISPs. Under the Act, the Commission has “express and expansive authority” to regulate common carriers (Title II), radio transmissions—*i.e.*, broadcast television, radio, and cellular telephony— (Title III), and cable service providers (Title VI).⁸ But the Commission does not have such authority to regulate ISPs. Likewise, as the Commission has yet to classify VoIP service as either a telecommunications or an enhanced service, the Commission cannot look to Title II of the Act for express authority to regulate VoIP Providers, either.

As made clear in the *Comcast Order*, in the absence of express authority in the Act, the Commission can only exercise ancillary jurisdiction after having satisfied two conditions: (1) the Commission must show that its general jurisdiction under Title I of the Act covers the regulated subject; and (2) the Commission must show that the proposed regulations are “reasonably ancillary to the Commission’s effective performance of *its statutorily mandated responsibilities*.”⁹ The Commission asserts general jurisdiction under section 2 of the Act.¹⁰ As for any claim of ancillary jurisdiction,¹¹ the Commission cites several different alleged statutorily mandated responsibilities. These are discussed individually below.

⁷ *Public Notice*, DA 10-1245 (rel. July 2, 2010) (*Public Notice*).

⁸ *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (DC Cir. 2010) (*Comcast Order*).

⁹ *Id.*, at 646 (emphasis added).

¹⁰ *NPRM*, para. 68; *see*, 47 U.S.C. § 152(a).

¹¹ *See* 47 U.S.C. § 154(i); *Comcast*, 600 F.3d at 645-46.

1. Section 615a-1 does not give the Commission express authority to require VoIP Providers to report network outages under the Part 4 rules.

In the *NPRM*, the Commission seeks to extend Part 4 network disruption reporting to “interconnected Voice over Internet Protocol service providers” (VoIP Providers) as presently defined in Commission rule 9.3.¹² The Commission reasons that it has express authority under section 615a-1 of the Act to adopt reporting obligations for VoIP Providers.¹³ The Commission is mistaken.

The duty imposed by section 615a-1 is on VoIP Providers. Specifically, VoIP Providers are obligated to “provide 9-1-1 service and enhanced 9-1-1 service to [their] subscribers.”¹⁴ The Commission’s role under the statute, however, is to pave the way for VoIP Providers by adopting regulations to make that possible.

When the Commission adopted the *VoIP E911 Order* in 2005, there was no federal regulatory mechanism in place that allowed VoIP Providers access to 911 facilities, such as trunks and selective routers, necessary to the provisioning of 911 and E911 Services (911 Services). The Commission recognized this shortcoming of the *VoIP E911 Order* itself:

40. We are requiring that all interconnected VoIP 911 calls be routed through the dedicated Wireline E911 Network because of the importance of protecting consumers who have embraced this new technology. *We recognize that compliance with this obligation is necessarily dependent on the ability of the interconnected VoIP providers to have access to trunks and selective routers via competitive LECs that have negotiated access with the incumbent LECs, through direct connections to the incumbent LECs, or through third-party providers. We expect and strongly encourage all parties involved to work together to develop and deploy VoIP E911 solutions and we point out that incumbent LECs, as common carriers, are subject to sections 201 and 202 of the Act. The*

¹² *NPRM*, para. 1. See 47 C.F.R. § 9.3 (“An interconnected Voice over Internet protocol (VoIP) service is a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user’s location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.”)

¹³ *NPRM*, para. 67; see 47 U.S.C. § 615a-1.

¹⁴ 47 U.S.C. § 615a-1(a).

Commission will closely monitor these efforts within the industry and will not hesitate to take further action should that be necessary.¹⁵

Section 615a-1 fills this missing piece of the VoIP 911 Service provisioning puzzle, not by ordering the regulation of VoIP Providers, but rather by directing the Commission to adopt regulations ordering the “owner or controller of a capability that can be used for 911 or E911 service ... [to] make that capability available to a requesting interconnected VoIP provider.”¹⁶ Such owners and controllers include incumbent local exchange carriers. But section 615a-1 does not grant the Commission any express authority to impose any regulations remotely similar to those of Part 4, and the Commission fails to cite to any.

Absent *express* authority to impose Part 4 rules on VoIP Providers, the Commission must be able to articulate ancillary jurisdiction if it hopes to pass appellate review of any new Part 4 rules.

2. *The Commission cannot demonstrate that extending Part 4 rules to VoIP Providers is reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.*

As stated above, in order to claim ancillary jurisdiction, the Commission must meet the two-part test articulated in the *Comcast Order*. As part of that test, the Commission must show that the proposed regulations are “reasonably ancillary to the Commission’s effective performance of *its statutorily mandated responsibilities*.”¹⁷ In this case, the extension of the Part 4 rules cannot be said to be reasonably ancillary to the Commission’s obligations under section 615a-1, which only involve making it possible for VoIP Providers to meet their duty to offer E911 Services to their subscribers.

In enacting section 615a-1, the Congress had the limited intention of obligating VoIP Providers to offer 911 Service to their subscribers and of authorizing the Commission to develop regulations to facilitate that obligation. As stated above, the regulated parties were the “owners

¹⁵ *IP-Enabled Services; E911 Requirements for IP-enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd 10245, 10269 para. 40 (2005) (*VoIP E911 Order*).

¹⁶ 47 C.F.R. § 9.7(a).

¹⁷ *Comcast*, 600 F.3d at 646 (emphasis added).

and controllers” of capabilities needed for 911 Service that were previously unavailable to VoIP Providers, such as ILECs. Congress did not intend to expose VoIP Providers to every manner of federal regulation that could with a little regulatory creativity be associated with 911 Service. Today, VoIP Providers are meeting their obligations under section 615a-1, and the Commission has satisfied its duties by facilitating their compliance when the Commission adopted appropriate regulations.¹⁸

In spite of this, the Commission claims that the VoIP Providers’ obligations are somehow imperiled by the fact that the facilities and networks they use to offer that 911 Service might on occasion be disrupted. First, it must be presumed that Congress was well aware that we live in an imperfect world and that those facilities and networks, even IP networks, may on occasion be disrupted. Had Congress thought that such disruptions would be a significant threat to compliance with section 615a-1, Congress could have addressed that specifically in the statute. It did not.

Second, the fact that networks are disrupted does not translate into an inability to offer 911 Service. In brief, networks are temporarily disrupted, the disruption is corrected, and service continues. There is nothing in extending the Part 4 rules that will change that fact. Indeed, Congress did not expect, and the Commission cannot ensure, that networks over which 911 Services ride will never be disrupted. And the imposition of outage reporting obligations will not of themselves effect any changes in the way VoIP Providers provision their services, in general, or 911 Services, in particular.

The Commission can show neither express nor ancillary jurisdiction to adopt and impose the Part 4 rules on VoIP Providers. Because of this, the Commission should reject the proposal to extend those rules to VoIP Providers.

¹⁸ See 47 C.F.R. § 9.7.

3. *Because the Commission cannot demonstrate ancillary jurisdiction over VoIP Providers for the purpose of imposing Part-4 reporting obligations, the Commission cannot show ancillary jurisdiction over ISPs.*

Wisely, the Commission does not even try to assert express authority to extend the Part 4 reporting obligations to ISPs. Rather, it tries, citing several statutes, to make the case for ancillary jurisdiction. In all cases, the Commission has failed to demonstrate a case for ancillary jurisdiction under the ruling in the *Comcast Order*.

The case the Commission tries to make is that, because the VoIP Provider's 911 Service rides over the ISPs' facilities and disruptions to those facilities can disrupt VoIP Provider traffic to 911 trunks and routers, imposing Part 4 rules on ISPs is ancillary to the Commission's alleged statutorily mandated responsibility to ensure that VoIP Providers are able to satisfy their 911 obligations. The first obvious weakness in this reasoning is that the Commission lacks both express authority and ancillary jurisdiction under section 615a-1 to impose the Part 4 rules on VoIP Providers. Without express authority in this matter over VoIP Providers, the Commission cannot demonstrate any ancillary jurisdiction over ISPs. And "doubling up" ancillary jurisdiction—*i.e.*, relying on a claim of ancillary jurisdiction over VoIP Providers as a basis for claiming ancillary jurisdiction over ISPs—does not fair any better. Making the case that the Commission has ancillary jurisdiction to regulate a third party's facilities because of some tenuous relation to a fraction of a VoIP Provider's overall service is weak enough. But this argument is made even less compelling when the Commission lacks express authority over the operations of the VoIP Provider.

This approach also fails for all the same reasons that the Commission's claim of ancillary jurisdiction over VoIP Providers fails: section 615a-1 is not an expression of congressional intent to give the Commission wide-ranging authority to impose regulations on VoIP Providers and ISPs based on some tenuous connection to 911 Service. The intent of this statute is to have the Commission develop regulations that give VoIP Providers the access they need to the pre-existing 911 infrastructure—trunks and routers—that make it possible for VoIP Providers to

fulfill their statutory obligation. That is, Congress asked the Commission to make available capabilities needed for provisioning 911 Service to VoIP Providers by asking the Commission to adopt regulations that directed the “owners and controllers” of those capabilities—largely ILECs—to make them obtainable on request. Congress did not ask the Commission to ensure that all 911 calls terminate to the PSAP, which is a practical impossibility. Consequently, any such Part 4 rules would not be “*reasonably* ancillary to the Commission’s *effective* performance of [any] statutorily mandated responsibilities.”

Next, the Commission proposes to promulgate the proposed rules under its Title III authority, and specifically points to sections 307(a), 309(j)(3), and 316(a)(1) as appropriate bases for its action.¹⁹ The *NPRM*’s assertion of Title III authority to adopt the proposed rules fails. As an initial matter, Title III at most offers the Commission authority to regulate wireless providers or carriers using wireless facilities. Thus, the Commission would not be able to impose the proposed rules on wireline and cable broadband Internet providers under Title III authority. Even if it could, the Title III provisions that the *NPRM* points to all fail to provide the requisite statutory basis for Commission action in this area.

The *NPRM* begins with section 307(a), which allows the Commission to grant, “if public convenience, interest, or necessity will be served,” station licenses to transmit over public airwaves.²⁰ The proposed rules sweep too broadly to be plausibly linked to the delegated responsibility in section 307(a). Indeed, section 307(a) addresses only the initial grant of licenses, and is silent as to the regulation of licensees post-authorization.

Similarly, section 309(j)(3) cannot be a basis for Commission authority to impose the proposed rules. Section 309(j)(3) only delegates to the Commission the authority to “establish a competitive bidding methodology.”²¹ While section 309(j)(3)(A) provides that the Commission should encourage the “development and rapid deployment of new technologies, products, and

¹⁹ *NPRM*, para. 70.

²⁰ 47 U.S.C. § 307(a).

²¹ 47 U.S.C. § 309(j)(3).

services for the benefit of the public,” this subsection does not constitute an independent grant of authority.²² Instead, the subsection directs the Commission to use the authority granted to it in section 309(j)(3)—namely the authority to establish a competitive bidding methodology—in a manner that would protect the public interest. Accordingly, the *NPRM*’s reliance on section 309(j)(3) fails.

Finally, the *NPRM* argues that it has authority under section 316(a)(1), which generally permits the Commission to modify a license if such an action would be in the public interest.²³ Again, the proposed new Part 4 rules cannot plausibly be linked to section 316(a)(1). To argue otherwise would require the conclusion that section 316(a)(1) authorizes any rule or any modification of a license if it would be in the “public interest”—an outcome that would leave the Commission’s jurisdiction completely unbounded. Such a result would clearly be contrary to congressional intent. Moreover, section 316(a)(1) does not contemplate general rulemaking proceedings, such as the one here. Instead, its primary function is to “protect the individual licensee from a modification order of the Commission” and, as such, it is “concerned with the conduct and other facts peculiar to an individual licensee.”²⁴ Thus, the Commission’s use of section 316(a)(1) to promulgate the proposed rules would run contrary to the spirit and purpose of section 316(a)(1).

The Commission also cites to section 4(o) and section 1302 in support of its attempt to impose regulations on ISPs. Section 4(o) only asks the Commission to “investigate and study” a “problem,” presumably the problem of “obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property.”²⁵ But *investigation*

²² 47 U.S.C. § 309(j)(3)(A).

²³ 47 U.S.C. § 316(a)(1).

²⁴ *WBEN, Inc. v. United States*, 396 F.2d 601, 618 (2d Cir. 1968).

²⁵ 47 U.S.C. § 154(o) (“Use of communications in safety of life and property. For the purpose of obtaining maximum effectiveness from the use of radio and wire communications in connection with safety of life and property, the Commission shall investigate and study all phases of the problem and the best methods of obtaining the cooperation and coordination of these systems.”).

and study does not require the adoption of regulations and the imposition of new and on-going reporting obligations on ISPs. Again, study and investigation does not contemplate general rulemaking. There are a myriad of ways the Commission could *investigate and study* issues pertaining to “getting cooperation and coordination of radio and wire communications” without periodic, on-going, open-ended network outage reporting, which would only be tangential at best to addressing the “problem” implicated in section 4(o). A good example of this was the Commission’s recent study of broadband performance—the so-call SamKnows Report—which was accomplished solely on a voluntary basis.²⁶

As for section 1302, the purpose of that statute is just the opposite of what the Commission is proposing. The aim of section 1302 is to empower the Commission to sweep away any legacy common carrier regulations that stand in the way of “accelerat[ing] deployment of [advanced telecommunications] capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.”²⁷ Here, the Commission seeks to burden the deployment of advanced telecommunications capability by *imposing* legacy common carrier regulations on advanced services providers.

If this were not enough, this entire scheme runs afoul of the Congress’s direction to the Commission under section 230(b) that it is the official policy of the United States to “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”²⁸ Not only has Congress directed the Commission repeatedly to unshackle the telecommunications market from regulations

²⁶ THE FEDERAL COMMUNICATIONS COMMISSION, MEASURING BROADBAND AMERICA: A REPORT ON CONSUMER WIRELINE BROADBAND PERFORMANCE IN THE U.S., Office of Engineering and Technology and Consumer and Governmental Affairs Bureau, (Aug. 2011) (SamKnows Report).

²⁷ 47 U.S.C. 1302 (“The Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . *by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance,* measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”) (Emphasis added.)

²⁸ 47 U.S.C. § 230(b)(2) (emphasis added).

unnecessary in a competitive free market, it has expressly told the Commission “hands off” the Internet. Any alleged authority the Commission argues it may have to impose these burdensome reporting obligations on ISPs runs headlong into this unambiguous congressional command to the contrary.

Not only is extending the Part 4 rules to VoIP Providers and ISPs a bad idea, the Commission lacks jurisdiction to do so and has been ordered by Congress to refrain from imposing just these sorts of regulations. For this reason alone, the Commission should abandon any proposal to extend the Part 4 rules to these providers in the competitive Internet market place.

B. NETWORK OUTAGE REPORTING IS UNNECESSARY

1. The Commission should not extend Part 4 reporting obligations to VoIP Providers and ISPs absent a showing of regulatory necessity in the face of market failure.

a. The Commission’s claims of the benefits of network outage reporting are greatly exaggerated.

In the *NPRM*, the Commission goes to great lengths to show that the Commission’s Part 4 rules have produced “tangible positive results.”²⁹ As evidence of this, the Commission proffers a chart purporting to show “lost 911 calls” over time (from roughly the first quarter 2005 through the third quarter 2010) and it describes its work with the Network Reliability Steering Committee (NRSC) and its ability to help “to identify and analyze trends and possible causes of the outages from the [NORS] data of not just the individual carrier’s network, but also from carriers’ networks across the industry.”³⁰ The Commission claims among other things that, due to its work with the NRSC, carriers were able to “take corrective action” to bring down the number of lost of 911 calls, as well as reduce the duration of outages affecting “high-capacity transport circuits.”³¹

²⁹ *NPRM*, para. 16.

³⁰ *Id.*

³¹ *Id.* With respect to reducing the number of lost 911 calls, the Commission’s chart shows that the third quarter 2010 level of “lost 911 calls”— post-“FCC Intervention”—is back

These claims aside, no one doubts the Commission staff's hard work to or its interest in assisting carriers to improve the efficiency and reliability of their networks. Unquestionably, the Commission staff's involvement is both helpful and appreciated. Yet, the evidence offered by the Commission in support of its Part 4 rules falls short of demonstrating that providers, left to their own devices, could not or would not achieve the same results without the benefit of the Commission's outage reporting scheme. And, even assuming for the sake of argument that there can be drawn some level of causal relation between the present day's NORS reporting structure under the Part 4 rules and these vaunted improvements over lost 911 calls and outages, it cannot be said that the evidence proffered actually demonstrates that the present level and nature of those rules is necessary to achieving those and similar results. Said another way, the evidence does not demonstrate or even support the contention that the claimed improvements are the result of the way carriers are required to provide data to the Commission under these rules today, including the definition of the term "outage" and the number and timing of NORS filings.

In its *NPRM*, the Commission seeks to extend the Part 4 rules to interconnected VoIP service providers (VoIP Providers) and broadband Internet service providers (ISPs). Any analysis of this proposal must also involve an analysis of the efficacy and necessity of the present day reporting structure imposed on common carriers and cable service providers under these rules.³²

down to the level of first quarter 2006, presumably pre-FCC Intervention. In spite of the coincidence of Commission participation in the NRSC process, the chart does not in fact prove that there is a causal relation between the Part 4 rules and the alleged drop in "lost 911 calls." For example, the Commission cannot say that the industry, acting on its own, could not have achieved similar results. This is especially true as the ballyhooed 2010 level in lost 911 calls dropped to the pre-Commission intervention level of 2006.

³² On different occasions, AT&T has addressed these issues with the Commission. See Comments of AT&T Inc. (Aug. 2, 2010), filed in response to *Public Notice*, ET Docket No. 04-35; WC Docket No. 05-271; GN Docket Nos. 09-47, 09-51, 09-137; DA 10-1245 (rel. July 2, 2010); Comments of AT&T Inc. (Jan. 31, 2011), filed in response to *Public Notice*, Commission Seeks Public Comment in 2010 Biennial Review of Telecommunications Regulations; etc., PS Docket No. 10-270 (rel. Dec. 30, 2010).

b. There is no evidence that the market is not working properly to maintain efficient and reliable networks.

In its *NPRM*, the Commission seeks to anticipate arguments from carriers and providers opposing the extension of the Part 4 rules based on their contention that the market is sufficiently competitive to guarantee the efficiency and reliability of networks. But the Commission’s case against the efficacy of the market is weak, at best. First, in response to earlier comments from AT&T—“that many providers already voluntarily participate in public-private partnerships to share information and to promulgate best practices in large part because it is in their competitive self-interest to ensure that they develop and implement procedures and practices that make their networks as reliable as they can realistically be”³³—the Commission confesses candidly that it is “unsure” of the steps taken and measures adopted by providers “to maintain the high-quality security, reliability and resiliency of their respective services.”³⁴ And, second, the Commission adds vaguely that “economic justification to ensure such service appears to be limited, and does not consider network externalities.”³⁵ Other than citing certain reply comments of the National Association of State Utility Consumer Advocates (NASUCA),³⁶ the Commission doesn’t provide any support for this claim or any explanation of how the “economic justification appears limited” or what “network externalities” need to be considered.

An examination of those NASUCA reply comments themselves doesn’t fair any better.

In NASUCA reply comments relied on by the Commission, NASUCA writes:

The first and perhaps most crucial point here is to challenge the providers’ claims that “competition within the ... market motivates providers to ensure high-quality, secure, reliable service.” As explained elsewhere by NASUCA, the economic justification to ensure such service is limited and ignores network externalities. Indeed, this claim is undercut by the providers’ own acknowledgement of the complexity of the network.³⁷

³³ *NPRM*, para. 20 (citing AT&T Inc.’s Comments, filed Aug. 2, 2010, pp. 5-6.).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Reply Comments of NASUCA, ET Docket No. 04-35, WC Docket Nos. 09-47, 09-51, and 09-137 p. 2 (Aug. 16, 2010) (NASUCA Reply Comments).

³⁷ *Id.*

NASUCA's argument is flawed as it is nothing more than a bald-face assertion without the slenderest evidentiary support. Consequently, the Commission's reliance on it is equally flawed. By way of "authority" for its bald-face assertion about economic justification and network externalities, NASUCA merely cites its own previously filed comments.³⁸

In its Broadband Network Equipment Reply Comments, NASUCA writes:

As in many other areas that impact the public interest, the providers assert, like Qwest Communications International, Inc., that "[b]roadband network providers operate in a competitive marketplace and have compelling financial and public interest incentives to fulfill customer service continuity expectations [citing Qwest Comments in that proceeding, as well as those AT&T Inc., MetroPCS Communications, Inc., the National Cable & Telecommunications Association, the United State Telecom Association, and Verizon and Verizon Wireless]. Yet in the very next paragraph Qwest notes that "[b]roadband networks are designed to be redundant where feasible **and the cost to provide redundancy is economically justified.**" The "economic justification," of course, is justification for the network owner/provider, and will likely not encompass all of the externalities created by the traditional network and by the broadband network as well.³⁹

NASUCA's criticism is bizarre, however, because Qwest is merely saying is that this is the way competitive free markets work. In a competitive free market, as is the case in the VoIP and broadband ISP services markets, competitive pressures guarantee efficient and well-run networks that serve the needs of their customers. It is not a shortcoming, therefore, that owners/providers of those networks take economic justification (or, said another way, the market) into consideration. Regulation should supplant free-market forces only *when it can be shown that there is a market failure requiring regulatory intervention.*⁴⁰ Because there hasn't been a demonstrated market failure (*i.e.*, there is no showing that the free market is failing to keep broadband networks efficient and reliable), NASUCA's argument—and now that of the Commission relying on it—is merely *ipse dixit*, an unsupported assertion. It doesn't make sense

³⁸ NASUCA Reply Comments, PS Docket No. 10-92 (filed July 26, 2010) (NASUCA Broadband Network Equipment Reply Comments); and, NASUCA Reply Comments, WT Docket No. 09-158 (filed July 19, 2010) (NASUCA Wireless Bill Shock Reply Comments).

³⁹ NASUCA Broadband Network Equipment Reply Comments, pp. 1-2 (NASUCA supplied emphasis).

⁴⁰ See for example *Nat'l Ass'n of Theatre Owners v. FCC*, 420 F.2d 194, 204 (D.C. Cir. 1969).

to argue that something needs to be fixed before it has been demonstrated that this something has in fact been broken.

In the NASUCA Wireless Bill Shock Reply Comments, NASUCA merely repeats a claim made by National Association of Regulatory Commissioners to the effect that profitable carriers do not adequately disclose information to consumers and “market forces do not effectively prevent fraudulent, deceptive, abusive, exploitative, or unfair practices that are profitable.”⁴¹ By in large, NASUCA’s claim is unsupported. And, it is contradicted by the record in that proceeding in which wireless providers showed that they already supply customers with tools “to monitor and manage” their usage of wireless services.⁴² Regardless, the more important point is that NASUCA is comparing apples to oranges—*i.e.*, the sort of behavior referred to by NASUCA in its comments bears no relation to network outages, which don’t constitute “fraudulent, deceptive, abusive, exploitative, or unfair practices”; which are hardly hidden from end users; and, which, when sizeable enough, are the subject of media attention.⁴³ And just as important, they are the subject of competitors advertising, express or implied.⁴⁴

What’s more, if NASUCA is correct that “economic justification” and “network externalities” prevent owners/providers from “ensur[ing] high-quality, secure, reliable service,” then what good would the Part 4 rules do anyway? By themselves, the Part 4 rules don’t create any incentives on owners/providers of networks to make their networks more efficient and reliable. The Part 4 rules are merely a reporting mechanism. If the owners/providers lacked the proper incentives to ensure high-quality, secure, and reliable service, the Part 4 rules wouldn’t

⁴¹ NASUCA Wireless Bill Shock Reply Comments, p. 3.

⁴² AT&T’s Wireless Bill Shock Comments, pp. 26-30 (Jan. 10, 2010).

⁴³ The Commission itself refers to press coverage of a service outage “involving the AT&T U-Verse [sic] platform.” *NPRM*, para. 25.

⁴⁴ Such media attention and advertising indisputably have an impact on consumer choices, including choice of provider. What’s more, providers are intensely committed to protecting their brand image, which can also be diminished by this type of publicity.

supply it. But, in point of fact, providers are already highly motivated to maintain efficient and reliable networks making any additional “incentives” superfluous.

c. The Commission radically underestimates the burdens of network outage reporting.

It is clear that the Commission believes that network outages raise concerns that can be addressed in part by an outage reporting scheme. In support of this, the Commission notes that “significant communication outages of interconnected VoIP service (as well as broadband Internet service) occur for a variety of reasons affecting the ability to send and receive traffic.”⁴⁵ And, in the *NPRM*, the Commission cites some examples of such outages—(1) June 2010 CenturyLink event; (2) May 2010 AT&T U-verse[®] event⁴⁶; and (3) March 2010 Comcast event.⁴⁷ While it is true that, when there is an outage that disrupts all calls on the network, calls to the wireline 911 network are equally affected. But the existence of some outages does not translate into the need to fashion an elaborate reporting scheme to monitor them. There is no evidence that providers who maintain the affected networks have not or would not—in the absence of Commission intervention—conduct a root-cause analysis and take steps to address any issues giving rise to a service disruption. The Commission has not, and indeed cannot, point to any failure of a provider to do so.

In further support of this belief, the Commission asserts that it is not “persuaded” that the burdens of extending the Part 4 rules “outweigh the benefits or are otherwise justified.”⁴⁸ But this is the equivalent of saying that, while the Commission cannot describe the extent of the

⁴⁵ *NPRM*, para. 21.

⁴⁶ In the case of the AT&T event, representatives of AT&T voluntarily discussed the event with the Commission on several occasions, including a face-to-face meeting on August 25, 2010, to answer the Commission’s questions and demonstrated that AT&T was actively engaged in preventing any future occurrence. The Commission wasn’t left guessing as to either what had taken place or the steps taken by AT&T to address the root cause of the disruption. And AT&T is confident that representatives of CenturyLink and Comcast would extend similar courtesies to the Commission upon request.

⁴⁷ *NPRM*, para. 3.

⁴⁸ *Id.*

problem or the source of any alleged problem, providers shouldn't worry because the Commission believes the reporting obligations aren't so bad. If the Commission cannot or chooses not to describe the extent of the alleged problem, the Commission cannot justify the claim that the benefits outweigh the proposed burden on providers. Essential to the costs-benefits analysis is knowing both the costs and the benefits. Thus, the Commission cannot claim with a straight face that, in extending the Part 4 rules to VoIP Providers or ISPs, it knows that the benefits will outweigh the costs.

What's more, the Commission's effort to diminish the extent of the burden of the Part 4 rules falls short of the mark. For example, the assertion that the burdens are mitigated through "online, automated reporting mechanisms" both misses the point and has shown to be untrue. The Commission made similar claims when it instituted mandatory Part 4 obligations for common carriers, including wildly optimistic estimates of the amount of time these reporting obligations would impose.⁴⁹ Yet, those claims proved entirely inaccurate. Regardless of automation, the Part 4 rules require many hours of work—far in excess of those estimated by the Commission.

In 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."⁵⁰ The Commission estimated that the total time for a reporting entity

⁴⁹ Back in 2009, ATIS refuted the Commission's rosy projections of the burden imposed by the Part 4 rules. In a letter to Paul de Sa, Chief of the Commission's Office of Strategic Planning and Policy Analysis, dated Sept. 23, 2009, ATIS pointed out that a single unnamed large carrier had already itself filed more than five times the total number of reports estimated by the Commission in its initial estimate. Moreover, ATIS pointed out that the Commission's initial cost estimates underestimated the burden on service providers, noting that they could "spend from 5,000 to 54,000 hours per year on outage reporting at a cost of between \$300,000 and \$5 million."

⁵⁰ *Report and Order*, 19 FCC Rcd 1683, at App. D, para. 28 (2004). The assumption that the Commission made was that the burden on providers would be limited to a small clerical overlay—*i.e.*, filling out online forms—onto the processes that providers already employ to monitor their networks. This proved to be entirely fallacious.

to complete these reports “would be significantly less than 5 hours.”⁵¹ And that the total number of annual reports from all reporting entities would only climb from around 126 outage reports in 2003 to a number “substantially less than 1,000.”⁵² In short, the Commission projected only a minor increase in the paperwork burden on reporting entities.⁵³

Despite Commission assurances that its expanded reporting requirements would be minimally burdensome, just the opposite has in fact occurred. Besides actually “completing the reports,” providers have 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. 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.”⁵⁴ 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.

The Commission also claims that the burdens of reporting “would be significantly less intrusive than those associated with direct operational mandates.”⁵⁵ This argument is circular. The Commission cannot justify the imposition of reporting rules by claiming that the burdens could be made worse on providers.⁵⁶ Regardless, if the Commission cannot justify the less burdensome reporting obligations either because it does not have the jurisdictional authority to

⁵¹ *Id.*, at 16913, para. 168 (“(the Notification + the Initial Report + Final Report: 15 minutes + 45 minutes + 2 hours = 3 hours)”).

⁵² *Id.*

⁵³ This is only a “minor” increase of the burden on reporting entities if one considers 5,000+ hours to be minor.

⁵⁴ *See* footnote 21 *supra*.

⁵⁵ *NPRM*, para. 21.

⁵⁶ It may not be the Commission’s intent, but this argument sounds more than vaguely extortionist in nature.

impose them or because it cannot make the case for regulation, then it cannot justify the more burdensome “operational mandates,” either.

Worst of all, however, is the Commission’s claim that “providers are not [currently] incentivized to achieve that goal [*i.e.*, the goal of a reliable nationwide broadband infrastructure].”⁵⁷ Again, the Commission offers no evidence of this claim. Indeed, the claim itself would appear to be undercut by the Commission’s own assertion in the same paragraph used in an attempt to diminish the extent of the burden imposed on reporting entities that “the types of information that would be needed in such outage reporting are already readily available to reporting entities *via normal network management processes*.”⁵⁸ To what end would providers have to create “normal network management processes” if not to guarantee a reliable broadband infrastructure? Said another way, if providers were not “incentivized” to maintain reliable networks, why would they undertake such processes in the first place and then collect and maintain such data for no practical purpose?

C. THE PART 4 RULES NEED REVISION

1. If the Part 4 rules are extended to VoIP Providers and ISPs, they should be made voluntary.

AT&T is fully aware that the Commission believes it is “appropriate” that the outage reporting described in the *NPRM* be mandatory.⁵⁹ Subject to a ruling on the Commission’s jurisdiction to impose the proposed outage reporting rules on VoIP Providers and ISPs, the Commission ought to consider voluntary reporting for the short term, if not permanently.⁶⁰ There are benefits to all concerned to this approach.

⁵⁷ *NPRM*, para. 21.

⁵⁸ *Id.* (emphasis supplied).

⁵⁹ *Id.*, para. 56.

⁶⁰ As stated above, AT&T believes that there are serious questions as to the Commission’s authority to impose these outage reporting obligations on VoIP Providers and ISPs. As noted in AT&T’s August 2010 Comments (citing by reference its Cyber Security Comments), if Congress has not conferred on the Commission the power to act in this arena, then a voluntary plan would not cure any possible jurisdictional defects. AT&T’s August 2010 Comments, pp. 9-10 (citing AT&T’s Cyber Security Comments, p. 24). By proposing voluntary

First, even though some providers in other capacities are reporting outages today under the existing Part 4 rules, many are not. Allowing a period of voluntary reporting can assist all providers in adopting new processes and mechanisms to furnish the requested information and otherwise adjusting to demands of periodic reporting.

Second, a period of voluntary reporting can help provide the Commission with information that is sorely missing today; that is, it can elicit data on the types, nature, and frequency of alleged outages. As it stands today, the Commission is seeking to impose mandatory reporting obligations to address an alleged problem about which it knows next to nothing. The proposal to extend the Part 4 rules to VoIP Providers and ISPs is a solution looking for a problem. The Commission would be well advised to confirm that there is indeed a problem that needs to be addressed and the nature and extent of any such problem.⁶¹ Additionally, if the criteria used in a voluntary reporting scheme produce a glut of filings from reporting entities—especially filings of little value in generating “best practices”—then the Commission would know that its criteria are flawed and need retooling.

It is difficult to justify a reporting scheme in the absence of such data and to formulate truly efficacious rules to gather useful information. The Commission is seeking to impose on providers a plan of action that will require the deployment of facilities and personnel—not to mention the investment of money—to comply with reporting obligations without sufficient data on which to judge the usefulness of that plan. By establishing a voluntary reporting scheme, the Commission can not only gather the needed data and assess the utility of any proposed rules, it can then make an informed decision as to whether any reporting is even justified.

reporting here, AT&T does not want to give the false impression that it believes that voluntary reporting would paper over the jurisdictional issues.

⁶¹ The SamKnows Report is an excellent example of how an investigation and study can disprove commonly held assumptions. In the case of that report, the commonly held assumption by some was that consumers were not enjoying advertised rates for broadband speeds—this in spite of statements by providers to the contrary. As it turned out, providers are doing an excellent job providing the broadband speeds they advertise.

As is discussed below, there are serious problems with the existing Part 4 rules criteria and these criteria need to be re-examined and adjusted. Simply applying these same criteria to ISPs will not encourage voluntary reporting. It is AT&T's stated position that at a minimum outage reporting rules need to have unambiguous and easy-to-apply threshold criteria and should not impose unrealistic reporting deadlines and unnecessary and duplicative reports.⁶² The present Part 4 rules violate that recommendation and should not be extended to other providers—especially if the Commission chooses to seek voluntary participation. Indeed, the existing rules need to be amended themselves.

2. *Before extending the Part 4 rules, the Commission should eliminate any unnecessary and duplicative reports and set reasonable reporting deadlines.*

The existing Part 4 rules are seriously flawed. They do not meet the standard of having unambiguous and easy-to-apply threshold criteria—especially for wireless outages—and they include unrealistic reporting deadlines and unnecessary and duplicative reports. At a minimum the Commission should not exacerbate the problem with the Part 4 rules by extending that model to other providers. And, preferably, these shortcomings should be addressed for all reporting entities.

In the wireline arena, the Part 4 rules threshold criteria are fairly straightforward and relatively easy to apply. For more dynamic networks, however, such as the wireless network, the criteria for outages are less clear and harder to apply. Apart from the difficulties this imposes on reporting entities, there is a question of useful and relevant information. Given the dynamic nature of the wireless network, some reportable events are not really outages at all and they are certainly not customer affecting. Consequently the data the Commission is getting from the wireless Part 4 outage reports to help develop best practices are of dubious value.

⁶² See AT&T's August 2010 Comments, pp. 7-9, and AT&T's Biennial Review Comments, pp. 6-7. In drafting the existing Part 4 rules, it was clearly the Commission's intent to simplify the process by developing a common matrix as a threshold for network outage reporting. *New Part 4 of the Commission's Rules Concerning Disruptions to Communications, Report and Order and Further Notice of Proposed Rulemaking*, 19 FCC Rcd 16830, 16834 (2004). This was more successful in some case than others.

Like the wireless network, however, the nature of the Internet is also dynamic. Although the Commission questions the claim that outage reporting is unnecessary because of the adaptive nature of the Internet that automatically and instantly reroutes traffic around snags on the information superhighway,⁶³ the Commission should not discount that adaptive nature of the Internet when developing threshold criteria for reporting outages. In the discussion below, AT&T proposes its own recommendations for reporting threshold criteria for this dynamic space. But just as importantly, the Commission should conduct a rulemaking for reviewing the reporting threshold criteria for wireless outages.

Another shortcoming of the existing Part 4 rules is the number and timing of the reports themselves. AT&T has already proposed that the Commission restrict the use of the 120-minute Notification to outages caused by terrorist activities and natural disasters.⁶⁴ In the *NPRM*, however, the Commission doesn't attempt to justify an outage reporting scheme for VoIP Providers and ISPs based on terrorist activity or natural disasters. If, as the Commission claims, the aim of the VoIP Provider and ISP outage reporting scheme is to develop "best practices" to help providers to improve the reliability of their networks to buttress access to emergency E911 Services, then the only report the Commission can justify in theory is the 30-day Final Report. As it stands today, the so-called 72-hour Initial Report is often withdrawn or its initial conclusions prove to be incorrect.⁶⁵ It is hard to see how any report other than the 30-day Final Report, with its fully developed and reasoned root-cause analysis, can have any value in generating "best practices."

If any initial notification of a reportable outage in advance of filing the 30-day Final Report would be deemed useful, it ought not to be required within 120 minutes crossing the

⁶³ *NPRM*, para. 21.

⁶⁴ AT&T's Biennial Review Comments, pp. 2-3. *See also* Comments of Alliance for Telecommunications Industry Solutions (ATIS), PS Docket 10-270 (filed Jan. 31, 2011).

⁶⁵ In prior comments, AT&T has also argued that the "initial report" should not be due within 72 hours. That deadline is needlessly burdensome and impractical. Rather, assuming there is any justification for such a report, it ought not to be due before the close of the third business day following the conclusion of the reportable outage.

threshold for reporting. The 120-minute notification requirement is unnecessarily burdensome and disruptive. If such notifications are at all useful, they can be provided by the close of the next business day after the outage has been resolved.⁶⁶

The Commission appears to be under the illusion that because providers collect data or otherwise create internal reporting to manage and improve their networks, the imposition of the Part 4 rules is not burdensome. In point of fact, the Commission has simply not been listening. These rules require far more time and effort than the Commission claimed in 2004 and do not match in any real way the manner in which network providers themselves collect and analyze events in their networks.

As part of any order requiring VoIP Providers and ISPs to start collecting and reporting network outages, the Commission will have to conduct an analysis under the Regulatory Flexibility Act of 1980 (RFA).⁶⁷ This analysis will have to include an evaluation of the information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA).⁶⁸ The repeated assertions by the Commission that these requirements do not impose burdens on providers are simply untrue and will be roundly disputed by providers in any post-Order Office of Management and Budget (OMB) review. In 2004, providers had no experience with these rules. Today, after over six years experience with them, they can provide significant refutation of any claim that they are not burdensome.⁶⁹

Plus, the burdensomeness of these rules is not in any way offset by any alleged benefits to providers or consumers. The *NPRM* itself is proof. In an effort to make the case for

⁶⁶ Requiring notices and reports within 120 minutes or 72 hours unnecessarily burdens providers who should be focusing on resolving any customer affecting problem. These arbitrary time constraints do nothing for consumers and providers and little for the Commission. At best, because they are often honored in the breach, they provide a source of revenue for the US Treasury. *See* AT&T's August 2010 Comments, p. 4 n.18.

⁶⁷ *See* 5 U.S.C. § 601 *et seq.*

⁶⁸ *See* 44 U.S.C. § 101 *et seq.*

⁶⁹ The Commission itself has not undertaken any study to determine with reasonable accuracy the costs associated with its Part 4 reporting scheme. Any claims the Commission makes in this regard have no basis in fact.

extending the rules to VoIP Providers and ISPs, the Commission had pitifully few alleged examples of benefits to the overall improvement of networks. And with these examples, as noted above, the Commission could not show that the same few results could not have been achieved by a less intrusive and less burdensome reporting scheme.⁷⁰

3. *The Commission should make any information provided to it under any extension of the Part 4 rules to VoIP Providers and ISPs confidential.*

In the *NPRM*, the Commission seeks comments on “whether the outage information collected from broadband ISPs and interconnected VoIP service providers should also be treated as presumptively confidential.”⁷¹ Given that the nature of the data collected involves both confidential commercial information and information concerning facilities that are a part of the “Nation’s critical information infrastructure,” it is imperative that any information collected by the Commission, either under compulsion or on a voluntary basis, be treated as confidential. And the Commission should only be allowed to share such information with other Federal agencies if those agencies can guarantee that the information can be maintained on an equally confidential basis.

As for releasing aggregated information, the Commission should be careful that public dissemination of aggregated information does not inadvertently jeopardize the “Nation’s critical information infrastructure.” It may be one thing to provide information on the number of reports filed by reporting entities and another to provide any information on root causes. Any public dissemination of information concerning the root causes of network outages could facilitate attacks on those networks and undermine the efforts of the Commission to reinforce the reliability of those networks. Caution should be the byword in any use and dissemination of information collected under this regime.

⁷⁰ The Commission’s examples all included ways the networks were allegedly made more reliable by the use of “best practices.” Other than the 30-day Final report, none of the other reports arguably contribute to the development of best practices.

⁷¹ *NPRM*, para. 66.

D. CRITERIA PROPOSALS

Without waiving any objections or concerns stated above that AT&T has to the Commission's proposal to extend Part 4 rules to VoIP Providers and ISPs, AT&T submits the following threshold criteria recommendations for the Commission's considerations.

1. VoIP Providers

In proposing outage reporting requirements for VoIP Providers, the Commission seeks in large measure to provide the same level of oversight for their service as it provides now for the "traditional telephone service" that VoIP service is displacing.⁷² And, the Commission aims to bring VoIP Provider's reporting requirements "into line with existing E9-1-1 obligations."⁷³ With this in mind, the Commission should develop an outage reporting threshold that incorporates some of the elements of the existing wireline reporting standards and at the same time eliminates unrealistic reporting deadlines and unnecessary and duplicative reports.

Among other things, this means that, for VoIP Providers, there is no need to consider adopting "metrics used by the Internet Engineering Task Force (IETF)," which are primarily service quality in nature.⁷⁴ Briefly, the Commission should not consider as a reportable outage quality of service (QoS) standards, such as "increased latency" or "jitter." Such QoS standards are not now applied to wireline reporting, and VoIP Providers shouldn't be held to a higher standard. Moreover, as discussed in a little more detail below, many VoIP services ride over "best efforts" networks that do not carry QoS guarantees. It makes little to no sense to apply QoS standards to an outage reporting mechanism for such services. It also means that the Commission needn't consider what guidance, if any, Real-time Transport Control Protocol (RTCP) or round-trip and Session Initiation Protocol (SIP) Event Package for Voice Quality

⁷² *Id.*, para. 25.

⁷³ *Id.*, para. 25.

⁷⁴ *Id.*, para. 27.

provide.⁷⁵ Rather, the outage reporting threshold should to a large degree reflect the standard presently in place for traditional telephone service reporting.

Subject to the previously stated legal and other objections and issues discussed in these comments, AT&T proposes the following outage reporting standard for VoIP Providers:

All interconnected VoIP providers shall submit electronically a Final Report within 30 days of having experienced on any facilities that they own, operate, lease, or otherwise utilize, an outage of at least 30 minutes duration: (1) of a non-redundant VoIP network element; (2) that potentially isolates subscribers' service for at least 900,000 user minutes; or (3) potentially affects a 911 special facility (as defined in paragraph (e) of § 4.5).

This standard is appropriate for several reasons. First, it is consistent with what is presently used for traditional telephone service, which makes it both easier to apply operationally, as many providers are set up to provide similar reporting today, and competitively fairer, as one service is not held to a substantially higher standard than is another. Second, it comports with the Commission's stated aim of addressing outages that have the potential of impacting consumers' access to emergency services.⁷⁶ Third, it provides the Commission with real *outage* data as opposed to flooding the Commission with useless (i.e., non-consumer affecting) quality of service information.

2. Access ISPs

In the *NPRM*, the Commission proposes two different definitions for broadband Internet Access Service Providers (Access ISPs). One is based on Access ISPs that do not necessarily provide interconnected VoIP service; the other would "encompass providers of any service that the Commission finds to be providing a functional equivalent of" interconnected VoIP service.⁷⁷

⁷⁵ *Id.*, para. 27.

⁷⁶ The Commission is asserting ancillary jurisdiction based on the obligations it says are imposed on it by 47 U.S.C. § 615a-1, which pertains solely to the duty of each IP-enabled voice service provider to provide 9-1-1 service. Given the Commission's specific and narrow claim of ancillary jurisdiction, the standard should not apply beyond what is strictly necessary to address that concern.

⁷⁷ *NPRM*, para. 34.

Only one definition is needed and that definition places the emphasis where it belongs: on speed and on the transmission of data.

VoIP service by definition requires a broadband component—either provided by the VoIP service customer (as in the case of non-facilities-based VoIP service) or provided by the VoIP Provider (as in the case of facilities-based VoIP service). Broadband ISP access service already has a workable definition, which is: a minimum of an actual download speed of at least 4 Mbps and an actual upload speed of at least 1 Mbps.⁷⁸ By referencing this speed, it eliminates the need to clarify in the definition that the service must be “able to support interconnected VoIP service” as defined in the Commission’s E911 rules or the need to expressly exclude “dial-up Internet access service.”⁷⁹ Likewise, it eliminates any need to include verbiage that gives the false impression that Access ISPs provide a “communications service” and focus the attention where it belongs on the capability to transmit and receive data.

AT&T proposes that the Commission define an Access ISP as simply: “A provider of mass-market retail broadband service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all Internet endpoints at a minimum download speed of at least 4 Mbps and a minimum upload speed of at least 1 Mbps.”

Unlike wireline telephony service, broadband Internet access service is a “best efforts” service. The provider does not provide the customer with service quality guarantees. For the most part, and depending on the Access ISP service the customer buys, the provider advises that the customer can expect throughput or speeds normally to fall within a certain range. Providers don’t claim, for example, that every Internet browser session will be successful or even that a given percentage of such sessions will be successful. The absence of such guarantees allows the providers to offer customers an Access ISP service within the range of their pocketbooks. Presently, Access ISP providers do not track the metrics defined in the IETF standards and do

⁷⁸ See FEDERAL COMMUNICATIONS COMMISSION, NATIONAL BROADBAND PLAN: CONNECTING AMERICA, Chapter 8, at 135 (rel. Mar. 16, 2010).

⁷⁹ *NPRM*, para. 34.

not consider any alleged degradation of service based on them as a cause for analysis. As providers do not aim to provide guaranteed levels of service, the data produced from an outage reporting scheme dependent upon QoS standards could not produce “best practices” for them to adopt. Consequently, applying QoS standards to Access ISP service outage reporting would be pointless.

Like other outage reporting criteria, the standard for Access ISPs needs to be unambiguous and easy-to-apply and out to avoid imposing unrealistic reporting deadlines and unnecessary and duplicative reports. And, as in the case of the standard for VoIP Providers, there is no reason to deviate in large part from the standard already in existence for wireline services under Commission rule 4.9(f). Again, subject to its previously stated legal and other objections, AT&T proposes the following outage reporting criteria:

All [wireline/wireless] Access ISPs shall submit electronically a Final Report within 30 days of having experienced an outage of at least 30 minutes duration (1) of a non-redundant Internet Protocol switching element that they own, operate, lease, or otherwise utilize; or (2) that potentially isolates subscribers’ Internet connectivity for at least 900,000 user minutes.⁸⁰

This proposed standard has the same benefits as the standard given above for VoIP Providers—*i.e.*, it is less burdensome to apply operationally, is competitively neutral, and provides usable outage data.

3. Backbone ISPs

In the *NPRM*, the Commission seeks to impose outage reporting obligations on Backbone ISPs, which it defines as “one that provides long-haul transmission for one or more broadband Internet access service providers.”⁸¹ For its part, AT&T finds the reference to “long-haul” ambiguous and would prefer that the Commission clarify what, if any, limitations on reporting this modifier would impose on reporting entities. Additionally, as these networks are generally

⁸⁰ AT&T has deleted any reference to special facilities because AT&T and other providers do not typically provide “mass-market retail broadband service” to special facilities, such as PSAPS or airports or nuclear power plants or key government facilities. See definition of Access ISP above.

⁸¹ *NPRM*, para. 34.

“best efforts” transport networks, meaning that the providers do not guarantee explicit performance standards in the transportation of data across their networks, the Commission’s definition and outage reporting threshold criteria should reflect these realities. Subject to the clarification of the term “long-haul,” AT&T proposes changing the definition of Backbone ISP to “one that provides transport of data for one or more broadband Internet access service providers.”

In the *NPRM*, the Commission proposes its own set of threshold criteria under which Backbone ISPs would submit an outage report.⁸² AT&T finds these criteria too broad, too burdensome, and inconsistent with the way in which AT&T monitors its backbone network today. First, AT&T recommends that the Commission avoid use of the term “service degradation” because it gives the false impression that deviation from a mean would translate into inability to transport data in a useful manner. The Commission should simply refer to “outages” and set a level at which an outage is presumed.

Second, the Commission should use a bright-line rule that is easier to apply. For example, referring to “service degradation ... on any major facility” is too vague. Rather Backbone ISPs should not report unless there is an actual outage of a major facility, which includes redundant facilities. That is for example, there should be no reason to report the outage of a major facility like a single core router if there are sufficient duplicative routers to allow the backbone to function normally. This is the way these dynamic backbone networks are designed to work. Reporting on the outage of a major facility that has no real impact on the ability of the

⁸² A broadband backbone ISPs would submit an outage report “when it experiences an outage or service degradation for at least 30 minutes: (a) on any major facility (*e.g.*, PoP, Exchange Point, core router, root name server, ISP-operated DNS server, or DHCP server) that it owns, operates, leases, or otherwise utilizes; (b) potentially affecting generally-useful availability and connectivity for any Internet PoP-to-Internet PoP (PoP-to-PoP) pair for which they lease, own or operate at least one of the PoPs where the “loss of generally useful availability and connectivity” is defined as: (1) an average packet loss of one percent or greater; (2) average round-trip delay of 100 ms or greater; or (3) average jitter of 4 ms or greater with measurements taken in each of at least six consecutive five-minute intervals as measured from source to destination PoP.” *NPRM*, para. 49.

backbone to transport data would be a fruitless exercise and impose unnecessary make-work on providers.

Third, while the proposed criteria ask all providers to measure packet loss, latency, and jitter, these are considered QoS metrics and not necessarily indications of a potential outage. For its part, when AT&T does measure and report on packet loss and latency, it does so for the benefit of reporting on “service level agreements” for premium managed access enterprise—as opposed to “mass market”—customers, and not for “best efforts” service. In addition, AT&T only measures these metrics between representative Internet PoP-to-PoP city pairs and not all internet PoPs that it owns, because doing so would be unduly costly and would not provide any better view of the performance of its network.

Fourth, as with the measuring points, different providers take their measurements at different intervals. The Commission should not impose on Backbone ISPs a requirement to measure packet loss and latency at “six consecutive five-minute intervals.” At present, AT&T takes measurements every 15 minutes. Each individual measurement takes at least nine to ten minutes to process and report. Typically, when measuring for packet loss and latency, AT&T doesn’t take action unless a third such measurement indicates a persistent problem.

In order to avoid costly and unnecessary retooling of the way AT&T—and presumably other Backbone ISPs—measures packet loss and latency today, AT&T proposes alternative criteria below that eliminates references to PoP-to-PoP pairs and measuring packet loss and latency. In whatever standard that may ultimately be adopted—assuming the jurisdictional questions can be resolved—the Commission shouldn’t require a report until at least after the third measurement is taken and found to be a persistent problem requiring correction, which would be approximately three tests within a 90-minute period. As different providers may undertake such measurements more or less frequently and process those measurements more or less quickly, AT&T recommends that the Commission adopt AT&T’s proposal below or, at a

minimum, draft a more flexible standard into which providers can fit their existing measuring processes.⁸³ Rigidity here would be the foe of compliance.

Consequently, a re-draft of the Backbone ISP reporting criteria might look more like:

Backbone ISPs should submit a Final Report within 30 days of experiencing an outage for at least 30 minutes (1) of any non-redundant major facility (*i.e.*, PoP, Exchange Point, core router, root name server, ISP-operated DNS server, or DHCP server) that they own, operate, lease, or otherwise utilize; or (2) that potentially isolates subscribers' Internet connectivity for at least 900,000 user minutes.

III. CONCLUSION

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

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⁸³ The Commission might want to consider, for example, a period of 120 minutes to confirm by existing procedures that there is in fact a persistent problem that is worthy of reporting.