

**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)

To: The Commission

**REPLY COMMENTS OF
THE WIRELESS INTERNET SERVICE PROVIDERS ASSOCIATION**

The Wireless Internet Service Providers Association ("WISPA"), by counsel, hereby replies to certain of the Comments submitted in response to the Notice of Proposed Rulemaking ("*NPRM*") in the above-captioned proceeding.¹ First, WISPA agrees with those commenters that question the Commission's authority to extend outage reporting obligations to broadband Internet service providers ("ISPs") and interconnected VoIP providers. Second, even if the Commission has such authority, the record demonstrates overwhelming opposition to extension of the reporting requirements to such providers. For these reasons, the Commission should not adopt its proposed rules.

¹ *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 (rel. May 13, 2011) ("*NPRM*"). WISPA filed Comments in this proceeding. *See* Comments of WISPA, PS Docket No. 11-82, filed Aug. 8, 2011 ("WISPA Comments").

Discussion

I. THE COMMISSION LACKS AUTHORITY TO ADOPT RULES THAT WOULD EXTEND OUTAGE REPORTING REQUIREMENTS TO BROADBAND ISPs AND INTERCONNECTED VoIP PROVIDERS.

The Commission attempts to ground its authority to extend its outage reporting obligations on Section 615a-1 of the Communications Act of 1934, as amended.²

Notwithstanding this proposition, and perhaps illustrating the Commission's own reservations, the Commission suggests that there may be other sources of direct or ancillary authority, and seeks comment on other potential sources of statutory jurisdiction.³ The Commission also observed that many commenters responding to the preceding *2010 Public Notice* questioned the Commission's authority.⁴

Not surprisingly, several commenters renew their doubts about the Commission's authority to impose outage reporting obligations on broadband and interconnected VoIP providers. Verizon and Verizon Wireless provide a lengthy detailed analysis of each possible source of direct or ancillary authority for Commission regulation, and concludes that such authority does not exist.⁵ Taking a similar point of view, CTIA explains that “[t]he 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

² See *NPRM* at ¶¶ 67-69.

³ *Id.* at ¶ 72.

⁴ See *Public Notice*, “Public Safety and Homeland Security Bureau Seeks Comment on Whether the Commission's Rules concerning Disruptions to Communications Should Apply to Broadband Internet Service Providers and Interconnected Voice over Internet Protocol Service Providers,” ET Docket No. 04-35, WC Docket No. 05-271 and GN Docket Nos. 09-47, 09-51 and 09-137, DA 10-1245, rel. July 2, 2011 (the “*2010 Public Notice*”)

⁵ See Comments of Verizon and Verizon Wireless, PS Docket No. 11-82, filed Aug. 8, 2011, at 24-35.

networks.”⁶ The American Cable Association (“ACA”) states that “significant questions exist concerning the Commission’s authority to expand its outage reporting requirements as proposed in the NPRM, and that the better course of action is to resolve those questions before proceeding.”⁷ Likewise, the Telecommunications Industry Association urges the Commission to first resolve jurisdictional questions before considering whether to extend outage reporting requirements on entities not deemed to be providers of telecommunications.⁸ A consortium of Fixed Wireless Internet Service Providers concludes that the Commission lacks jurisdiction to impose on fixed wireless ISPs regulations to which Title II common carriers are subject.⁹

Only a few commenters – both state public service commissions – cling to the belief that the Commission has jurisdiction to impose outage reporting requirements on interconnected VoIP providers. Citing their own comments in an unrelated proceeding, the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (“Consumer Advocates”) argue that because the Commission has determined that interconnected VoIP traffic constitutes “telecommunications” traffic and the Commission previously imposed 9-1-1 obligations on them, the Commission has authority to impose outage reporting obligations on interconnected VoIP providers.¹⁰

⁶ Comments of CTIA – The Wireless Association, PS Docket No. 11-82, filed Aug. 8, 2011, at 14.

⁷ Comments of the American Cable Association (“ACA”), PS Docket No. 11-82, filed Aug. 8, 2011, at 4. ACA adds that the Commission has not resolved the issue of whether ISPs and other providers of IP-enabled services are subject to regulation under the Act. *Id.*

⁸ *See* Comments of the Telecommunications Industry Association, PS Docket No. 11-82, filed Aug. 8, 2011, at 2-4.

⁹ Comments of Fixed Wireless Internet Service Providers, PS Docket No. 11-82, filed Aug. 12, 2011.

¹⁰ *See* Comments of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (“Consumer Advocates”), PS Docket No. 11-82, filed Aug. 8, 2011, at 9-10. The Consumer Advocates make no attempt to argue that the Commission has authority to extend outage reporting obligations to broadband providers, which have never been determined to be telecommunications providers. Though it strains to find legal authority to impose outage reporting obligations on interconnected VoIP providers, even the Consumer Advocates must realize that there is no theory that could arguably require such obligations to be placed on broadband providers.

The Consumer Advocates acknowledge that interconnected VoIP providers have not been classified as “telecommunications carriers,” but dismiss this dispositive point as a mere inconvenience. The Massachusetts Department of Telecommunications and Cable (“MDTC”) argues that the Commission has “ancillary” jurisdiction to require outage reporting based on the Commission’s exercise of authority over interconnected VoIP providers – but not broadband ISPs – in other contexts.¹¹

As even the Commission itself understood in specifically seeking comment on the potential sources of its jurisdiction, statutory authority cannot be conceived from general statements and must undergo rigorous analysis.¹² The Commission’s reliance on ancillary authority to impose, say, Form 477 reporting obligations does not automatically establish precedent for the Commission to over-step its authority in a different context. As Verizon and other commenters make clear, the strained and generalized broad-brush arguments put forth by the Consumer Advocates and MDCT cannot withstand such scrutiny.¹³

Tellingly, these parties make no attempt to argue that the Commission has authority to extend outage reporting obligations to broadband providers, which have never been determined to be telecommunications providers. Though it strains to find legal authority to impose outage reporting obligations on interconnected VoIP providers,

¹¹ See MDCT Comments, PS Docket No. 11-82, filed Aug. 8, 2011, at 7-8.

¹² The Consumer Advocates state that “[t]he use of a particular technology, regardless of regulatory classification, should not give some carriers that use the public switched telephone network fewer obligations than others.” *Id.* at 10. WISPA notes that interconnected VoIP providers do not presently enjoy many of the same regulatory rights and privileges to which its Title II competitors are entitled, such as universal service subsidies under Section 253 of the Act and pole attachment access under Section 224 of the Act.

¹³ Other parties supporting extension of the outage reporting requirements, the New York State Public Service Commission, the Michigan Public Service Commission and PayPal, make no argument claiming that the Commission has jurisdiction; rather, they simply presume such authority, something the Commission, to its credit, has acknowledged it cannot do.

even the Consumer Advocates and MDCT must realize that there is no theory that could arguably require such obligations to be placed on broadband providers.

Based on its review of the record, WISPA agrees that the Commission lacks direct and ancillary authority to impose its proposed rules on interconnected VoIP providers, and the jurisdictional basis to impose reporting obligations on broadband ISPs is even more barren. Serious questions have been raised in both this docket and the *2010 Public Notice* proceeding. Accordingly, the Commission should terminate this proceeding without adopting the far-reaching rules proposed in the *NPRM*.

II. IF THE COMMISSION HAS AUTHORITY TO ADOPT ITS PROPOSED RULES, THE RECORD SHOWS OVERWHELMING OPPOSITION TO SUCH ACTION.

Rarely are there Commission proceedings that are as one-sided as this one is when it comes to opposing rules the Commission proposes. Of the forty or so Comments filed in this proceeding, only a handful supports the Commission's view. This should not have been surprising given that the Comments filed in response to the *2010 Public Notice* that preceded this rulemaking proceeding similarly voiced strong opposition to the Commission's notion of extending its outage reporting requirements. Having failed twice to develop a record suggesting that adopting the proposed rules would be within the Commission's authority and consistent with the public interest, the Commission should conclude this proceeding by announcing that it will not impose outage reporting obligations on broadband Internet service providers and interconnected VoIP providers. To do otherwise would violate principles of administrative procedure and sound rulemaking processes.

If for some reason – and there is none in the record – the Commission nevertheless adopts outage reporting rules, it should exempt small businesses that provide Internet or VoIP services. Citing the “substantial costs” of applying outage reporting requirements that would disproportionately disfavor small broadband providers,¹⁴ the Wireless Communications Association International, Inc. (“WCAI”) supports a reporting exemption for small ISPs.¹⁵ Small entities typically lack the technical and financial resources that would be necessary to comply with outage reporting regulations. In fact, the costs and burdens such requirements would impose on small companies could be so substantial that they would undermine their ability to provide service, especially in rural areas where deployment costs are already high.

¹⁴ Many other commenters cited the increase in administrative costs and burdens on broadband ISPs and interconnected VoIP providers if they were forced to comply with the Part 4 outage reporting obligations. *See, e.g.*, Comments of MegaPath, PS Docket No. 11-82, filed Aug. 8, 2011; Comments of the Voice on the Net Coalition, PS Docket No. 11-82, filed Aug. 8, 2011; Comments of the Alliance for Telecommunications Industry Solutions, PS Docket No. 11-82, filed Aug. 8, 2011.

¹⁵ *See* WCAI Notice of Oral Ex Parte Presentation and submission of Written Material, PS Docket No. 11-82, filed Sept. 22, 2011, Presentation at 7. The WCS Coalition urges that WCS and other similarly situated licensees be exempt from reporting until they have met build-out requirements. Comments of the WCS Coalition, PS Docket No. 11-82, filed Aug. 8, 2011.

Conclusion

For the foregoing reasons, the Commission should not adopt the proposed outage reporting rules proposed in the above-captioned *NPRM*.

Respectfully submitted,

**WIRELESS INTERNET SERVICE
PROVIDERS ASSOCIATION**

By: */s/ Elizabeth Bowles, President*
/s/ Jack Unger, Chair of FCC Committee

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