

**STATEMENT OF COMMISSIONER AJIT PAI,
CONCURRING IN PART AND DISSENTING IN PART**

Re: *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications, PS Docket No. 15-80, ET Docket No. 04-35, PS Docket No. 11-82, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration.*

A year ago, the Commission unanimously adopted a *Notice of Proposed Rulemaking* that sought to modernize and streamline our outage reporting rules. We sought comment on targeted reforms that would eliminate unnecessary reporting obligations while requiring companies—including broadband providers—to submit useful information about actual outages that impact consumers. I supported the *Notice* because updating these rules would advance the Commission's core public safety mission and would focus the private sector's attention on getting consumers back online rather than filing unnecessary paperwork.

But somewhere between the *Notice's* good intentions and the document before us, this proceeding got way off track. Rather than focusing on outages that actually impact consumers, the Commission mandates that companies file reports even when their networks are fully functioning and no consumer is affected. Rather than requesting targeted outage information that would make it easier for the FCC to identify trends and threats, it requires a flood of new reports that will only make this task more difficult. Rather than promoting public safety and lowering costs for consumers, the item simply asserts that we're improving public safety and in fact raises costs.

Examples abound. Take what the *Order* refers to as a "simplex event." For those lucky enough not to be steeped in the arcane world of wireline, a simplex event occurs when a circuit loses one of its many redundant pathways. Given the circuit's design, a simplex event has no impact on the consumer. The traffic carried by that circuit is automatically re-routed. And, as the redacted record evidence shows, a simplex event isn't a signal of things to come; it doesn't herald additional or cascading network failures that would impact a consumer. Moreover, in the 911 context, the FCC doesn't require *any* outage report when re-routing is available. But rather than harmonize our rules and eliminate the unnecessary simplex reporting obligation, the FCC doubles down on it. It expands the number of simplex events that trigger reporting obligations—a step that even the *Order* concedes will result in hundreds upon hundreds of new reports each year. This is paperwork with no purpose.

The *Further Notice of Proposed Rulemaking* dives down similar rabbit holes. On the wireless side, the Commission does not limit its proposal to cell towers that are down. Instead, it tentatively concludes that providers must file outage reports when their towers are fully functional and operating at capacity. It does not matter if there are no call failures. It does not matter if excess demand never materializes. And it certainly does not matter if the report diverts resources that could be used to identify and repair actual outages. The Commission proposes that providers must nonetheless report that these towers are "out." Tellingly, it places the word "out" in quotation marks throughout this section, which just highlights its refusal to focus on actual outages.

The *Further Notice's* approach to broadband is another prime example. Instead of focusing on actual outages, it concludes that broadband providers should track and report on numerous metrics selected by the FCC—packet loss, latency, and throughput, among potentially many others—metrics that may have nothing to do with an outage or consumers' ability to use their broadband service. The *Further Notice* even suggests that broadband providers will be responsible for providing reports about facilities that they do not own, operate, lease, or use. This is a marked departure, and a bizarre distraction, from the goals of our outage reporting regime.

Indeed, in 2012, under then-Chairman Genachowski, the Commission unanimously rejected going down this road. It declined to require reports on packet loss, latency, and other metrics that don't

necessarily affect consumers.¹ Instead, it concluded that the agency would focus on outages that result in a “complete loss of service or connectivity.”² The Commission unanimously found that doing so would be “simpler,” more consistent with our outage reporting regime, and balance the agency’s need for outage reports with the burdens that our rules impose on providers and, in turn, consumers.³ I asked my colleagues to recommit to this bipartisan approach—an approach calibrated to the consumer experience and one far more likely to give us useful, targeted information. Unfortunately, the majority refused to support that request, if they bothered to respond at all.

Another major deficiency in this document is its cost-benefit analysis—or rather, the lack thereof. A meaningful discussion of costs and benefits is nowhere to be found in today’s decision. Indeed, the FCC focuses almost exclusively on the nation’s largest broadband providers—AT&T, Comcast, and Verizon, for instance—and suggests that those corporations are large enough to bear the costs imposed by our rules, however steep they may be. That might be true, and perhaps this reflects the market structure the majority would like to see—fewer providers and far more regulation. But there is virtually no consideration given to the thousands of small and mid-size providers who are critical to competition in these markets. Small cable operators, cellular companies, fixed wireless competitors, and others lack the army of lawyers and regulatory compliance departments that their larger competitors employ. Many of them have told the FCC that this top-heavy approach to outage reporting will siphon resources away from broadband deployment, slow genuine outage repair, and provide no benefit to consumers.⁴

And there is reason to believe that the regulatory costs will be quite high. At least one provider submitted a detailed, quantitative analysis of the costs associated with our reporting regime. While the FCC requires three separate reports for every outage or event, the analysis shows that it takes about a dozen hours to prepare and file just a single one of those reports. That’s nearly six times the number of hours the FCC includes in its cost estimate. So how does the agency respond to this data? How does it modify its cost-benefit analysis? It doesn’t. It simply asserts “we are not convinced that twelve hours are necessary.” Why is that exactly? What is the basis for this assertion? The agency offers no insight.

In the end, of course, none of this matters. This proceeding is not about actual outages that impact actual consumers. Nor is it about gathering targeted and useful information. It is about regulation for its own sake.

That’s a shame. There are concrete steps that we can and should be taking in this proceeding and in others, like the contraband cellphone docket, to promote public safety. Because we do not focus here on actual outages that impact consumers, I dissent from the bulk of today’s decision.

¹ See *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*, Report and Order, 27 FCC Rcd 2650, 2686, para. 90 (2012).

² *Id.*

³ *Id.*

⁴ See, e.g., Letter from Jill Canfield, Vice President of Legal & Industry, NTCA—The Rural Broadband Association, to Marlene H. Dortch, Secretary, FCC, at 1 (May 16, 2016) (stating that the FCC’s proposals “would significantly increase the reporting burden on small carriers and consequently have a corresponding negative affect on their rural consumers”), available at <http://go.usa.gov/cJsNB>; Reply Comments of ITTA – The Voice of Mid-Size Communications Companies at 12 (July 31, 2015) (urging the FCC to “refrain from adopting unnecessary proposals that would increase burdens on providers without producing any tangible public safety benefit”), available at <http://go.usa.gov/cJsNY>; Letter from Rebecca Murphy Thompson, General Counsel, Competitive Carrier Association, to Marlene H. Dortch, Secretary, FCC, at 2 (July 16, 2015) (stating that the “benefits associated with the proposed rules will not ‘outweigh the costs of crippling carrier resources available to actually repair and restore communications facilities—especially if less onerous means of obtaining this information are available’”), available at <http://go.usa.gov/cJsNe>.

I concur, however, with two parts of the *Order*. First, I agree that we should eliminate the obsolete DS3-based reporting metric. And second, the *Order* now provides a more reasonable transition period for providers to comply with the new reporting requirements—a change that both Commissioner O’Rielly and I urged our colleagues to make. I only wish that we could have found more common ground, for common ground there was to be found.