STATEMENT OF
COMMISSIONER MICHAEL O'RIELLY

Re: *Implementing Kari's Lay and Section 506 of RAY BAUM'S Act, PS Docket 18-261; Inquiry Concerning 911 Access, Routing, and Location in Enterprise Communications Systems, PS Docket No. 17-239; Amending the Definition of Interconnected VoIP Service in Section 9.3 of the Commission's Rules, GN Docket No. 11-117*.

Today, the Commission adopts an item implementing two different, but related, statutory provisions in Kari's Law and RAY BAUM'S Act, both enacted by Congress in 2018. When Congress speaks and provides direction to the Commission, it is our obligation to implement its will. For this reason, I will approve today's item.

There are, however, some issues with the item that I must note. While a good part of the Kari's Law section generally appears to implement the statute as written, there is one significant part that doesn't seem to match up. Specifically, the law's 911 direct dialing and notification requirements apply to MLTS, which is defined, in pertinent part, as "a system comprised of common control units, telephone sets, control hardware and software and adjunct systems, including network and premises based systems, such as Centrex and VoIP, as well as PBX, Hybrid, and Key Telephone Systems…."[1] The Commission, however, expands that definition to include cloud-based IP technology and over-the-top applications that are not contemplated in the statutory definition. And, I think that is problematic, even if I am going to support the entirety of the item.

The Commission appears to think that, because the definition of MLTS from 2012 refers to systems such as VoIP, which was a newer technology at the time, Congress meant to capture all future technologies that can be used for MLTS without explicitly saying so. It is as if the Commission believes that Congress isn't capable of adding or is unfamiliar with over-the-top apps and the cloud. To add to this, the item justifies this expansion by stating that "there is no language in the statute specifically excluding cloud-based IP technology and over-the-top applications from the definition of MLTS." I am at a loss for words to think that an agency can read any language it wants into a statute if not specifically banned, and I am surprised that my colleagues are being so whimsical about Congressional intent. Congress needs to be on notice that their statutory language must be exact, to the point of explicitly noting what technologies are not included and possibly even technologies not used or in existence at the time, or else an agency has carte blanche to do whatever it wants in the future.

The Commission also flat out ignores that Congress clearly knows how to broadly apply a statute to myriad technologies, because the same, exact Congress, in section 506 of the RAY BAUM'S Act, directed the Commission to look at whether dispatchable location could be transmitted with a 911 call "regardless of the technological platform used."[2] Congress could have easily done the same thing in Kari's Law, but it didn't. Maybe it meant to or maybe it didn't but just saying that the expanded definition is not banned by law is the worst type of agency arrogance I can imagine.

In particular, the Commission unilaterally decides to include two other technologies, which then leads to an exhaustive discussion of all the possible permutations of who is responsible and liable for compliance as a manager, operator, installer, manufacturer, or owner of an such a system. In the end, the party responsible will be determined on a case-by-case basis. Shockingly, this is likely to lead to inconsistent enforcement actions and enhance regulatory uncertainty. That's good news for contract attorneys to draft creative indemnification clauses and descriptions of what tasks are performed by which

[1] 47 U.S.C. § 1471(2).

[2] Repack Airwaves Yielding Better Access for Users of Modern Services Act of 2018, Pub. L. No. 115-141, §506, 132 Stat. 348, 1095.

parties. Not to mention, as I raised in my statement to the 2018 Notice, I am not even sure how we can enforce this rule when apps and cloud-based systems can be developed, updated and distributed from anywhere in the world. And, of course, there is no real cost-benefit analysis of how much these additions will cost industry.

As for the RAY BAUM'S Act section, Congress told the Commission to broadly "consider" dispatchable location for 911 calls.[3] Therefore, the question is not whether we can, but, instead, whether we should regulate. The Commission has recognized that dispatchable location is the gold standard for 911 location accuracy and has been headed that direction in the context of wireless services, which make up a large percentage of 911 calls and continues to increase. I strongly support providing first responders with the best location information possible, but recognize that in many circumstances dispatchable location and floor information are not technically feasible today.

My first concern is that the Commission requires different levels of location accuracy depending upon technology. For example, there is fixed MLTS, non-fixed on-premises MLTS, non-fixed off-premises MLTS, and non-fixed interconnected VoIP. The Commission applies a more flexible location standard for non-fixed, off-premises MLTS location accuracy than non-fixed VoIP, even though industry participants argue that determining an approximate in-building location, including the floor level, is challenging in both instances and the more flexible standard should be applied to both. I am not sure if we got this right, and it is possible that the Commission may have to reconsider this issue in the future.

Further, there are submissions in the record that discuss the possible unintended consequences of requiring the delivery of outbound-only interconnected VoIP calls to 911. When such calls have connected to emergency call centers, the calls have been of very short duration, indicating possible misdials or nefarious activity. Concerns have been raised that this could create a situation similar to non-service initialized, or NSI, phones, which public safety has recognized are used in a high percentage of fraudulent 911 calls. Instead of dismissing these concerns, the Commission should have considered this further, because, as we have learned with NSI phones, once you implement these rules, it is hard to undue them without concerns being raise about the one legitimate call that was could be missed and the legal liability that can result if it is not connected to a call center.

Finally, the cost-benefit analysis is lacking. It primarily discusses what we stated in the Notice, which is mostly based on comparing the potential cost against the benefit of a hypothetical number of lives being saved based on the flawed "Value of a Statistical Life" metric. Now that the Office of Economic and Analysis is up and running, we must do better.

In the end, the bulk of the item should enhance the safety of the public when it uses MLTS. That should be lauded and applauded, even if some elements of it should have been resolved differently.

[3] *Id*.