Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

In the Matter of Information Collection Regarding Emergency Backup Power for Communications Assets as set forth in the Commission's Rules (47 C.F.R. § 12.2)	))))))))	73 Fed. Reg. 52354

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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CTIA – The Wireless Association® ("CTIA")[1] hereby submits these comments on the information collection requirements set forth in the Federal Communications Commission's ("FCC" or "Commission") *Order on Reconsideration* in the matter of *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*.[2] CTIA respectfully requests that the Office of Management and Budget ("OMB") reject the emergency back-up power reporting requirements in the *Katrina Order on Reconsideration* as inconsistent with the Paperwork Reduction Act.[3] CTIA suggests that OMB and the FCC work together to ensure that the above-captioned reporting requirements do not impose unrealistic burdens on wireless carriers and consider alternate approaches that benefit the public through

[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Services, PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Order on Reconsideration, 22 FCC Rcd 18013 (2007) ("*Katrina Order on Reconsideration*").

[3] 44 U.S.C. §§ 3501 *et seq.*

less restrictive means.

I. INTRODUCTION AND BACKGROUND

In the *Katrina Order on Reconsideration*, the FCC required local exchange carriers ("LECs") and Commercial Mobile Radio Service ("CMRS") providers within six months of the effectiveness of the rule to file reports with the Commission that identify the following information:

1. An inventory listing of each asset that was designed to comply with the backup power mandate;

2. An inventory listing of each asset where compliance is precluded due to risk to safety or life or health;

3. An inventory listing of each asset where compliance is precluded by private legal obligation or agreement;

4. An inventory listing of each asset where compliance is precluded by Federal, state, tribal or local law; and

5. An inventory listing of each asset designed with less than the required emergency backup power capacity and that is not otherwise precluded from compliance for one of the three reasons identified above.[4]

These reports also must include "a description of the facts supporting the basis of the LEC's or CMRS provider's claim of preclusion from compliance . . . [, which, in turn, must include] the citation(s) to the relevant laws[,] . . . the relevant terms of the obligation or agreement and the dates on which the relevant terms of the agreement became effective and are scheduled to expire[, and/or] . . . a description of the particular public safety risk and sufficient facts to demonstrate substantial risk of harm."[5]

For those sites not falling into one of the narrow exceptions, CMRS providers have six

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4 *Katrina Order on Reconsideration* at 18025; 47 C.F.R. § 12.2 (2007).

5 *Id.*

additional months to achieve full compliance with the back-up power rule.[6] CMRS providers may achieve compliance either by modifying cell sites to meet the eight-hour emergency back-up power requirement or by filing a "certified emergency backup power compliance plan" that describes "how, in the event of a commercial power failure, the LEC or CMRS provider intends to provide [eight hours of] emergency backup power to 100 percent of the area covered by any non-compliant asset."[7] Where compliance is not possible, CMRS providers may be forced to decommission cell sites while seeking to "find other, more suitable, locations for their assets."[8]

On November 15, 2007, the FCC sought comment on the information collection requirements contained in the back-up power rule.[9] On November 23, 2007, CTIA and Sprint Nextel filed timely Petitions for Review of the back-up power rule in the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit"). On December 19, 2007, Sprint Nextel filed a Motion for Stay of the rule. The D.C. Circuit granted the Motion for Stay on February 28, 2008, staying the effective date of the emergency back-up power rule pending its disposition of the pending Petitions for Review.[10] On July 8, 2008, however, the D.C. Circuit issued an opinion stating that, "[b]ecause none of the backup power rule's requirements takes effect until OMB approves the information collections, the case is unripe and we shall hold it in

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6 *Id*.

7 *Id*.

8 *Id*. at 18026.

9 *See* Information Collection Regarding Emergency Backup Power for Communications Assets as set forth in the Commission's Rules (47 C.F.R. § 12.2), 72 Fed. Reg. 64,221 (Nov. 15, 2007). In this Notice, the Commission initially estimated that it would take carriers an average of 70.32 hours to complete the inventory reports and certified compliance plans, for 6,540 hours total on *all* respondents at no additional cost. *See id*.

10 *CTIA – The Wireless Assoc. v. Federal Communications Comm'n*, No. 07-1475, Order (D.C. Cir. Feb. 28, 2008).

abeyance pending OMB's decision."[11] On September 9, 2008, the Commission sought comment on the information collection requirements, as detailed in its Information Collection Request Submission and Supporting Statement ("FCC Supporting Statement") attempting to justify the underlying time and cost estimates associated with carriers' compliance with the back-up power rule.[12] The September 9th notice estimates that 73 respondents will file initial inventory reports at six months[13] and 20 respondents will file certified plan reports at 12 months.[14] The Commission further estimates that preparation and submission of these reports will take an average 96 hours per inventory report and 192 hours per certified plan report, resulting in an overall total time estimate for report preparation of 10,848 hours and that "each respondent would spend $312,600."[15]

As described in detail below, the back-up power rule as adopted by the Commission hinders this proceeding's goal of enhancing the redundancy, reliability and resiliency of critical public and private emergency communications. Further, the FCC grossly underestimated the burden this reporting requirement will impose on CMRS providers. The reporting requirement will impose both significant financial and personnel resource burdens on the wireless industry and the Commission. What's more, less burdensome alternatives are available that would still meet the FCC's objectives in this proceeding. The FCC also failed to adhere to the procedural requirements of the Paperwork Reduction Act in adopting these reporting requirements and acted

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11 *CTIA – The Wireless Assoc. v. Federal Communications Comm'n*, No. 07-1475, slip op. at 4 (D.C. Cir. Jul. 8, 2008).

12 *See* Information Collection Regarding Emergency Backup Power for Communications Assets as set forth in the Commission's Rules (47 C.F.R. § 12.2), 73 Fed. Reg. 52,354 (Sept. 9, 2008).

13 47 C.F.R. § 12.2(c)(1)-(3).

14 47 C.F.R. § 12.2(c)(4).

15 FCC Supporting Statement at ¶ 12.

without adequate statutory authority in adopting the back-up power rule under review. For these reasons, CTIA seeks FCC and OMB action to address the Paperwork Reduction Act analysis in the *Katrina Order on Reconsideration* and ensure that the reporting requirements under Section 12.2 of the Commission's rules do not impose unworkable burdens on wireless providers.

II. THE BACK-UP POWER RULE UNDERMINES, RATHER THAN ADVANCES, THE FCC'S OBJECTIVE OF EMERGENCY PREPAREDNESS.

The back-up power rule does not reasonably further, but rather undermines, the goal of emergency preparedness. The FCC itself has acknowledged that wireless carriers may be forced to find new locations for cell sites, thus temporarily decommissioning those sites, where compliance with the back-up power rule is not possible.[16] Yet decommissioning cell sites, even temporarily, could disrupt important public and private emergency communications and jeopardize networks that are used "to disseminate reliable emergency information to the public," a function regarded by communications experts as "critical."[17] By forcing CMRS providers to decommission cell sites that cannot be made compliant, the back-up power rule would undercut its own stated emergency preparedness goals. The FCC's failure to craft its rule to meet this challenge is nothing short of capricious. Further, in order to comply with the Commission's rules, carriers would not be able to move assets around in the event of a disaster – as they did recently during hurricanes Gustav and Ike – because they would be out of compliance in the areas from where the assets were moved. This outcome is counter to the goal of improving safety in areas impacted by disasters.

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16 *Katrina Order on Reconsideration* at 18026.

17 *Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, Report and Recommendations to the Federal Communications Commission, June 12, 2006 at ii.

More fundamentally, imposing an "across-the-board" back-up power rule on all cell cites so lacks a "rational connection" with the "facts found" that it is simply illogical.[18] CMRS providers have undertaken extensive voluntary efforts to protect their communications networks. Among other things, CMRS providers have identified the most important links in their networks for the support of critical communications and currently protect them not only with adequate power but by, for example, "hardening" them from wind or pre-positioning additional equipment, *e.g.*, portable generators, in advance of a storm. CMRS providers also presently employ effective solutions to power outages that do not require the installation of permanent power sources, such as mobile cell sites on wheels ("COWs"), cell sites on light trucks ("COLTS"), and satellite cell sites on light trucks ("SatCOLTS"). Moreover, carriers design emergency plans to fit the particular emergency and unique risks in different parts of the country.

A key principle in understanding wireless network deployment and operation is that not all cell sites are equal in regards to their importance to network communications. Some may be located at essential "hub" locations, while others are merely "fill-in" capacity sites of much lesser operational significance. Moreover, different areas of the country face different types of risks. While hurricanes are a particularly acute problem in Florida, that is not true in Arizona; whereas California is susceptible to earthquakes, North Dakota is not; and highly populated urban areas like New York City and Washington D.C. may face special risks of terrorism not present in other parts of the country. By eliminating CMRS providers' flexibility to prioritize sites based on factors such as the degree of vulnerability to outages and relative importance in an emergency (*e.g.*, evacuation routes, hospitals, evacuation centers, and the hardest hit areas), the FCC's one-size-fits-all back-up power rule actually undermines public safety instead of

[18] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

increasing it.[19] Indeed, many problems other than a lack of back-up power caused network interruptions in the affected areas in the wake of Hurricane Katrina. Eight hours of on-site back-up power is of little use in disasters when the wireline telephone network facilities carriers use to connect base stations to their networks are disrupted and where communications workers are prevented from entering an area for restoration work. Accordingly, OMB should not approve the information collection requirement underlying this rule, as it would not further the "proper performance of the functions of the agency, including that the information has practical utility."[20]

III. THE RULE'S REPORTING REQUIREMENT WILL IMPOSE SIGNIFICANT BURDENS ON THE WIRELESS INDUSTRY AND HAVE LITTLE, IF ANY, "PRACTICAL UTILITY" FOR THE FCC.

A. The FCC's New Reporting Requirement Will Impose Substantial, Unanticipated Burdens on Wireless Carriers.

Currently, there are well over 200,000 towers and cell sites throughout the country. When one considers the multiple questions asked by the Commission regarding each site, as well as the Commission's request for supporting data, it is quite clear that the amount of time needed for carrier compliance will be significant. The FCC, however, estimates that this requirement will impose a burden of only 10,848 total hours on *all* respondents.[21] The fact remains that even this revised time estimate is wholly unrealistic. This estimate would allow respondents to spend a maximum of 3 ¼ minutes on each tower and/or cell site to comply with this reporting

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19 The validity of the FCC's back-up power rule was cast further in doubt by the February 28, 2008 Order by the D.C. Circuit granting Sprint Nextel's Stay Motion. *See CTIA – The Wireless Assoc. v. Federal Communications Comm'n*, No. 07-1475, Order (D.C. Cir. Feb. 28, 2008) (granting a stay of the rule after weighing the likelihood of success on the merits, including the FCC's failure to consider possible alternatives, and the equities).

20 44 U.S.C. § 3506(c)(3)(A)

21 *See* FCC Supporting Statement at ¶ 12.

requirement – this is a mere 81 seconds longer than the allotted time per asset under the Commission's previous estimate. And this estimate assumes that towers and cell sites are the only assets that must be reported, which is incorrect.[22] Thus, carriers would be allowed even less time to meet this requirement on an asset-by-asset basis.

The implausibility of the Commission's burden estimate is even more apparent when one considers its estimated time for each response. Mid-sized and larger carriers may utilize between 10,000 and 50,000 towers (and in certain cases, even more). The FCC, however, estimates that each LEC or CMRS provider will be required to spend 96 hours on average to comply with this initial inventory reporting requirement. Applying this estimate, mid-sized and large carriers theoretically would have between seven (7) and 35 seconds to complete the reporting requirement for each tower utilized – an amount of time that is flatly insufficient. Clearly, it will take carriers much more time to meet this requirement than the FCC's estimate allows. In fact, given the number of facilities subject to this rule, some nationwide wireless carriers estimate they would have less than six (6) seconds to nine (9) seconds per site if the Commission's 96 hour figure were accurate.

Moreover, carriers' actual time estimates for assessing the scope of the Commission's reporting requirements total in the *tens of thousands of man-hours* per carrier to complete. One national carrier, for example, previously estimated that spending a mere five minutes on average per asset (a conservative estimate) would take approximately 14,000 hours to complete the information collection requirement.[23] One regional wireless carrier with more than 5,000 sites anticipates more than 2,850 hours to conduct the initial investigation and preliminary analysis –

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[22] The Commission has stated that the reporting requirement also applies to distributed antenna systems ("DAS"), as well as assets such as repeater sites, micro- and pico-cells, and other pole structures. *See Katrina Order on Reconsideration* at 18030-31.

[23] *See* PRA Comments of AT&T at 4 (filed Jan. 14, 2008).

not the development and submission of the actual reports that the FCC assumes can occur within the 96 hours it has allotted!

To comply with this new reporting requirement, CMRS providers must perform a number of time-consuming and expensive activities. For example, wireless providers must perform site surveys of each cell site to determine compliance. These initial site surveys must take place just to analyze the scope of work to be done. Wireless providers then must determine whether a cell site is exempt from the rule. To do so, wireless providers in many cases must hire real estate attorneys and specialists in local or municipal regulation to analyze relevant laws, regulations, and contracts to determine whether particular sites are exempt. Once this initial analysis is complete, wireless providers and their attorneys and consultants must draft the required listings and the necessary justification for why specific sites are exempt. This clear, objective need to engage these outside attorneys and consultants to comply with the reporting requirement contradicts the FCC's unsupported claim that respondents will have no need to engage "outside services."[24] These activities will require significant financial and time investments by respondents – much more than the time allotted by the Commission for each location.

In order to claim a minimal time burden on carriers, the FCC erroneously assumes that the information required for the reports "consolidates information carriers have already gathered through the normal course of business, including through efforts to comply with backup power requirements that do not involve an information collection"[25] and "much of the information that [it] seek[s] is of the type that the carriers will routinely have as part of their customary preparation for disruptions to commercial power supply …."[26] Carriers do not generally collect

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24 FCC Supporting Statement at ¶ 13.

25 *Id*. at ¶ 8.

26 *Id*. at ¶ 12.

this type of information. By adopting this perspective, the FCC is attempting to exclude from its estimate the time and expense "that would be incurred in the normal course of business."[27] But Section 1320.3(b)(2) of OMB's regulations provides that the FCC may only exclude this time and expense from the reporting burden "if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary."[28] The FCC has made no such demonstration. Carriers do not already as a "usual and customary practice" inspect, identify, collect, analyze and submit detailed information for all assets concerning: weight and space limitations affecting placement of additional back-up power equipment; public safety issues presented by the installation of back-up power; the ability to configure a non-compliant site to support the required eight hours back-up power; federal, state, local and tribal laws that may impact installation of back-up power; whether lease agreements permit the installation of back-up power; or detailed asset-by-asset compliance plans.

Even where carriers maintain documents and databases tracking back-up power at cell sites, such data was prepared for internal tracking, rather than for regulatory certification. As a general matter, this internal tracking information does not reach the level of granularity required for compliance with the back-up power rule. For example, a carrier database that catalogs effective and expiration dates of site lease agreements would not inform whether additional space is available on-site to accommodate 3,000 – 5,000 pounds of back-up power equipment, or whether the particular type of equipment (*e.g.*, a fuel-powered generator with sufficient fuel storage for eight hours of operation) may be prohibited under the terms of the agreement. Additional fact-finding would be necessary in such instances.

The Commission also grossly underestimated the substantial cost burden on carrier

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27 5 C.F.R. § 1320.3(b)(2).

28 *Id.*

resources. The FCC estimates the 10,848 hours total time burden on respondents at a total cost of $312,600 for "each respondent,"[29] which calculates to a mere $1.56 per site! The FCC indicates that this is the cost for "each respondent" but, using the agency's own math, this appears to be the total cost for all respondents. Utilizing the FCC's estimate of 93 respondents filing the inventory reports and compliance plan reports, the actual cost averages a mere $3,361 for "each respondent." In light of the substantial time and effort carriers would have to spend to inspect, identify, collect, analyze and submit detailed information for all assets, combined with the need to engage outside attorneys and consultants, this estimate is wholly inadequate and cannot withstand even cursory scrutiny.

In addition to these quantifiable burdens, the reporting requirement will inadvertently burden other provider activities that benefit the public. For example, the network engineers responsible for overseeing and/or coordinating the site analyses and reports are also responsible for upgrading providers' networks, resolving interference concerns, and managing the networks' communications. As a result of the Commission's back-up power reporting requirement, these network engineers may be forced to divert attention from these important tasks to overseeing and/or compiling reports, which may limit carriers' ability to address other issues. Alternatively, wireless carriers may be forced to hire additional personnel and outside consultants to meet all of these obligations. Accordingly, these regulations do not come without a cost to the consumer.

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[29] FCC Supporting Statement at ¶ 12 ("**Total Estimated Cost to Respondents of Burden Hours for Information Collection:** It is estimated that each respondent would spend $312,600. This estimate is based on the assumptions that the 73 respondents file section 12.2(c)(1)-(3) inventory reports and 20 respondents file section 12.2(c)(4) certified plan reports, using 96 hours per inventory report and 192 hours per certified plan report. This results in an overall time estimate for report preparation of 10,848 hours annually.").

B. The New Information Collection Will Impose Significant Burdens on the FCC and Have Little, If Any, Practical Utility.

The back-up power rule's reporting requirement will likely result in an exorbitant amount of data and analysis that must be submitted to and reviewed by the FCC, imposing not only a significant burden on the reporting entities but also on the FCC. As a result of this information collection, the Commission will receive a minimum of 5,000 pages of cell site lists.[30] In addition, the Commission could receive between five and ten pages of paperwork per exempt cell site.[31] Ultimately, the reporting requirement could result in over one million pages of paperwork for the FCC to review.

The FCC's information collection requirements are not "necessary for the proper performance of the functions of the agency" and will have no "practical utility" under Section 3506(c)(3)(A) of the Paperwork Reduction Act ("PRA") and Section 1320.5(d)(1)(iii) of OMB's regulations,[32] as it is clear that the FCC does not have the resources to adequately review this deluge of paperwork. Not only is the FCC's allocation of merely one attorney and one engineer working 25% of time grossly inadequate, it demonstrates the FCC has no intention of actually reviewing these carrier reports.[33] Before imposing this burden on wireless providers, the FCC must take steps to ensure that it is capable of performing this review by ensuring that it has

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30 This calculation presumes 209,900 cell sites nationwide and 40 cell sites per page.

31 As detailed above, the reports require not only an assessment of which assets comply with the rule, but a description of the facts with legal analysis and citations to relevant legal authority for each cell site that does not comply and is exempt under one of the rules exceptions. For assets that do not comply, providers must also file certified back-up power compliance plans with the Commission. In addition, all reports must include sworn affidavits or declarations. 47 C.F.R. § 12.2(c) as amended by *Katrina Order on Reconsideration* (2007).

32 44 U.S.C. § 3506(c)(3)(A); 5 C.F.R. § 1320.5(d)(1)(iii).

33 FCC Supporting Statement at ¶ 14. Accordingly, CTIA submits that the FCC's "Total Cost Estimate to the Federal Government" of $79,680.12 is flawed and significantly underestimated.

adequate staffing, funding, and time to meaningfully review these reports. The FCC's own analysis reveals that it does not.

In sum, the Commission appears to have grossly miscalculated the time and resource burden that the emergency back-up power reporting requirement will have on wireless carriers and the agency itself.

IV. THERE ARE LESS BURDENSOME MEANS OF MEETING THE FCC'S OBJECTIVES.

The Commission can collect information to ensure adequate back-up power for communications infrastructure through less burdensome means. Specifically, the FCC should not require respondents to submit a list of all assets including those that comply.[34] The requirement to provide information about individual base sites is inconsistent with the long-held standards for both cellular and Personal Communications Services ("PCS"). The FCC has compelled cellular licensees to provide information on base station sites only when the information effectively defines the market service area; the FCC found that other base station information is unnecessary.[35] The Commission has never required information about individual PCS base station sites and does not even accept such information.[36] These reporting requirements are supposed to inform the Commission as to which assets do not comply. Therefore, a list of compliant assets is superfluous information that the Commission should not need.

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[34] 47 C.F.R. § 12.2(c)(1)(i).

[35] *Revision of Part 22 of the Commission's Rules Governing the Public Mobile Servs.*, Report and Order, 9 FCC Rcd 6513 at ¶¶ 22, 25 (1994) (removing the requirement that licensees notify the Commission when they make "permissive" minor modifications to their stations or add new "internal" transmitters to existing systems because the notifications are unnecessary).

[36] 47 C.F.R. § 24.11(b) ("Applications for individual sites are not required and will not be accepted.").

The FCC also could reduce this unnecessary burden by allowing respondents to maintain their own records justifying the exemptions. Each exemption will require several pages of paperwork including legal analyses and copies of local laws, regulations, leases, and other contracts that might be part of the exemption. Rather than flood the Commission with paper that it will not be able to review meaningfully, wireless providers should be allowed to maintain their own records.[37] In the event of a dispute over a particular asset, these records could be provided to the Commission.

V. THE FCC FAILED TO ADHERE TO THE PROCEDURAL REQUIREMENTS OF THE PAPERWORK REDUCTION ACT.

The FCC failed to adhere to the procedural requirements of the PRA and, in doing so, disregarded its obligation to give the public and OMB detailed information concerning the back-up power reporting requirement before its adoption. First, the FCC improperly invoked 44 U.S.C. § 3507(d) in submitting to OMB the new information collection requirements in its *Katrina Order on Reconsideration*.[38] Section 3507(d) applies only when "an agency publishes a notice of proposed rulemaking and requests public comments."[39] The reporting requirements associated with the emergency back-up power rule, however, are *final* rules issued in its *Katrina Order on Reconsideration*, not *proposed* rules laid out in a Notice of Proposed Rulemaking.[40] Lack of OMB approval does not render a rule non-final.[41] The PRA anticipates situations like

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37 CTIA notes that the Commission never considered less burdensome requirements such as carrier logs or inventory lists.

38 *Katrina Order on Reconsideration* at 18032.

39 44 U.S.C. § 3507(d)(5). The language in other subparts of § 3507(d) show that the section applies only to proposed rules, *see* § 3507(d)(1) ("For any proposed collection of information contained in a proposed rule…."); § 3507(d)(3) (referring to the time period after the "notice of proposed rulemaking.").

40 *See* 47 C.F.R. § 12.2.

41 *See Career College Assoc. v. Riley*, 74 F.3d 1265, 1269 (D.C. Cir. 1996).

the present where an agency seeks approval of an information collection that is not contained in a proposed rule in Section 3507(c).[42] Thus, the FCC invoked an inapplicable section of the PRA – it should have relied on Section 3507(c) rather than Section 3507(d).

Second, the Commission did not seek comment on its new information collection before adopting the final rule, as required by the statute. The PRA requires an agency to meet the requirements in Section 3507(a) "*in advance* of the adoption or revision of the collection of information."[43] The FCC did not seek comment on its information collection prior to adopting the reporting requirement. Rather, the reporting requirement in 47 C.F.R. § 12.2 was adopted in its *Katrina Order on Reconsideration* on October 2, 2007. The agency did not seek comment on this reporting requirement in the Federal Register as required by Section 3507(a)(1)(d) until November 15, 2007. Therefore, the Commission failed to act within the requirements of the PRA because it (1) invoked Section 3507(d), which applies only to proposed rulemakings, not final rules as adopted in the *Katrina Order on Reconsideration*, and (2) did not seek comment on the reporting requirement *in advance* of adopting the requirement. Thus, the FCC must refile with OMB under Section 3507(c) to cure this defect.

VI. THE COMMISSION LACKS AUTHORITY TO IMPOSE THE BACK-UP POWER RULE BASED ON PURPORTED "ANCILLARY AUTHORITY" CONFERRED BY SECTION 1 OF THE COMMUNICATIONS ACT.

OMB should not approve the information collection because it is clear the FCC does not have authority to promulgate the back-up power rule since Congress has not authorized the Commission to expand its regulatory scope beyond telecommunications services. The

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[42] 44 U.S.C. § 3507(c) ("For any proposed information collection not contained in a proposed rule…."). CTIA is challenging the FCC's lack of notice in its pending appeal of the back-up power rule, 47 C.F.R. § 12.2. *See CTIA – The Wireless Association® v. FCC*, Case No. 07-1475 (D.C. Cir., docketed Nov. 23, 2007).

[43] 44 U.S.C. § 3507(a) (emphasis added).

Commission bases its authority to impose the far-reaching back-up power rule on purported "ancillary authority" conferred by Section 1 of the Communications Act.[44] Ancillary authority, however, exists only when: "(1) the Commission's general jurisdictional grant in Title I covers the subject matter of the regulations; and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[45] The back-up power rule fails both parts of this test.

First, the back-up power rule is outside the Commission's Section 1 grant of general jurisdiction. The FCC incorrectly found that the "first prong of the ancillary jurisdiction test is met because the backup power rule . . . pertains to the provisioning of 'interstate and foreign commerce in communication by wire and radio."[46] The Commission, however, lacks jurisdiction to regulate the communications facilities while they are "not engaged in the process of radio or wire transmission."[47] Allowing the Commission to govern the non-communications activities of regulated entities would lead to unbounded constructions of Section 1 with no logical stopping point, and thus would confer virtually limitless jurisdiction on the agency.

Second, even if the back-up power rule is within the scope of the general jurisdiction conferred by Congress to the FCC, the agency nevertheless has failed to identify any "statutorily mandated responsibility" to which the back-up power rule could possibly be "ancillary."[48] Title I "merely suppl[ies] the FCC with ancillary authority to issue regulations that may be necessary

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44 *Katrina Order on Reconsideration* at 18019-21.

45 *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citations omitted).

46 *Katrina Order on Reconsideration* at 18020 (quoting 47 U.S.C. § 151).

47 *Am. Library Ass'n*, 406 F.3d at 703.

48 *Id*. at 700 (citations omitted).

to fulfill its primary directives contained elsewhere in the statute."[49] By failing to point to any substantive statute to which the back-up power rule could be ancillary, the Commission arrogated to itself "unconstrained authority" to regulate the CMRS providers so long as the regulation "promote[s] safety of life and property through the use of wire and radio communications."[50] Indeed, were the FCC able to use Title I as a self-sufficient source of both general subject-matter jurisdiction and a substantive source of statutory authority, the Commission would be empowered to impose sweeping regulation without regard to its congressionally-delegated, statutory responsibilities found elsewhere in the Act. It conceivably would allow, for instance, the regulation of internal cell phone batteries, fuel stockpiles, fuel reserves, security at cell sites, and even commercial power itself, which, of course, is arguably more important to the provision of wireless service than emergency back-up power.

Accordingly, OMB should look askance at the FCC's illegitimate attempt to increase its own authority beyond that delegated to it by Congress and find that the back-up power rule exceeds the Commission's statutory authority.[51]

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[49] *Iowa Util. Bd. v. FCC*, 120 F.3d 753, 795 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366 (1999), *aff'd in part, rev'd in part sub nom. Verizon Commc'ns, Inc. v. FCC*, 535 U.S. 467 (2002), *vacated in part by* 301 F.3d 957 (8th Cir. 2002).

[50] 47 U.S.C. § 151.

[51] The Commission also refers in passing to 47 U.S.C. § 303(r) as an additional basis of authority for the back-up power rule. *Katrina Order on Reconsideration* at 18020. Section 303(r), however, cannot supply an independent basis for jurisdiction if general regulatory authority over the subject matter does not otherwise exist under Section 1. *MPAA v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) ("The FCC must act pursuant to *delegated authority* before any 'public interest' inquiry is made under § 303(r)."). The same is true of Section 332, 47 U.S.C. § 332(a)(1) (instructing Commission to consider whether CMRS regulations will "promote the safety of life and property"), which the FCC cites in a footnote attached to the Section 303(r) discussion, *Katrina Order on Reconsideration* at 18020 n.58.

VII. CONCLUSION.

As described above, the back-up power rule obstructs carriers' ability to enhance the redundancy, reliability and resiliency of their communications networks. The FCC grossly underestimated the burden this reporting requirement will impose on CMRS providers. These reporting requirements will impose both significant financial and personnel resource burdens on the wireless industry and the Commission. In addition, the Commission should give serious consideration to less burdensome alternatives that would still meet its objectives in this proceeding. The FCC also failed to adhere to the procedural requirements of the Paperwork Reduction Act in adopting these reporting requirements and acted without adequate statutory authority in adopting the back-up power rule under review.

Accordingly, CTIA seeks FCC and OMB action to address the Paperwork Reduction Act analysis in the *Katrina Order on Reconsideration* and ensure that the reporting requirements under Section 12.2 of the Commission's rules do not impose unrealistic burdens on wireless carriers for purposes of compliance with an ineffective rule.

Respectfully submitted,

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