

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matters of)	
)	
<i>Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications</i>)	PS Docket No. 15-80
)	
<i>New Part 4 of the Commission's Rules Concerning Disruptions to Communications</i>)	ET Docket No. 04-35
)	
<i>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</i>)	PS Docket No. 11-82
)	

**COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY
COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (NARUC) files these comments in response to the May 26, 2016 Federal Communications Commission's (FCC) release of a Further Notice of Proposed Rulemaking¹ (FNPRM) seeking additional comment on proposals to improve its Part 4 outage reporting rules.

¹ See *Amendments to Part 4 of the Commission's Rules Concerning Disruptions to Communications; New Part 4 of the Commission's Rules Concerning Disruptions to Communications; 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 Nos. 15-80 and 11-82, ET Docket No. 04-35, Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, [FCC 16-63] 64 Communications Reg. (P&F) 1487, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-63A1.pdf, published at: 81 Fed. Reg. 45095 (July 12, 2016), <https://www.federalregister.gov/articles/2016/07/12/2016-16273/disruptions-to-communications>

For over 125 years, NARUC, a quasi-governmental non-profit corporation in the District of Columbia, has represented the interests of public utility commissioners from agencies in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands charged with, *inter alia*, overseeing certain operations of telecommunications utilities. NARUC is recognized by Congress in several statutes² and consistently by the Courts³ as well as a host of federal agencies,⁴ as the proper entity to represent the collective interests of State utility commissions.

NARUC filed comments⁵ on the prior rulemaking in this docket which proposed sharing NORs data with State Commissions.⁶

² See 47 U.S.C. §410(c) (1971) (Congress designated NARUC to nominate members of Federal-State Joint Board to consider issues of common concern); See also 47 U.S.C. §254 (1996); See also *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where this Court explains “Carriers, to get the cards, applied to...(NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system).

³ See, e.g., *U.S. v. Southern Motor Carrier Rate Conference, Inc.*, 467 F. Supp. 471 (N.D. Ga. 1979), aff'd 672 F.2d 469 (5th Cir. 1982), aff'd en banc on reh'g, 702 F.2d 532 (5th Cir. 1983), rev'd on other grounds, 471 U.S. 48 (1985) (where the Supreme Court notes: “The District Court permitted (NARUC) to intervene as a defendant. Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.” 471 U.S. 52, n. 10. See also, *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976); Compare, *NARUC v. FERC*, 475 F.3d 1277 (D.C. Cir. 2007); *NARUC v. DOE*, 851 F.2d 1424, 1425 (D.C. Cir. 1988); *NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 469 U.S. 1227 (1985).

⁴ Compare, NRC Atomic Safety and Licensing Board *Memorandum and Order* (Granting Intervention to Petitioners and Denying Withdrawal Motion), LBP-10-11, *In the Matter of U.S. Department of Energy (High Level Waste Repository)* Docket No. 63-001-HLW; ASLBP No. 09-892-HLW-CABO4, mimeo at 31 (June 29, 2010) (“We agree with NARUC that, because state utility commissioners are responsible for protecting ratepayers’ interests and overseeing the operations of regulated electric utilities, these economic harms constitute its members’ injury-in-fact.”)

⁵ See, *Comments of the National Association of Regulatory Utility Commissioners*, filed July 16, 2015, in this proceeding, online at: <https://www.fcc.gov/ecfs/filing/60001093786/document/60001116258>.

⁶ See *Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications; New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, PS Docket Nos. 15-80 and 04-35, Notice of Proposed Rulemaking, Second Report and Order, Order on Reconsideration, 30 FCC Rcd 3206, available at https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-39A1_Rcd.pdf - published in the FR at: 80 Fed. Reg. 34350 (Jun. 16, 2015), <http://www.gpo.gov/fdsys/pkg/FR-2015-06-16/pdf/2015-14687.pdf>.

Those NARUC comments, and an earlier filed ex parte,⁷ are based on a resolution passed by the association in February of 2015.

That 2015 resolution explicitly supports a California Public Utilities Commission petition pending before the FCC since 2009, referenced in the NPRM, seeking direct access to the FCC's Network Outage Reporting System (NORS).⁸

The NARUC 2015 comments generally agreed with (i) with earlier comments filed by the Michigan Public Service Commission⁹ that States should be granted full access to NORS data as "States would undoubtedly benefit from the full range of outage information that providers are already required to report to the FCC;" and with (ii) similar sentiments filed by the Massachusetts Department of Telecommunications and Cable¹⁰ that (i) support the FCC's proposal to grant States access to the NORS database, (ii) explain why the FCC should grant States such access under the same requirements for which the FCC has granted access to other databases containing confidential information.

The May 2016 FNPRM confirms it is in the public interest for States to receive outage reports. This is logical as State commissions in many incidences are the first to respond to such outages. However, the agency also noted a number of inefficient proposals to unnecessarily constrain State access.

DISCUSSION

⁷ See March 18, 2015 *Notice of Written Ex Parte filed in the proceedings captioned: Petition of the California Public Utilities Commission And The People of the State of California for Rulemaking on States' Access to the Network Outage Reporting System (NORS) Database and a Ruling Granting California Access to NORS*, ET Docket No. 04-35, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001026958>.

⁸ November 12, 2009 *Petition of the California Public Utilities Commission for Rulemaking on States' Access to the Network Outage Reporting System ("NORS") Database and a Ruling Granting California Access to NORS*, available online at: <http://apps.fcc.gov/ecfs/comment/view?id=6015498545>

⁹ See *Comments of the Michigan Public Service Commission*, filed in PS Docket No. 15-80 & ET Docket No. 0435 (July 16, 2015), at 8, online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001093661>.

¹⁰ See *Comments of the Massachusetts Department of Telecommunications and Cable*, filed in PS Docket No. 15-80 & ET Docket No. 0435 (July 16, 2015), online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001093448>.

Providing Access to NORS can only Increase the Reliability of the Network.

NARUC commends the FCC for its explicit conclusion in Report and Order accompanying the FNRPM, at ¶ 4, that “direct access to NORS by our state and federal partners is in the public interest.”

The states, after all, frequently are better positioned to, and frequently respond more quickly to, outages. As recent events confirm,¹¹ communications network outages pose a significant risk to health and safety of the public.

State agencies, including NARUC’s member commissions as well as State Offices of Emergency Services, are responsible for maintaining public services, including telecommunications services, before, during and after emergencies.

Many State commissions are responsible for ensuring access to 911/E911 service, and have obligations to ensure call completion.

Granting States secure access to NORS data is consistent with a history of the FCC sharing confidential information with State commissions when a vital need is shown and the information is properly safeguarded.

¹¹ See, e.g., March 18, 2015 FCC News Release *Verizon Agrees to \$3.4 Million Settlement to Resolve 911 Outage Investigation*, at: <http://www.fcc.gov/document/verizon-pay-34-million-resolve-911-outage-investigation-0>; March 18, 2015 FCC News Release *Oklahoma Carrier Fined \$100,000 for failing to direct 911 Calls to Local Emergency Responders*, at: <http://www.fcc.gov/document/oklahoma-carrier-fined-100k-sending-911-calls-autorecording-0>, December 2, 2014 Washington Utilities and Transportation Commission Press Release: *CenturyLink facing (\$2.9 Million in) Penalties for Statewide 911 Outage*, available online at: <http://www.utc.wa.gov/aboutUs/Lists/News/DispForm.aspx?ID=291>; January 17, 2013 *Commonwealth of Virginia, State Corporation Commission, Staff Report of Final Findings and Recommendations* (The Staff’s Derecho Report), available online at: http://media10.washingtonpost.com/wapo_generic/media/document_cloud/document/pdf/PUC-2012-00042_1-17-13.pdf.

The Solution is Simple. There is no reason to micromanage Access.

The FNPRM does raise a number of issues worthy of close examination.

However, none of them are in ¶¶85-86. Those paragraphs present a laundry list of industry-proposed unworkable, inefficient and - in at least in two cases – illegal, restrictions on State access.

The characteristic all those industry suggestions share is that – in large measure – they are simply unnecessary and undermine the public interest.

All require additional, wasteful and complicated expenditure of both federal and State resources.

There is no reason for the FCC to micromanage State access.

All the FCC has to do to avoid concerns raised by the tiny minority of States that have arguably deficient “FOIA” type protections in-place, is to condition access to the data on a State providing some level of confidential treatment. As NARUC noted in its original comments, States are already given access to certain FCC data subject to confidentiality requirements.¹²

That is the solution.

The FCC need do no more.

Other industry-proposed restrictions, on either access or use of the data, are simply not necessary.

Most, by their own terms, are suggested not to protect competition or assure security of the network, but simply to prevent States from using information to otherwise fulfill their statutory duty to – like the FCC - *act in the public interest*.

¹² Accord, FNPRM, at ¶84 (“ATIS “does not oppose the sharing, with appropriate safeguards, of NORS data with states,” but “believes that it should be provided only to those states that agree to abide by the confidentiality and other restrictions established by the Commission.” COMPTTEL asserts that “[t]here is no question that the public interest would be served if state governments were made and kept aware of communications outages within their borders,” but urges similar confidentiality protections.”)

Preempting Existing State Authority Can Only Undermine Public Safety.

As discussed, *supra*, there is no need to preempt State laws to achieve any needed level of confidentiality. Preemption is also a particularly bad policy choice. It can only have one impact - undermining the reliability and security of the network.

Clearly States will benefit from the full range of outage information providers are already required to report to the FCC for the States/region they operate in. As Massachusetts noted in its 2015 comments:

State entities collect different information than is contained in the NORS database, and should not be foreclosed from making their own determinations as to whether data is duplicative. [] Further, because State entities utilize data differently, it is unlikely that NORS data will adequately capture all the State's needs. Indeed, as this NPRM highlights, experience may lead to refinements in data collection and a State entity should not be categorically prohibited from adopting reporting requirements it finds critical to collect, but are not currently available through the NORS database.¹³

Restricting the information that States can access pursuant to State law regarding service outages can only obscure the true picture of the providers' services; rendering the reporting – and any State conclusions drawn based on that reporting – incomplete.

It also would directly impact any State commission investigation of a past or current outage in obvious ways – hampering restoration as well as State ability to prove or justify any fines or penalties or any order requiring remedial measures. Obviously, attempts to restrict State collection options can only undermine public safety and State efforts to “protect public safety and welfare.”

¹³ See *Comments of the Massachusetts Department of Telecommunications and Cable*, at page 6, filed in PS Docket No. 15-80 (July 16, 2015), online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001093448>.

It also could seriously undermine both the speed,¹⁴ and accuracy of the FCC's investigations. For example, the *September 2012 Preliminary Staff Report of the Virginia Corporation Commission* found that Verizon's lack of compliance with maintenance and testing procedures for backup generators contributed directly to the Derecho storm 911 outages. The FCC's Public Safety and Homeland Security Bureau report, released a few months later, credited the VCC report as source for its acquisition of this crucial lapse in procedures. Information that would have otherwise likely gone un-noticed:

“Verizon indicated to the Bureau . . . that the critical generators...had functioned properly during a maintenance test just days prior to the derecho. However, the Bureau learned from the Virginia State Corporation Commission (“SCC”) Preliminary Staff Report (“Virginia SCC Report”) when it was publicly released on September 14, 2012, that the Arlington central office generator did *not* pass the test, as confirmed by Verizon's own maintenance logs.¹⁵

If history is any guide, such FCC efforts will also instigate frivolous industry lawsuits to interfere with crucial State investigations diverting both federal and State tax dollars and government resources to litigation.¹⁶

¹⁴ See, *In the Matters of 911 Governance & Accountability Improving 911 Reliability*, 29 F.C.C. Rcd. 14208 at ¶ 22 (2014) (“The Bureau coordinated its inquiry into the outage with a parallel investigation by the Washington Utilities and Transportation Commission, providing an example of such cooperation between federal and state authorities.”)

¹⁵ See, *Impact of the June 2012 Derecho on Communications Networks and Services: Report and Recommendations by the FCC Public Safety and Homeland Security Bureau*, January 2013, 2013 WL 139332, mimeo at 9-10 (OHMSV 2013) available at: https://apps.fcc.gov/edocs_public/attachmatch/DOC-318331A1.pdf.

¹⁶ See, e.g., **Motion of National Association of Regulatory Utility Commissioners for Leave to Submit Amicus Brief; Amicus Brief in Support of Defendant's Motion for Summary Judgment**, *New Cingular Wireless et al. v. Michael Picker et al.*, USDC ND CA Case No. 3:16-cv-02461(VC), online at: <http://pubs.naruc.org/pub/D393D8AB-FDFD-0C42-0486-44C1613A9692>.

The FCC lacks Authority to Preempt State Collection (or FOIA) Laws.

Unfortunately for certain industry-back proposals, not only do they not necessarily lead to poor policy outcomes, but the FCC lacks authority to implement them. There is simply no question the FCC lacks authority to preempt State laws requiring carriers to provide outage information.

BIAS services are “telecommunications services.” Assuming for the sake of argument, the somewhat specious suggestion that any State outage reporting requirement could actually have a negative impact on competition,¹⁷ there is absolutely no question that State requirements for the reporting of outage data is, as 47 U.S.C. § 253(c) suggests, necessary to “protect the public safety and welfare”, necessary to “safeguard the rights of consumers,” necessary to “ensure the continued quality of telecommunications services” and necessary to “preserve and advance universal service” – which of course includes advanced services.

Congress speaks directly to the issue raised by these industry proposals in that provision and specifies preemption is not permissible.

But even ignoring the dictates of Section 253, overall State Commissions are charged by Congress with enforcing crucial elements of a federal framework designed to protect consumers and competition for the entire telecommunications sector. The 1996 Act requires the FCC to work hand-in-glove with State Commissions to open local markets to competition,¹⁸ to “preserve and advance universal service,”¹⁹ and to encourage deployment “of advanced

¹⁷ There is zero record evidence in this docket (or any other FCC proceeding) suggesting that that is the case.

¹⁸ See, e.g., *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S. Ct. 872 at 876, 882 (2004); *Weiser, Philip, Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U.L.Rev. 1692, 1694 (2001) (describing the 1996 Act as “the most ambitious cooperative federalism regulatory program to date”). See, § 252(e) (requiring State approval of all interconnection agreements between incumbent local exchange and competitive carriers).

¹⁹ See, 47 U.S.C. § 254 (f) (State universal service programs), §§ 410(c) and 254 (a) (State Commissioners nominated by NARUC act as federal Administrative law judges to address crucial issues of universal service policy), § 254 (b) (Congress *mandates* that the FCC explicitly base its policies to advance universal service (which

telecommunications to all Americans.”²⁰ Restrictions on such State ordered collections of data associated with broadband and VoIP use is simply inconsistent with the statutory scheme. But even ignoring both the explicit reservations of Section 253 and the obvious import of the Congressional scheme, the fact is nowhere in the statute did Congress provide the FCC with specific authority to preempt State data collections.²¹ And, as recent legislation clearly illustrates, it certainly knows how to do so when it deems preemption is warranted.²²

includes both "advanced" and "information" services) on the existence of STATE mechanisms), § 214(e), (States designate *telecommunications carriers* to receive federal subsidies), § 251(f) (States can exempt rural *carriers* from certain Title II requirements.)

²⁰ See, 47 U.S.C. § 1302(a) which specifies the FCC and each State Commission “with regulatory jurisdiction over telecommunications services” “shall encourage” the deployment of advanced telecommunications capability.” Among the methods suggested by Congress for reach that goal – “price cap regulation” and “forbearance”.

²¹ Congress specified in 1996 legislation that preemption is not to be implied. 47 U.S.C. § 152 (note (Pub. L. No. 104-104, § 601(c)(1)) The Courts have separately recognized this principal. See, e.g., *Altria Group v. Good*, 555 U.S. 70 (2008) (When the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily "accept the reading that disfavors pre-emption." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005)); *Wyeth v. Levine* 555 U.S. 555 (2009) (emphasizing the "two cornerstones" of pre-emption jurisprudence: First, "the purpose of Congress is the ultimate touchstone in every pre-emption case." . . . Second, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated ... in a field which the States have traditionally occupied,' ... ***we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'***" *Lohr*, 518 U. S., at 485 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947)). {Emphasis added}) *Accord Lorillard Tobacco Co. v. Reilly*, 533 U. S. 535, 541–2. Even the Administration agrees. See May 20, 2009, *Memorandum for the Heads of Executive Departments and Agencies*, from President Obama, online at: <https://www.whitehouse.gov/the-press-office/presidential-memorandum-regarding-preemption> “In recent years, however, notwithstanding Executive Order 13132 of August 4, 1999 (Federalism), executive departments and agencies have sometimes announced that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles.” Note - Executive Order 13132 of August 4, 1999 - at 64 Fed. Reg. 43,255 (August 10, 1999), specifies, that at least for Executive agencies, “Agencies, in taking action that preempts State law, shall act in strict accordance with governing law. (a) Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.”

²² See, *Fixing America’s Surface Transportation Act*, Public Law 114-94 (Dec 4, 2015), at: <https://www.congress.gov/bill/114th-congress/house-bill/22/text?q=%7B%22search%22%3A%5B%22fast+act%22%5D%7D&resultIndex=2> (which states in §215: “Critical electric infrastructure information--...shall not be made available by any Federal, State, political subdivision or tribal authority pursuant to any Federal, State, political subdivision or tribal law requiring public disclosure of information or records.”) Significantly, even here, where Congress is dealing with what is unquestionably the most sensitive type of data, Congress did not preempt State authority to collect data – it just preempted disclosure laws – in the context of data shared because of requirements of Federal Law. There is no analogous FOIA provision in the Telecom’s Act, much less a provision permitting preemption in this context.

CONCLUSION

Granting State agencies access to NORS outage information will permit States to perform crucial duties with better information. There is no downside risk or inefficiency with allowing access. The necessary confidential protections can be extended and agreed to by States prior to obtaining access to their respective region's NORS outage information by using current registration procedures for accessing confidential information that have been used by the FCC elsewhere successfully. Nothing else is either required or desirable.

Respectfully submitted,

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