

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.**

In the Matter of )  
 )  
Ensuring Continuity of 911 Communications ) PS Docket No. 14-174  
 )

**OPPOSITION OF THE FIBER TO THE HOME COUNCIL AMERICAS TO THE  
PETITION FOR RECONSIDERATION OF THE JOINT CONSUMER ADVOCATES**

The Fiber to the Home Council Americas (“FTTH Council” or “Council”) opposes the Joint Consumer Advocates’ Petition for Reconsideration<sup>1</sup> in the above-referenced proceeding.

On August 7, 2015, the Commission, in a Report and Order,<sup>2</sup> adopted a new rule<sup>3</sup> placing requirements on providers of facilities-based, fixed residential voice services to ensure access to 911 and other emergency services during power outages as consumers transition from legacy to IP-based telephone services. Under the new rule, providers of “Covered Services”<sup>4</sup> must, among other requirements, offer to customers “a backup power solution that provides 911 access for 8 hours in the event of commercial power loss.”<sup>5</sup> The Joint Consumer Advocates seek

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<sup>1</sup> *In the Matter of Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Petition for Reconsideration of the National Association of State Utility Consumer Advocates, Maryland Office of People’s Counsel, Public Knowledge, the National Consumer Law Center (on behalf of its low-income clients), the Public Utility Law Project of New York, the Benton Foundation, the Center for Rural Strategies, the Greenlining Institute, the Broadband Alliance of Mendocino County, Access Sonoma Broadband (filed Nov. 16, 2015) (“Petition”). The petitioners hereinafter will be referred to as the Joint Consumer Advocates unless referred to individually.

<sup>2</sup> *Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Report and Order, FCC 15-98 (rel. Aug. 7, 2015) (“Report and Order”).

<sup>3</sup> 47 C.F.R. § 12.5.

<sup>4</sup> Covered Services are defined as “any facilities-based, fixed voice service offered as a residential service, including fixed wireless service offered as a residential service, that is not line powered.” *See* Report and Order, App’x C.

<sup>5</sup> Report and Order, ¶ 9. The new rule also requires providers of these services to develop a 24-hour backup power solution within three years, and to give subscribers adequate

reconsideration of this requirement and request that the Commission adopt the rules proposed in the NPRM.<sup>6</sup> As explained herein, the Petition fails to provide adequate justification to grant this request pursuant to Section 1.429 of the Commission’s rules. Therefore, the Commission should deny the Joint Consumer Advocates’ Petition.

### **FACTUAL BACKGROUND**

In the NPRM, the Commission found that “[t]he Nation’s communications networks are in the midst of a series of technology transitions” and that these transitions, while valuable, also create certain risks and uncertainty.<sup>7</sup> In particular, the Commission was concerned about the ability of consumers to retain access to 911 after transitioning from traditional to IP-based wireline telephone service. Accordingly, the Commission in the NPRM proposed a number of measures, including “that providers should assume responsibility for provisioning backup power that is capable of powering their customers’ CPE during the first eight hours of an outage.”<sup>8</sup>

The Commission received dozens of comments on this proposal, including from several of the Joint Consumer Advocates.<sup>9</sup> The FTTH Council opposed the potential backup mandate, explaining that the proposed regulations ignored (1) the dramatic changes in the market for voice services;<sup>10</sup> (2) the responsible behavior of providers in giving consumers notice of and enabling

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notice and disclosure about the battery backup options it offers so that subscribers can make informed decisions about whether to purchase one of these options.

<sup>6</sup> See Petition at 12; see also *Ensuring Continuity of 911 Communications et al.*, PS Docket No. 14-174, et al., Notice of Proposed Rulemaking and Declaratory Ruling, FCC 14-185, ¶ 35 (rel. Nov. 25, 2014) (“NPRM”).

<sup>7</sup> NPRM, ¶ 1.

<sup>8</sup> *Id.*, ¶ 35.

<sup>9</sup> See, e.g., Comments of the National Association of State Utility Consumer Advocates, PS Docket No. 14-174, 8-11 (filed Feb. 5, 2015); Comments of Public Knowledge, et al., PS Docket No. 14-174, 21-28 (filed Feb. 5, 2015).

<sup>10</sup> See Comments of Fiber to the Home Council, PS Docket No. 14-174, 10, 17-18 (filed Feb. 5, 2015) (“FTTH Comments”).

use of or access to backup power;<sup>11</sup> and (3) the significant costs – with negligible benefits – that the regulations would have imposed.<sup>12</sup> Many other commenters also opposed the mandate.<sup>13</sup>

The Commission, based on the robust record, adopted a rule requiring providers of Covered Services to offer a backup solution with at least 8 hours of standby power to all customers that request battery backup, develop and provide a 24-hour backup solution within three years, and notify customers about the provider’s available backup options “at the point of sale and annually thereafter until September 1, 2025.”<sup>14</sup> These requirements place a significant, additional onus on service providers. Despite opposing any new obligations, the Council believes the decision is a fair and balanced resolution of the many competing interests based on the evidence in the record.

The Joint Consumer Advocates in their Petition argue that “the rules adopted in the Report and Order depart from the approach taken in the [NPRM], transfer the responsibility for ensuring the reliability of 911 and other emergency voice communications from the provider to the consumer, and undermine the public safety and policy goals set forth in 47 U.S.C. § 151.”<sup>15</sup> However, as explained below, these claims are inaccurate. Moreover, the Petition presents no evidence to warrant a reversal of, or amendment to, the rule adopted in the Report and Order and should be denied.

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<sup>11</sup> See FTTH Council Comments at 18-19.

<sup>12</sup> See FTTH Comments at 20-21.

<sup>13</sup> See, e.g., Comments of the National Cable & Telecommunications Association, PS Docket No. 14-174, 2-10 (filed Feb. 5, 2015); Comments of Verizon, PS Docket No. 14-174, 17-22 (filed Feb. 5, 2015); Comments of the Telecommunications Industry Association, PS Docket No. 14-174, 5 (filed Feb. 5, 2015).

<sup>14</sup> *Report and Order*, ¶¶ 3-4. See also 47 C.F.R. § 12.5.

<sup>15</sup> Petition at 2.

## STANDARD OF REVIEW

Section 1.429 of the Commission’s rules allows an interested party to seek reconsideration of a final order in a rulemaking proceeding.<sup>16</sup> Commission precedent makes clear that “[r]econsideration is generally appropriate only where the petitioner shows either a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner’s last opportunity to respond.”<sup>17</sup> By contrast, “if a petition simply repeats arguments that were previously considered and rejected in the proceeding,” the petition generally will be dismissed or denied.<sup>18</sup> As explained below, the Joint Consumer Advocates’ Petition fails to satisfy the Commission’s requirements for reconsideration.

## ARGUMENT

### *The Petition Fails to Show a Material Error or Omission*

The Joint Consumer Advocates assert that the Commission should reconsider its decision because “the rules adopted in the Report and Order depart from the approach taken in the [NPRM].”<sup>19</sup> In urging the Commission to “return to the concepts expressed in the NPRM,” the Joint Consumer Advocates appear to suggest that the Commission acted improperly by adopting a rule that was not expressly proposed in the NPRM. The Commission, however, has substantial discretion to adopt a rule that is a “logical outgrowth” of the proposed rule based on the record evidence.<sup>20</sup> That is precisely what the Commission did in adopting the new rule, which reflected

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<sup>16</sup> See 47 C.F.R. § 1.429.

<sup>17</sup> See *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services*, WT Docket No. 05-265, Order on Reconsideration, 29 FCC Rcd. 7515, 7518 ¶ 7 (2014).

<sup>18</sup> See, e.g., *Connect America Fund et al.*, WC Docket No. 10-90, Third Order on Reconsideration, 27 FCC Rcd. 5622, ¶ 1 (2012).

<sup>19</sup> Petition at 2.

<sup>20</sup> See, e.g., *Pub. Serv. Comm’n of D.C. v. FCC*, 906 F.2d 713, 717-18 (D.C. Cir. 1990) (“It is well established that the exact result reached after a notice and comment rulemaking

evidence submitted by the Council and others about the extensive consumer use of non-line-powered voice services and their reliance on non-line-powered transmission media to access 911 and other emergency services.

The Petition next claims that the final rules “transfer the responsibility for ensuring the reliability of 911 and other emergency voice communications from the provider to the consumer.”<sup>21</sup> To the contrary, the Commission placed an additional burden on providers of Covered Services by requiring these providers to offer at least 8 hours of battery backup power to all subscribers and to make new material disclosures to their customers.<sup>22</sup> The Commission adopted these requirements to reflect its concern about ensuring 911 access for consumers who continue to rely on wireline voice services.<sup>23</sup> The Joint Consumer Advocates disfavor this approach. Instead, they would have the Commission ignore the reality that the majority of consumers now rely on alternative means of accessing 911 services<sup>24</sup> and impose a “one-size-fits-all” backup requirement<sup>25</sup> that would increase costs, promote inefficiency and decrease competition in the voice services market. However, the Petition presents no evidence to demonstrate that the Commission’s approach constitutes a material error such that the decision should be reversed.

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need not be set out in the initial notice for the notice to be sufficient. Rather, the final rule must be ‘a logical outgrowth’ of the rule proposed. ... ‘[A] final rule may properly differ from a proposed rule -- and indeed must so differ -- when the record evidence warrants the change. A contrary rule would lead to the absurdity that in rule-making under the APA the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary.’” (quoting *Edison Elec. Inst. v. OSHA*, 849 F.2d 611, 621 (D.C. Cir. 1988)).

<sup>21</sup> Petition at 2.

<sup>22</sup> See Report and Order, ¶¶ 32, 56.

<sup>23</sup> See *id.*, ¶ 17.

<sup>24</sup> See FTTH Council Comments at 17-18.

<sup>25</sup> See Petition at 10. The Commission expressly rejected the “one-size-fits-all” approach. See Report and Order, ¶ 31.

Finally, the Joint Consumer Advocates claim that the Report and Order “undermine[s] the public safety and policy goals set forth in 47 U.S.C. § 151.”<sup>26</sup> To support this, the Petition points to evidence that the majority of consumers do not purchase battery backup options when offered by a provider.<sup>27</sup> The Commission acknowledged that low purchase rates for backup services are likely indicative that “many subscribers of fixed, residential VoIP service also purchase mobile voice service that provides an alternative means of reaching 911 in an emergency.”<sup>28</sup> It further explained that decisions about whether to purchase battery backup services or equipment are frequently a matter of consumers’ personal preferences.<sup>29</sup> These determinations are reasonable in light of the evidence presented about the extensive evolution of marketplace for the Covered Services from wired to wireless and, for wired, from line-powered copper to other network technologies. The Petitioners disagree, essentially arguing the backup purchase data demonstrates that consumers are incapable of making decisions in their own self-interest, and therefore the Commission should step in and do it for them.<sup>30</sup> But the Joint Consumer Advocates fail to present any substantive evidence that the Commission’s conclusion was erroneous. Rather, they reiterate arguments that were presented – and considered by the Commission – during the notice and comment process. Therefore, any argument by the Joint Consumer Advocates that this conclusion is a material error or omission should fail.

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<sup>26</sup> Petition at 2.

<sup>27</sup> *See id.* at 8.

<sup>28</sup> Report and Order, ¶ 37.

<sup>29</sup> *See id.* Nevertheless, as an added measure of protection, the Commission going forward will require providers to notify subscribers about their available battery backup options, and “strongly encourage[s] providers to inform subscribers, both at the point of sale and annually thereafter, of known ways consumers can maintain connectivity during extended power outages.” *Id.*, ¶¶ 36, 48-77. The notification requirement aims to “empower” consumers to make informed decisions about their personal backup power needs.

<sup>30</sup> *See* Petition at 8-9.

*The Petition Fails to Present New Facts or Arguments*

The Joint Consumer Advocates do not identify any new facts or arguments not presented during the rulemaking proceeding, let alone demonstrate why those facts or arguments warrant reconsideration of the Report and Order. They assert that “[c]ore conclusions reached in the Report and Order lack adequate consideration and support”<sup>31</sup> and criticize the Commission’s reasonable interpretation of the evidence and actions based on that evidence. Contrary to the Petition’s claims, there is myriad evidence in the record to justify the Commission’s new rule.<sup>32</sup> More importantly, Joint Consumer Advocates present no evidence in the Petition to counter what was already in the record, and as such, cannot succeed in a bid to reverse or amend the rule.

**CONCLUSION**

The Joint Consumer Advocates have presented no new facts, arguments or evidence upon which the Commission can rely to conclude that the rule adopted in the Report and Order constitutes a material error or omission. Accordingly, the Petition should be denied.

Respectfully Submitted,

FIBER TO THE HOME COUNCIL  
AMERICAS



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<sup>31</sup> Petition at 7.

<sup>32</sup> See Report and Order, ¶¶ 30-38 (citing comments from parties such as Hawaiian Telecom, Verizon, United States Telecom Association, American Cable Association and AT&T).

## CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2015, true and correct copies of the foregoing *Opposition of the Fiber to the Home Council Americas to the Petition for Reconsideration of the Joint Consumer Advocates* were provided via first class U.S. Mail and/or electronic mail to the following:

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