Before the
Federal Communications Commission
Washington, D.C. 20554

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

NTCA–THE RURAL BROADBAND ASSOCIATION
OPPOSITION TO
THE PETITION FOR RECONSIDERATION OF NASUCA, *ET AL*.

December 31, 2015

TABLE OF CONTENTS

I. INTRODUCTION & SUMMARY 1

II. THE COMMISSION SHOULD DISMISS THE PETITION FOR RECONSIDERATION 3

A. The Petition Fails to Meet the Standard for a Petition for Reconsideration as Set Forth by Section 1.429 of the Commission's Rules 3

B. The Petition Fails to Demonstrate that the Report and Order Was Not Adopted in Accordance with the Administrative Procedure Act or is Otherwise Not in Accordance with the Law 4

C. Additional Arguments Set Forth by Joint Petitioners are Unpersuasive and Not Supported by the Record.....9

III. CONCLUSION.....12

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I. INTRODUCTION & SUMMARY

Pursuant to Section 1.429[1] of the rules of the Federal Communications Commission ("Commission"), NTCA–The Rural Broadband Association ("NTCA")[2] hereby submits this Opposition to the Petition for Reconsideration filed by the National Association of State Utility Consumer Advocates ("NASUCA"), The Benton Foundation, The Maryland Office of People's Counsel, Public Knowledge, The National Consumer Law Center, The Public Utility Law Project of New York, The Center for Rural Strategies, The Greenlining Institute, and The Broadband Alliance of Mendocino County and Access Sonoma Broadband ("Joint Petitioners")[3] in the above-captioned proceeding. The Petition seeks reconsideration of the Report and Order

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[1] 47 C.F.R. § 1.429.

[2] NTCA represents nearly 900 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[3] National Association of State Utility Consumer Advocates ("NASUCA"), The Benton Foundation, The 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 Center for Rural Strategies, The Greenlining Institute, The Broadband Alliance of Mendocino County and Access Sonoma Broadband Petition for Reconsideration, PS Docket No. 14-174 (fil. Nov. 16, 2015) ("Joint Petitioners' Petition" or "Petition").

adopted on August 7, 2015, in which the Commission adopted battery backup power and consumer disclosure rules applicable to providers of facilities-based, fixed, non line-powered voice services.[4]

NTCA urges the Commission to dismiss the Petition. The Petition is premised on the argument that Section 12.5 of the Commission's rules[5] as adopted in the Report and Order is a departure from a proposal made in the NPRM[6] or was a "previously announced rule."[7] However, the Petition fails to present any argument or fact that the Commission did not have before it in the underlying proceeding, and it should therefore be dismissed consistent with Section 1.429. The Petition also fails to demonstrate that the Commission failed to properly provide interested parties with notice, pursuant to Section 553 of Administrative Procedure Act, of the rules ultimately adopted. Just the opposite, the Report and Order sought comment on several alternative proposals and in the end the Commission chose one based on the record. Further, the Petition fails to make the case that the Commission failed to consider any relevant factors in adopting the Report and Order or otherwise acted in an arbitrary and capricious manner or not in accordance with the law. As such, the Petition for Reconsideration should be dismissed.

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4 *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, FCC 15-98, Report and Order (rel. Aug. 7, 2015) ("Report and Order").

5 *Id*., Appendix C (Final Rules).

6 Petition, p. 2.

7 *Id*., p. 6.

II. THE COMMISSION SHOULD DISMISS THE PETITION FOR RECONSIDERATION

A. The Petition Fails to Meet the Standard for a Petition for Reconsideration as Set Forth by Section 1.429 of the Commission's Rules

Consistent with Section 1.429 of its rules, the Commission should dismiss the instant Petition. In previous proceedings, in reviewing a petition for reconsideration filed in a rulemaking proceeding, the Commission has stated that, "if a petition for reconsideration simply repeats arguments that were previously considered and rejected in the proceeding, it will not likely warrant reconsideration."[8] Joint Petitioners take the position that the Commission should have required providers to take the initial responsibility for providing all voice consumers with eight hours of backup power and that consumers should not have to pay for such backup power.[9] This is the same position that NASUCA[10] and Public Knowledge[11] (individually and not as part of Joint Petitioners as they are for purposes of this Petition) advanced in comments submitted in February 2015. In arguing for this outcome in the Petition, Joint Petitioners fail to make any argument or point to any fact that was not part of the underlying record upon which the Commission based the Report and Order. For example, among other things, Joint Petitioners point to a Communications Security, Reliability and Interoperability Council ("CSRIC") report on the state of backup power,[12] the economies of scale that would result from requiring providers

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8 Connect America Fund, WC Docket No. 10-90, *et al*., Fourth Order on Reconsideration, FCC 12-82 (rel. Jul. 18, 2012), ¶ 1 (citing 47 C.F.R. § 1.429).

9 Petition, p. 9.

10 Comments of NASUCA, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), pp. 8-11.

11 Comments of Public Knowledge, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), pp. 21-28.

12 Petition, p. 5.

to provide backup power,[13] and the fact that some consumers retain a landline phone for emergency purposes.[14] Yet none of these arguments is new, and each was part of the underlying record upon which the Commission relied in adopting the Report and Order.[15] (And as noted below, Joint Petitioners fail to make the case that the Commission failed to account for these and other relevant factors). In short, the Petition is an attempt at "another bite at the apple," or an attempt at a "do over," to have the Commission reconsider its rules based on the same arguments and facts it already considered. Because it simply repeats arguments made and rejected in the underlying proceeding, the Petition should be dismissed.

B. The Petition Fails to Demonstrate that the Report and Order Was Not Adopted in Accordance with the Administrative Procedure Act or is Otherwise Not in Accordance with the Law

Joint Petitioners argue that reconsideration is warranted because the rule as adopted by the Commission in August departs from the "approach" taken in the NPRM and that a final rule (Section 12.5) that only requires carriers to provide a backup battery to customers choosing one at the point-of-sale was an "unannounced rule."[16] As demonstrated below, to the contrary, the policy choice made by the Commission, as well as the one endorsed by Joint Petitioners, were simply two of several alternatives proposed in the NPRM. The Report and Order reflects the

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13 *Id*., p. 9.

14 *Id*.

15 The CSRIC report was placed into the record by the Commission itself. NPRM, ¶ 36. The NPRM sought comment on whether assigning the initial responsibility to provide customers with backup power to carriers would introduce economies of scale and drive down the cost. *Id*., ¶ 41. NASUCA stated in comments in response to the NPRM that such an approach would indeed introduce economies of scale. NASUCA comments, p. 9. Public Knowledge asserted in initial comments that many customers retain a landline because it has traditionally provided customers with the feature of being able to make calls in the event of a power outage. Public Knowledge comments, p. 33.

16 Petition, p. 6.

policy choice made by the Commission based on the public input of a large and diverse group of stakeholders and the Commission's ultimate determination that its policy choice would best promote the public safety goals discussed in the NPRM. As such, the Petition lacks merit and should be dismissed.

As to the characterization of Rule 12.5 as a "previously unannounced rule," a review of the NPRM negates any assertion – though one is not made directly by the Petition – that the Commission did not "describe the range of alternatives being considered with reasonable specificity"[17] or that the Commission somehow failed to comply with Section 553 of the APA.[18] It is true, as the Joint Petitioners state, that the NPRM proposed requiring carriers to take the initial responsibility for providing customers with eight hours of battery backup in case of a power outage.[19] Yet, the rule ultimately adopted – Section 12.5, which requires such backup power option be offered to new customers only and which requires customers that elect such an option to pay for the backup power – was not a "previously unannounced rule"[20] as Joint Petitioners claim. To the contrary, Section 12.5 – as well as the alternative proposal endorsed by Joint Petitioners – was *one of several alternatives* that the Commission discussed and solicited comment on in the NPRM. More specifically, in the very same paragraph to which Joint Petitioners point, wherein the NPRM proposes requiring carriers to assume the responsibility for the initial provision of eight hours of backup power, the NPRM *also sought comment* on whether it is "reasonable for providers to *continue* to bear primary responsibility for CPE backup

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17 *Prometheus Radio Project v. FCC*, 652 F.3d 431, 450-52 (3d Cir. 2011) (internal quotations and citations omitted).

18 5 U.S.C. § 553.

19 Petition, p. 5 (citing NPRM, ¶ 35).

20 *Id*., p. 6.

power."[21] Further, the NPRM sought comment on the "costs and benefits"[22] of such a proposal, on whether the Commission should require providers to "make available at least one piece of CPE that can be powered for at least 8 hours using commercially available batteries"[23] and sought comment on proposals "that would address [their] concerns without the need to adopt regulatory requirements."[24] These inquiries would have been meaningless if the Commission were procedurally precluded from doing anything about them. Instead, the Commission described a reasonable range of alternatives and sought comment on them – including the alternative represented by Section 12.5, the rule with which Joint Petitioners take issue. In the end, the Commission considered the comments filed by a large and diverse group of industry stakeholders and ultimately adopted the rule at issue herein based on the belief that the course of action taken would best advance the goal of 911 continuity. For this reason, Section 12.5 can hardly be construed as a departure from the "approach" taken in the NPRM. That Joint Petitioners do not like this "approach" and would have preferred a different outcome does not mean it merits reconsideration.

With respect to that policy choice discussed above, there is no basis for a finding (nor is the argument even made by Joint Petitioners) that in enacting the backup power and consumer disclosure provisions of the Report and Order that "the Commission failed to consider relevant factors or made a clear error in judgement."[25] In fact, a review of the record and the Report and

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21 NPRM, ¶ 35 (emphasis added).

22 *Id.*, ¶ 41.

23 *Id.*, ¶ 42.

24 *Id.*, ¶ 48.

25 *Cellco P'ship v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004), citing *Citizens to Preserve Overton Park, Inc. v. Vople*, 401 U.S. 402, 416, (1971).

Order finds just the opposite. Specifically, the point-of-sale 8 hour battery requirement,[26] the "no obligation to retrofit"[27] requirement, and the consumer disclosure requirements[28] are all based on "relevant factors" discussed in the record, such as consumer usage and consumer preference patterns (*i.e.*, the percentage of consumers that have "cut the cord"[29] and the tendency of Voice over Internet Protocol ("VoIP") customers to decline to take a battery when one is offered by their provider[30]), the cost to providers of a retrofitting requirement,[31] and the cost of providing a battery to every customer that does not want it.[32] With respect to the latter, the Commission rejected a Public Knowledge proposal to "require providers to furnish backup power without an additional fee because…this argument disregards the record evidence that batteries or other potential substitutes for line powering carry a not insignificant additional cost over an entire network."[33] The Commission also found that "it is not unreasonable to permit providers to recoup those additional costs from those subscribers who have need for the additional coverage."[34] In short, the Commission analyzed each of the relevant factors based on arguments made by parties on both sides of the issue and determined that on balance, the rules adopted were consistent with and indeed furthered its commitment to "ensure the continuity of

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26 Report and Order, ¶¶ 31-38.

27 *Id*., ¶ 43.

28 *Id*., ¶¶ 48-71.

29 *Id*., ¶ 37. *See also*, NPRM, ¶ 9.

30 Report and Order, ¶ 37.

31 *Id*, ¶ 43.

32 *Id*., ¶ 44.

33 *Id*.

34 *Id*.

911 communications to homes across the country."[35] Such a thorough analysis of the record and the relevant factors that went into the final decision can hardly be called "arbitrary and capricious."

The Commission should also reject the argument that the Report and Order will "undermine the public safety and other policy goals set forth in 47 U.S.C § 151."[36] To begin with, the Petition fails to point to any language in Section 151 or a prior interpretation of the provision by the Commission, Congress, or the courts that would require the adoption of backup power provisions of the sort endorsed by Joint Petitioners. Beyond that omission, the Petition also fails to demonstrate or even allege that the Commission failed to consider fully its responsibility to public safety pursuant to Section 151. On the contrary, the Commission balanced its commitment to 911 availability with other relevant factors. Specifically, the Commission recognized the limited value that certain consumers place on backup power, but those consumer preferences notwithstanding, declined to abandon its efforts to adopt backup power rules.[37] With this continued commitment to 911 availability in mind, the Commission stated that "[t]he provision of backup power for network equipment at the subscriber premises promotes the 'safety of life and property through the use of wire and radio communication' by enabling 911 calls for subscribers of the covered services, when the power is out."[38] The Commission went on to note that "the rules we adopt today will preserve safety of life by enabling the use of VoIP and other non-line powered services to contact 911 in a commercial

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35 *Id.*, ¶ 19.

36 Petition, p. 2.

37 Report and Order, ¶ 19.

38 Id., ¶ 21 (citing 47 U.S.C. § 151).

power outage."[39] The Commission also concluded in the Report and Order that "[u]ltimately, we are persuaded that subscribers should not have to pay for backup power they do not want."[40] In sum, the Commission balanced two competing but important factors – their commitment to public safety, including the public safety goals contained in Section 151, and their commitment to consumer choice – and found that Section 12.5(d) as adopted would further both.

C. Additional Arguments Set Forth by Joint Petitioners are Unpersuasive and Not Supported by the Record

The Petition asserts that the Commission declining to require carriers to assume responsibility for providing every customer with backup power is based on an inference that has "no basis."[41] Specifically, the Petition states that the Order is based on an inference that consumers have "come to prefer the minimal backup-power afforded by the charge on a wireless phone or the convenience of a cordless phone without backup power."[42] Contrary to the Petition's assertion, there is indeed substantial basis for just such an inference. This includes the data in record that "41 percent of American households rely exclusively on wireless services,"[43] that "more than 70 percent of 911 calls originate from mobile phones"[44] and "comments in the

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39 *Id*.

40 *Id*., ¶ 44.

41 Petition, p. 3.

42 *Id*.

43 NPRM, ¶ 9. *See also*, Comments of AT&T, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), p. 12, fn 25; Comments of CenturyLink, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), p. 3, fn. 6; Comments of USTelecom, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), p. 4.

44 Comments of the National Cable & Telecommunications Association ("NCTA"), PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), pp. 6-7 (citing *See Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, Statement of Commissioner Jessica Rosenworcel (Jan. 29, 2015) at 1 ("The number of wireless calls to 911 is skyrocketing. In fact, more than 70 percent of 911 calls are now made from wireless phones.").

record indicat[ing] that, when it is offered, consumers often may not choose to avail themselves of options to purchase backup power."[45] This inference was also supported by the comments of Cincinnati Bell in this proceeding that included a very interesting case study as to the limited value that consumers place on the availability of backup power.[46] These data points demonstrate that a large number of consumers have expressed a clear preference for VoIP service without a battery when offered and consumer premises equipment (cordless phones[47]) that limit their ability to dial 911 in the event of a power outage. Moreover, these data points also show that consumers in substantial numbers have chosen to live without a fixed voice service entirely and are entirely comfortable with dialing 911 from their mobile device in the event of an emergency. Based on this data, it is hard to see how the Commission could have come to any other inference other than the one with which Joint Petitioners take issue as noted above.

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[45] Report and Order, ¶ 37 ("We further acknowledge that comments in the record indicate that, when it is offered, consumers often may not choose to avail themselves of options to purchase backup power) (citing comments of comments of Comcast and BrightHouse Networks).

[46] Cincinnati Bell stated in their comments that after the 2008 Hurricane Ike power outage that caused nearly 2 million people to lose power for up to nine days, they responded by attempting to market their landline services to cable and Voice over Internet Protocol ("VoIP") subscribers by promoting the availability of backup power should the customer choose to subscribe to Cincinnati Bell's voice service. Cincinnati Bell "saw little to no uptick as a result and landline loses continued at a steady pace despite the lack of backup power with alternative services." Comments of Cincinnati Bell, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593 (fil. Feb. 5, 2015), p. 7.

[47] It should also be noted that the Report and Order's discussion of cordless phones recognizes the limits of the Commission's authority to regulate consumer premises equipment ("CPE"). Moreover, the Report and Order states that "[w]e recognize that some telephone handsets (including cordless telephones) that are traditionally considered unregulated CPE may need backup power during a commercial power outage in order to function. *This is also the case, however, when line-powered service is provided.* The rules adopted today do not apply to such CPE, because such CPE is not part of the "service" provided to the customer (just as it is not part of a line-powered service offering)." Report and Order, fn 266 (emphasis added). In other words, the Report and Order implicitly recognizes that overcoming the lack of consumer preference for backup power would mean actually regulating CPE. It also implicitly recognizes that the use of cordless phones – which may limit a consumer's ability to dial 911 in the event of a power outage – is not unique to the rise in the use of VoIP or to the IP transition. In other words, the Commission would have ventured far beyond the original intent or scope of the NPRM to overcome this issue.

The Petition also misses the mark in pointing to what it terms as several "serious omissions,"[48] such as the Commission's failure to consider the economies of scale that would result from a rule requiring carriers to provide backup power to every customer at no expense and its failure to mitigate the cost of requiring consumers to pay for a backup power battery. Contrary to the Petition's assertion, however, these considerations are not omitted from the Report and Order; they are, rather, dismissed or addressed by the Commission based on the record. The Report and Order notes, when discussing the possibility of requiring carriers to provide backup power to every customer, the "additional cost over an entire network"[49] of doing so. The Report and Order also notes at one point that, "[u]ltimately, we are persuaded that subscribers should not have to pay for backup power they do not want."[50] Thus, regardless of the economies of scale that could theoretically be achieved, the Commission was confronted with the policy choice of requiring carriers to absorb the cost of providing a battery backup to every customer (costs that would need to be passed on to every customer in some form anyway) – including those that did not want it – or allowing customers to make the affirmative choice of whether to obtain and pay for a battery themselves. The Commission made the policy choice reflected in the Report and Order based on consumer preferences and the fact that the consumer disclosure provisions[51] would enable consumers to make an *informed* choice. This in effect made questions surrounding economies of scale irrelevant. Moreover, contrary to the assertion made in the Petition, the costs to the consumers that do make such a choice to purchase a backup

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48 Petition, p. 10.

49 Report and Order, ¶ 44.

50 *Id*.

51 Section 12.5 (d).

battery are indeed mitigated by the Commission's admonition that "we expect market forces to ensure that backup power is offered at competitive prices."[52] In fact, if the Petition is correct that providers will "make profit centers out of backup power,"[53] such market forces are likely to prevail as battery backup manufacturers are likely to enter the market (spurred by the Report and Order[54]) and drive prices downward for the battery themselves, and carriers are likely to price the battery and installation service well within reach of consumers to whom it will seek to market such a feature.

III. CONCLUSION

For all of the reasons discussed above, the Petition for Reconsideration of the Report and Order should be dismissed.

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52 *Id.*, ¶ 45.

53 Petition, p. 11.

54 While providers of the covered services are not required to provide backup power to every customer, they are required to make it available to every new customer at the point of sale and to disclose to all customers annually that they can choose to purchase such backup power. This will require providers to have on hand substantial quantities of batteries and any attendant equipment to make them work to satisfy consumer demand. Battery and equipment manufacturers are likely to ramp up their production of such batteries and development of longer lasting and less expensive batteries and attendant equipment and thus drive down the price for such batteries.

NTCA-THE RURAL BROADBAND ASSOCIATION

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