

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

In the Matter of)
)
Amendments to Part 4 of the Commission’s) PS Docket No. 15-80
Rules Concerning Disruptions to)
Communications)

**OPPOSITION
OF
NTCA–THE RURAL BROADBAND ASSOCIATION**

NTCA–The Rural Broadband Association (“NTCA”)¹ hereby submits this Opposition to the Petition for Reconsideration (“*Petition*”)² filed by the California Public Utilities Commission (“CPUC”) in the above-captioned Federal Communications Commission (“Commission”) proceeding. The *Petition* seeks reconsideration of the Commission’s decision³ declining to revisit its pre-existing presumption of confidentiality for all information contained in Network Outage Reporting System and Disaster Information Reporting System (“NORS/DIRS”) filings. Even as the Commission did not seek (and was not required to seek) comment on the specific issue that is the subject of the *Petition*, it did consider the issue, addressing comments proposing to revisit its current presumption of confidentiality and rejecting them on a substantive basis. While the *Order* left open the possibility of examining the issue in the future – and there is nothing preventing the CPUC (or any other party) from petitioning for a rulemaking to change existing rules if it wishes to do so – the *Petition* merely

¹ NTCA represents approximately 850 providers of high-quality voice and broadband services in the most rural parts of the United States. In addition to voice and broadband, many NTCA members provide wireless, video, and other advanced services in their communities.

² Petition for Reconsideration, California Public Utilities Commission (“Petitioner” or “CPUC”), PS Docket No. 15-80 (fil. May 28, 2021) (“*Petition*”).

³ Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications, PS Docket No. 15-80, Second Report and Order, FCC 21-34 (rel. Mar. 18, 2021) (“*Order*”).

repeats arguments already rejected by the Commission in the instant proceeding and fails to demonstrate that seeking comment will result in a different result. The *Petition* should therefore be dismissed.

In its *Petition*, the CPUC asserts that the Commission should “consider” revisiting its current presumption of confidentiality first adopted in 2004 – the *Petition* also states that the “Commission should have sought comment on”⁴ this issue in the proceeding that ultimately produced the *Order*, and thus the CPUC asserts that the Commission erred in reaching its conclusion without first seeking comment on the confidentiality presumption. The *Petition* misses the mark, however, in attempting to expand the scope of the instant proceeding and also in glossing over both the record compiled in response to the *2020 Second Further Notice*⁵ and the Commission’s response to that. As an initial matter, the Commission was not required to give notice and seek comment on any given topic other than those associated with the rules it proposed to amend and the specific changes it intended to make to them. As much as the CPUC may have wished for the Commission to seek comment as well on the confidential treatment of NORS/DIRS reports, the Commission was under no obligation to do so and instead sought comment specifically on those particular items and issues that it proposed to change. As long as sufficient notice and comment procedures are followed, and in the absence of a statutory mandate or court order on remand to consider some specific issue, no party is entitled to reconsideration of a rulemaking simply because the Commission chose to define the scope of the rulemaking in a manner differently than the party would have preferred.

⁴ *Petition*, p. 10.

⁵ *Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Second Further Notice of Proposed Rulemaking, FCC 20-20 (rel. Mar. 2, 2020) (“*Second Further Notice*”).

Moreover, even as the Commission did not seek comment on the specific topic of revisiting its presumption of confidentiality, several commenters proposed just that⁶ – and they were rejected on a substantive policy basis. After reviewing such proposals, the Commission stated that, “[w]e are unpersuaded on the current record that the presumption of confidentiality for all NORS and DIRS information is not fully warranted, as some commenters argue.”⁷ Far from simply dismissing the issue or erring in reaching its determination,⁸ the Commission took on directly the policy arguments, concluding that while some commenters argued that “NORS and DIRS information often does not contain information that is sensitive for national security reasons, no commenter provides practical guidance on how to distinguish at an operational level those reports that contain such sensitive national security information (or sensitive business information) from those that do not.”⁹ Although the *Order* further determined that the record on such matters was incomplete and that the Commission was not in a position to determine whether commenters’ assertions had merit,¹⁰ it found that, based upon the record before it, commenters had failed to “address the possibility that a collection of NORS and DIRS filings could reflect patterns that implicate national security, even when filings taken individually may not.”¹¹ In short, the Commission addressed arguments to make NORS/DIRS filings public and found them unpersuasive even as it noted that it was not permanently foreclosing further discussion of the issue.¹² Given the arguments raised and the findings noted, the *Petition* fails to make the case that setting aside

⁶ *Order*, ¶ 46, fn. 95 (citing entities seeking a revisiting of the presumption of confidentiality).

⁷ *Order*, ¶ 46.

⁸ *Petition*, p. 1.

⁹ *Order*, ¶ 46.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

the *Order* and seeking comment on the issue is likely to result in a different outcome or that arguments that are persuasive to the Commission will be forthcoming.

In addition, CPUC is incorrect in stating that the discussion highlighted above in the *Order* (retaining the current presumption of confidentiality) was “nothing more than an affirmation of the status quo” or that had the Commission “taken comment” on the issue it could have received “further guidance.”¹³ In addition to being a rejection of the CPUC’s substantive arguments on the presumption, the findings of the Commission were a logical outgrowth of the proceeding and the questions asked in both the *Second Further Notice* as well as the *2016 Further Notice*.¹⁴ In both notices, the Commission sought comment on the topic of expanding access to NORS/DIRS filings. That a different question of a different scope – whether the presumption of confidentiality should be revisited entirely – was not specifically asked is irrelevant. Nothing in the Administrative Procedure Act requires the Commission to reconsider final decisions simply because commenters make proposals outside the scope of a rulemaking that are ultimately nonetheless rejected on substantive grounds.

Indeed, in addition to the procedural infirmities of the *Petition*, the substantive arguments themselves weigh heavily in favor of the Commission’s determinations. The *Petition* fails to make a persuasive case that unfettered public access to NORS and DIRS filings would not be detrimental to national security, would promote public safety, or further “competition.”¹⁵ Perhaps most importantly, as can be seen below, this lack of persuasive argument demonstrates that even if the Commission had sought comment on revisiting the

¹³ *Petition*, pp. 12-13.

¹⁴ *Amendments to Part 4 of the Commission’s Rules Concerning Disruptions to Communications, et al.*, PS Docket No. 15-80 et al., Report and Order, Further Notice of Proposed Rulemaking, and Order on Reconsideration, FCC 16-63 (rel. May 26, 2016) (“*2016 Further Notice*”).

¹⁵ *Petition*, pp. 16-22.

confidentiality presumption (or if it should do so going forward), the current approach represents the correct balancing of interests and should be retained.

Turning to the policy arguments made in favor of revisiting the confidentiality presumption, the fact that “some” of the information at issue here is already public, and that “most” of the information is “general” in nature¹⁶ is not enough – once again, as the FCC already found, this argument does not “provide[] practical guidance on how to distinguish at an operational level those reports that contain such sensitive national security information (or sensitive business information) from those that do not.”¹⁷ Put another way, the CPUC fails to offer up a framework for public access to NORS/DIRS information that *also* protects national security – and the *Petition* offers no indication that setting aside the *Order* and seeking comment on the issue will elicit such a framework when the CPUC was unable to do so both in response to the *Second Further Notice* or in the instant *Petition for Reconsideration*. In addition, the fact that energy utilities in some case publicly report on outages or that in Japan the service providers publicly report on some outage information¹⁸ is not dispositive of whether US based service providers’ public reporting of NORS/DIRS information will promote public safety¹⁹ – indeed, the connection between these points is left unexplained by the CPUC. Finally, the argument that making the information at issue here public would “promote competition” is incomplete – the overarching concern here is promoting public safety and, as the Commission notes, to “provide critical situational awareness that enables the Commission to be an effective participant in emergency response and service restoration

¹⁶ *Id.*, p. 13.

¹⁷ *Order*, ¶ 46.

¹⁸ *Petition*, p. 20.

¹⁹ *Id.*, pp. 20-22.

efforts, particularly in the early stages of communications disruption.”²⁰ To the extent that consumers may base their choice of service provider on frequency and duration of outages, the Commission must also balance national security concerns, and here once again the CPUC fails to offer an effective framework for releasing information that will further the former while still securing the latter.

Ultimately, the *Petition* fails to show that setting aside the *Order* and seeking comment on revisiting the confidentiality presumption will yield a different result – the CPUC was unable to make a persuasive case on this in response to the *Second Further Notice* or in their *Petition*. Because the Commission was on firm procedural ground to reject these arguments, and because setting aside the *Order* would only delay moving forward with new NORS/DIRS provisions that advance the agency’s policy considerations (the advancement of public safety and the protection of national security), the *Petition* should be dismissed.

Respectfully submitted,

NTCA–The Rural Broadband Association

By: /s/ Michael R. Romano
Michael R. Romano
Senior Vice President –
Industry Affairs & Business Development
mromano@ntca.org

By: /s/ Brian J. Ford
Brian J. Ford
Director of Industry Affairs
bford@ntca.org

4121 Wilson Boulevard, Suite 1000
Arlington, VA 22203
703-351-2000

August 13, 2021

²⁰ *Order*, ¶ 1.