



July 22, 2015

Ex Parte Notice

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Technology Transitions, GN Docket No. 13-5; Ensuring Customer Premises Equipment Backup Power for Continuity of Communications, PS Docket No. 14-174.

NTCA–The Rural Broadband Association (“NTCA”), GVNW Consulting, Inc., and Vantage Point Solutions (“the Rural Representatives”) hereby submit this *ex parte* letter to address issues raised in a November 25, 2014 Federal Communications Commission (“Commission”) Notice of Proposed Rulemaking (“NPRM”).¹ The Commission therein sought comment on, among other things, issues surrounding the provision of standby battery backup power necessary for subscribers of non-line-powered voice services to utilize their customer premises equipment (“CPE”) in the event of a power outage.

For the reasons explained in prior filings in this proceeding and further herein, the Commission should refrain from adopting any new backup power mandates. Should the Commission determine that such mandates are necessary, it should (as it has in other regulatory contexts, as discussed further below) exempt small businesses – and rural, rate of return-regulated carriers (“RLECs”) in particular – or at the very least adopt less burdensome alternatives for small businesses pursuant to its responsibilities under the Regulatory Flexibility Act.

Any Backup Power Mandates Adopted in this Proceeding Would Fail a Cost/Benefit Analysis in Light of the Affirmative Choices That Consumers Have Made

Any Commission action in this proceeding should include a cost/benefit analysis, as any backup power mandates will impose on providers costs that, understandably, must be ultimately

¹ *Ensuring Customer Premises Equipment Backup Power for Continuity of Communications*, PS Docket No. 14-174, *Technology Transitions*, GN Docket No. 13-5, *Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers*, RM-11358, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Notice of Proposed Rulemaking, FCC 14-185 (rel. Nov. 25, 2014) (“NPRM”).

recovered from consumers. Such a cost/benefit analysis should examine consumers' affirmative choices in terms of voice service providers and CPE and the benefit to consumers should the Commission adopt additional backup power mandates on providers of non-line-powered voice services.

As the Commission has already acknowledged, 41 percent of Americans have fully "cut the cord" and rely on a mobile wireless phone as their *only* voice service.² A backup power mandate would be of no benefit to these consumers in terms of emergency access to 911 during a power outage. It should go without saying that consumers that have "cut the cord" in terms of voice and adopted mobile wireless as their only voice service clearly understand (or should) that their ability to dial 911 is dependent upon having a charged battery in their wireless device.

In addition, even in homes that continue to subscribe to a landline voice service, it is likely that the vast majority utilize a cordless phone that requires the availability of power in the first instance. In fact, one estimate found that approximately 75 percent of landlines phones purchased in 2013 were cordless phones.³ Such sales trends bear directly on the issue of the effectiveness of additional backup power mandates for the large number of consumers that, like mobile wireless users, clearly understand (or should) that the ability to utilize their home telephone is dependent in the first instance upon the availability of power to the house (or, alternatively, an informed choice to maintain their own "backup" in the form of a non-cordless phone).

In terms of subscribers to non line-powered voice services, these consumers' choices also call into serious question the need for and consumer benefit of additional backup power mandates. As nationwide and cable voice providers have stated, only a small percentage of their voice subscribers choose to purchase a backup power battery when offered to them.⁴ In fact, Cincinnati Bell's experience in marketing the availability of backup power to potential customers presents the Commission with a telling case study that must inform any Commission action going forward. In its February 6, 2015 comments Cincinnati Bell stated 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 voice service to cable and Voice over Internet Protocol ("VoIP") subscribers by promoting the availability of backup power

² *Id.*, ¶ 9.

³ *See*, Consumer Electronics Association, Digital America: State of the U.S. Consumer Electronics Industry 1 (2013), available at <http://www.ce.org/News/Publications/Digital-America.aspx>.

⁴ National Cable & Telecommunications Association ("Cable") *Ex Parte* Letter, GN Docket No. 13-5, PS Docket No. 14-174 (fil. May 18, 2015), p. 2 (stating that "an exceedingly small percentage of cable voice customers purchase batteries for their CPE when offered and *that there is no demonstrable increase in demand for batteries following extended power outages*. This experience suggests that the customers rely on alternative means of communicating (i.e., mobile devices and services) if the voice equipment in their home is not working.") (emphasis added). *See also*, Verizon *Ex Parte* Letter, GN Docket No. 13-5, PS Docket No. 14-174 (fil. May 22, 2015), p. 2 (stating that "only a very small number of customers elect to purchase battery back-ups given the near ubiquitous use of cell phones and customers' adoption of cordless telephone handsets in the home.").

should the consumer choose to switch to Cincinnati Bell's voice service. Cincinnati Bell "saw little to no uptick as a result and landline losses continued at a steady pace despite the lack of backup power with alternative services."⁵ The cable industry has also noted that power outages are not followed by increased consumer demand for backup power batteries.⁶

Often living in the communities they serve, RLECs take seriously their commitment to provide subscribers with reliable, quality services consistent with consumer expectations, needs, and demands. The Rural Representatives' members and clients report that the provision of a battery that is capable of providing approximately eight hours of standby backup power⁷ is typically a standard part of any fiber-to-the-home ("FTTH") installation. The NPRM's proposal for an eight hour standard strikes the right balance between ensuring that consumers' needs in a time of emergency or power outage are met and the increased costs of mandating a longer time frame.

In considering additional mandates beyond the eight hour standard, however, it is important for the Commission to consider the critical yet often overlooked distinction between: (1) the costs of providing a backup battery upon *initial installation* of subscribers' service; and (2) the costs of upgrading or replacing the Network Interface Device or other carrier-installed equipment placed at the customer premises (as would be required under some of the proposals being considered in this proceeding). RLECs utilize several different vendors for this equipment, and the capabilities of the equipment available will vary. Generally speaking, however, increasing the standby backup power available to consumers through, for example, a longer battery life, adding additional battery life monitoring⁸ within the network, or notification features at the customer premises, would each require the services of an RLEC technician to each and every affected customer location. Although such dispatches may be somewhat simpler and relatively less costly on a per-subscriber basis in more densely populated areas (although still burdensome), RLECs are unique in that they primarily serve rural areas where density and distance add significant per-location cost to the dispatch of a technician. Many of these small businesses operate in areas with fewer than 10 subscribers per square mile. A "truck roll" to many customer locations can consume several hours per customer location. Truck rolls to *each* existing customer location

⁵ 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.

⁶ Cable, May 18 *Ex Parte* Notice, p. 2 ("there is no demonstrable increase in demand for batteries following extended power outages.").

⁷ Consistent with the discussion of "standby backup power" in the NPRM, this refers to "the availability of standby backup power, not actual talk time." NPRM, fn. 110.

⁸ In terms of any requirement that providers monitor the health of customers' batteries and provide notifications as to the impending need for replacement, a number of RLECs do not have this capability at this time and that complying with such a mandate would require significant expense. This would likely include possibly dispatching technicians to each customer location in addition to upgraded equipment across the network as a whole. Moreover, whether customers would heed such notifications and the issue of liability should they choose to ignore those notification is unclear. Again, considering that customers place so little value on the availability of backup power, the number of cordless phones in use and the alternatives that most consumers use (*i.e.*, mobile wireless), such a mandate would fail any cost/benefit analysis.

across wide swaths of Nebraska or Montana or Maine or Texas to upgrade the battery and/or related equipment would impose significant and unique operating costs on small business RLECs, in addition to the upfront capital cost of acquiring the upgraded equipment to be installed.

The Rural Representatives are also aware that the Commission is considering whether it would be possible to mandate replacement of carrier-installed equipment at the customer premises with a backup battery solution utilizing commonly available battery sizes (*e.g.* D-Cell batteries). Such solutions appear to be driven in large part by one large provider that has indicated an intention to begin utilizing – although it has apparently not yet done so – a D-Cell battery solution.⁹ Even as one large provider is considering (but seems not yet to have implemented) such a step, it must be acknowledged that the size of the RLEC community as a whole (particularly as compared to nationwide providers) limits their ability to drive innovation and rapid production in the equipment market. Moreover, this large provider has been clear that the technology it plans to use is proprietary in nature and not compatible with that of other providers. Thus, the cost of developing and acquiring such devices is likely to be higher for these smaller providers. RLECs serving a very small percentage of the nation’s subscribers are unlikely, on their own, to possess the economies of scope and scale necessary to affordably obtain or drive down the cost of backup power equipment using such D-cell batteries, and thus the increased costs of obtaining such equipment will fall on their smaller customer bases. Pending a move toward greater standardization in the market for backup power battery technology¹⁰ – something that could potentially lower the costs for smaller providers – a mandate that that carriers move to something like a D-cell battery backup solution (which, again, has not yet been *actually* deployed by anyone yet) is not a cost-effective solution for RLECs.

Finally, a requirement that providers offer every subscriber the option to purchase backup power capability beyond the eight-hour capability typically installed by RLECs would itself impose substantial costs – and thus affect the pricing of such an option to the end user. As an initial matter, to respond to such consumer requests, carriers would presumably be required to acquire and maintain an inventory of such batteries in addition to the related and necessary equipment that must also often be placed at the customer premises to make such batteries work. In addition,

⁹ Verizon *Ex Parte* Letter, GN Docket No. 13-5, PS Docket No. 14-174 (fil. May 22, 2015), p. 2 (stating that the Verizon “PowerReserve” which utilizes conventional D-cell batteries “is designed to work with Verizon equipment only and will not power other providers’ network terminals.”).

¹⁰ As NTCA noted in initial comments, a Communications Security, Reliability and Interoperability Council (“CSRIC”) report cited in the NPRM stated that, “[e]ven if a VoIP service has a good battery backup system, the ability to provide power during outages is usually limited to a few hours. Best practices are needed to offer solutions that can last multiple days or even weeks, in case catastrophic damage, such as a major storm.” CSRIC IV Working Group 10B, CPE Powering – Best Practices; Final Report – CPE Powering, at 9-11 (September 2014) (“CSRIC CPE Powering Report”). As the report goes on to state, “[f]or the service provider, one of the greatest challenges is how to provide a reliable service given the wide range of technologies and the lack of any standards for DC power backup systems and interfaces.” *Id.* The report concluded, among other things, that “[t]he lack of any commonality or standards in DC power supplies negatively impacts the ability to back up VoIP systems. Every vendor of a DC powered CPE devices makes their own decisions on power adapters and interface connectors.” *Id.*

the dispatch of a technician to the customer's location would still be necessary in most cases, thereby driving even higher the cost of such an option to the consumer. In addition, while the NPRM proposes that carriers would "be entitled to commercially reasonable compensation"¹¹ in the event that certain CPE backup power mandates are adopted, this raises several questions as to how such a regime would work – for example, would the Commission regulate backup power rates? Presumably RLECs, given the nature of the areas they serve and being small businesses and given the limited customer base for which inventory must be acquired and maintained, would be entitled to recover more per-customer? At bottom, mandates of the kind contemplated here must be seen as contrary to good public policy generally and laws requiring flexibility for small businesses more specifically if providers are precluded in any way from recovering from consumers the true cost of compliance.

The Commission Should Exempt Small Businesses from Any New Backup Power Requirements Imposed in this Proceeding

Should the Commission move forward with additional backup power requirements, it should exempt small businesses such as those that comprise the Rural Representatives' members and clients. Such an exemption would be entirely consistent with similar exemptions adopted in other recent proceedings that have cited the disproportionate burden of regulatory requirements on small businesses.

For example, in the call completion proceeding, the Commission adopted an exemption from certain of the provisions of its November, 2013 Order¹² for providers of long-distance voice service that make the initial long-distance call path choice for less than 100,000 domestic retail subscriber lines. The Commission adopted a similar, though temporary exemption to its enhanced transparency rules adopted in the Open Internet proceeding in February 2015.¹³ The Commission noted therein the possible disproportionate impact of the new requirements on small businesses and acted accordingly to limit such burden.

An exemption for small businesses is particularly justified here, where the costs of deploying (or even just maintaining inventory of) new backup batteries could far outpace the additional reporting costs of the obligations noted above. For one, RLECs are unique among providers as they operate in some of the most challenging to serve areas of the nation, with lack of subscriber density, weather, and topography topping the many challenges they face. Moreover, as noted above, small businesses will be unable to drive the market for backup batteries and the related

¹¹ NPRM, fn. 109.

¹² Rural Call Completion, WC Docket No. 13-39, Report and Order and Further Notice of Proposed Rulemaking, FCC 13-135 (rel. Nov. 8, 2013), ¶ 27.

¹³ Protecting and Promoting the Open Internet, GN Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, FCC 15-24 (rel. Mar. 12, 2015), ¶ 172. The Commission is now examining this exemption to determine whether it should be made permanent. *See*, Public Notice, Consumer and Governmental Affairs Bureau Seeks Comment on Small Business Exemption from Open Internet Enhanced Transparency Requirements, (GN Docket No. 14-28) (rel. June 22, 2015).

and necessary equipment. In addition, RLECs being small businesses with limited customer bases will be strained in their ability to absorb the costs of a backup power standard greater than eight hours. As a result, the costs of proposed mandates for additional backup power availability or other proposals above would, necessarily, be passed on to consumers that have, to date, actually demonstrated little, if any, interest in such features. The operating expenses associated with maintaining a broadband network would be unnecessarily increased at a time when the Commission is attempting to design a universal service high-cost plan that limits such expenses.

Indeed, the proliferation of mobile wireless devices and cordless handsets in wireline subscribers' homes (both requiring a charged up battery) means that additional mandates may benefit a very small percentage of RLECs' subscribers. The fact that an estimated 70 percent of 911 calls are made via mobile wireless devices¹⁴ demonstrates that consumers have rapidly adapted to the use of these devices to meet their needs in the event of an emergency situation. As with the small business exemptions discussed above, the limited benefit that will be realized via an additional backup power mandate is far outweighed by the manpower costs that such requirements would impose on small businesses, such as RLECs – and unlike in these other recent cases in which exemptions were granted, this mandate would involve substantial new equipment costs as well.

A small business exemption in this proceeding would also be consistent with the Commission's responsibilities under the Regulatory Flexibility Act ("RFA"),¹⁵ which requires all federal agencies to consider the economic impact of regulations on small entities and to, among other things, consider exemptions to all of or any parts of proposed rules. A Small Business Administration ("SBA") document discussing the RFA notes that this statute "requires agencies to analyze the economic impact of proposed regulations when there is likely to be a significant economic impact on a substantial number of small entities, and to consider regulatory alternatives that will achieve the agency's goal while minimizing the burden on small entities."¹⁶

In keeping with the RFA compliance guidance from the SBA, the Commission should exempt RLECs from any backup power mandates adopted in this proceeding. As noted above, these carriers typically provide backup power to their subscribers with backup power availability meeting the NPRM's proposed eight hour standard. Thus, these carriers already provide their subscribers with the backup power necessary to meet the Commission's objectives in this proceeding, that is, to ensure that consumers are able to access emergency services in the event

¹⁴ 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.").

¹⁵ Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified at 5 U.S.C. § 601).

¹⁶ The RFA in a Nutshell: A Condensed Guide to the Regulatory Flexibility Act, SBA, Office of Advocacy (Oct. 2010), p. 4, available at: https://www.sba.gov/sites/default/files/advocacy/RFA_in_a_Nutshell2010.pdf.

of a power outage. In other words, the eight hour backup power standard “will achieve the agency’s goal while minimizing the burden on small entities.”¹⁷

Further in keeping with the mandates of the RFA, should the Commission consider adopting any backup power mandates, it should adopt less burdensome alternatives applicable to small businesses. More specifically, to the extent that the Commission does impose *any mandates*, they should be at best “forward-looking,” that is, applying in any and all cases *only* to new customer installations. Absent such a distinction between new customer installations and existing subscribers, RLECs would be required to dispatch a technician to each and every location within their service areas, incurring substantial costs and manpower usage to do so.

Based on the above-discussed choices that consumers have made and the resultant limited impact that additional mandates as to backup power would have, the Rural Representatives urge the Commission to at most adopt the NPRM’s proposal that service providers make available standby backup power necessary for consumers to make use of their communications services for, *at most*, the first eight hours during a power outage situation. Any additional mandates would impose on the small businesses that comprise the Rural Representatives members and clients costs far in excess of any benefit to consumers. Thus, a small business exemption to any mandates should be adopted if the Commission takes action beyond the eight hour standard.

Finally, to the extent that the Commission is concerned that consumers are not sufficiently aware of limitations of the choices that they have made as to voice service providers and cordless phones, should additional consumer education mandates be adopted, they should remain flexible and must allow RLECs to tailor their consumer disclosures as to backup power availability based on their current capabilities, internal systems and their years of experience in serving their customer bases. More specifically, while bill inserts (in addition to point of sale disclosures) may be the best solution for some RLECs, others may not have the ability to adopt such a practice quickly and without significant expense related to upgrades of automated billing systems. Other RLECs may find that bill inserts have been ineffective in the past and that other forms of disclosure (email notifications for example) are, in their experience, more effective. In any case, flexibility should be the touchstone of any consumer education requirements adopted here. Finally, the Commission could also work to create a “safe harbor” consumer notification provision that would provide guidance to carriers of all sizes.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission’s rules, a copy of this letter is being filed via ECFS.

¹⁷ *Id.*

Sincerely,

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