

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL O'RIELLY**

*Re: Ensuring Continuity of 911 Communications*, PS Docket No. 14-174, Report and Order

Consumers should make plans to communicate during power outages, as part of their overall emergency preparedness efforts, including understanding the benefits and limitations of their communications services and devices. At the same time, the Commission should be careful not to place undue burdens on providers to offer backup power solutions that provide little real benefit, based on how the market is already developing.

The record in this proceeding highlights the transitions that are already well underway in the communications market. One commenter emphasized that, “among telephone households during 2013, more than 90 percent had wireless service and 43 percent used only wireless telephones for voice service.”<sup>1</sup> Of the remaining households, “30 percent were using non-traditional services such as VoIP via broadband” meaning that “only 27 percent of telephone households were using traditional landlines as of year-end 2013.”<sup>2</sup> These trends will continue apace. In particular, the percentage of households that have “cut the cord” is expected to top 50 percent by the end of this year.<sup>3</sup> And such consumer adoption of new technology happened without a new FCC backup power regime.

Even amongst households that continue to subscribe to a landline voice service, however, “it is likely that the vast majority utilize a cordless phone that requires the availability of power in the first instance.”<sup>4</sup> Indeed, one commenter estimated that “less than one percent of households are traditional telephone subscribers with line power service, a corded telephone, and no mobile wireless service.”<sup>5</sup>

It is not too surprising that when consumers are offered a backup power option, most choose not to avail themselves of it. Several commenters attributed the lack of consumer demand for backup power to the fact that “customers rely on alternative means of communicating (i.e., mobile devices and services) if the voice equipment in their home is not working.”<sup>6</sup> As one commenter noted, “consumers mainly rely on wireless communication during emergencies, and a large portion of this is texting. In addition, use of social media is becoming more prominent, since it enables members of communities to communicate quickly and provide assistance more immediately.”<sup>7</sup> Even CSRIC, the FCC’s own advisory committee, noted that “the need for back-up power is evolving, as consumers increasingly rely on their cell phones and other portable devices for emergency communications during a commercial power outage.”<sup>8</sup>

The order acknowledges that “many” providers already offer backup power solutions to their customers. Yet, as one association stated, “an exceedingly small percentage of cable voice customers

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<sup>1</sup> Comments of The United States Telecom Association, PS Docket No. 14-174 et al., at 3 (filed Feb. 5, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 4.

<sup>4</sup> Letter from NTCA–The Rural Broadband Association, GVNW Consulting, Inc., and Vantage Point Solutions to Marlene Dortch, FCC, GN Docket No. 13-5, PS Docket No. 14-174, at 2 (filed July 22, 2015).

<sup>5</sup> Letter from Fiber to the Home Council Americas to Marlene Dortch, FCC, PS Docket No. 14-174, at 2 (filed May 7, 2015).

<sup>6</sup> *See, e.g.*, Letter from National Cable & Telecommunications Association to Marlene Dortch, FCC, GN Docket No. 13-5, PS Docket No. 14-174, at 2 (filed May 18, 2015) (NCTA Ex Parte).

<sup>7</sup> Letter from Fiber to the Home Council Americas to Marlene Dortch, FCC, GN Docket No. 13-5, PS Docket No. 14-174, at 2 (filed May 13, 2015).

<sup>8</sup> CSRIC Working Group 10 Report at 19 (September 2014),

<http://transition.fcc.gov/pshs/advisory/csric4/CSRIC%20WG10%20CPE%20Powering%20Best%20Practices%20Final%20Draft%20v2%20082014.pdf>.

purchase batteries for their CPE when offered and that there is no demonstrable increase in demand for batteries following extended power outages.”<sup>9</sup> The same experience rings true among telephone companies. For example, one provider that tried to promote its voice service by advertising the availability of backup power in the wake of a hurricane that caused significant outages “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.”<sup>10</sup>

Given these facts, efforts to impose backup power requirements on providers should face heightened scrutiny to ensure that the costs are truly justified. Once again, however, the FCC tries to bypass the required analysis by trotting out the same old stale statistic that each life saved is worth x millions of dollars. Even if that figure made sense in this setting, that is still no excuse for refusing my request to do the work needed to estimate the costs imposed by this Order. Why does the agency continuously refuse to conduct a true cost-benefit analysis? If this item is truly of value, then the data will support it. Without that critical information, I must make my own best estimate based on input from stakeholders. This is quite a challenge when they know little about the requirements set forth in the order—not an ideal situation.

My general sense is that, while the order is largely unnecessary, the adjustments that have been made since last year’s proposal better align the costs imposed by the FCC with the benefits. In particular, the providers are given flexibility to decide how to meet the requirement to offer customers the option to purchase a backup power solution for 8 hours in the near-term and 24 hours in 3 years. Moreover, while companies must provide information about the solution at the point of sale and annually thereafter, they also have some flexibility to decide how best to communicate with their customers. For example, if a customer has requested to receive information from a provider by email, then these requirements can be met by providing the information by email. In addition, the item condenses the minimum requirements. Moreover, the rules include a sunset—something that I have advocated for across FCC proceedings—albeit after 10 years, which is a longer timeframe than needed.

That is not to say that I am satisfied with the order. I do not understand the hesitancy to make clear that states cannot regulate interconnected VoIP by adopting their own backup power requirements. The Commission previously declared that “this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to [VoIP] and other IP-enabled services having the same capabilities.”<sup>11</sup> While some of my colleagues may want states to play a greater role, it is disingenuous for the item to imply that states have a larger role than what is actually permitted under long-standing Commission precedent. They do not and no state should read our actions today suggesting otherwise.

Moreover, there is no pre-emption of state regulation of other types of voice service. It does no good for the FCC to try to tailor the burdens on providers only to leave a gaping loophole for 56 states and territories to apply different standards, potentially increasing the costs of compliance. For example, I

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<sup>9</sup> NCTA Ex Parte at 2.

<sup>10</sup> Comments of Cincinnati Bell, PS Docket No. 14-174, GN Docket No. 13-5, RM-11358, WC Docket No. 05-25, RM-10593, at 7 (filed Feb. 5, 2015).

<sup>11</sup> Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm., Order, 19 FCC Rcd 22404, 22405, para. 1 (2004), aff’d, *Minnesota Pub. Util. Comm’n. v. FCC*, 483 F.3d 570 (8th Cir. Mar. 21, 2007). The Commission further stated that “[f]or such services” state regulation must “yield to important federal objectives”, thereby confining the state role to “protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints” and enforcement of “general laws governing entities conducting business within the state, such as laws concerning taxation; fraud; general commercial dealings; and marketing, advertising, and other business practices.” *Id.* This reasoning was used in a series of orders setting forth federal obligations for interconnected VoIP service.

asked staff whether states could require providers to offer 30 days of backup power and the answer was shockingly “yes”. What a horrible answer. I am unwilling to write a blank check for backup power burdens that are barely justified in the first place.

I am also concerned that, here again, we are giving the Enforcement Bureau undue power to second guess whether providers’ materials were “reasonably calculated” to reach their customers. My request to narrow that discretion was rejected.

Overall, today’s Order represents an improvement over what was proposed and discussed in past months. I continue to have concerns that the rules will impose undue costs and a number of key issues that I tried to work out with Commission leadership were ultimately rejected. Therefore, I concur.