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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)
)
Revision of the Commission's Rules to Ensure)
Compatibility with Enhanced 911 Emergency)
Calling Systems)

CC Docket No. 94-102

To: The Commission

COMMENTS OF BELL SOUTH CORPORATION

BellSouth Corporation ("BellSouth"), by its attorneys, hereby responds to the Commission's *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Request for an Emergency Declaratory Ruling Filed Regarding Wireless Enhanced 911 Rulemaking Proceeding," DA 98-1504 (July 30, 1998). The *Public Notice* seeks comment on a request filed by the State of California 9-1-1 Program Manager for an immediate ruling concerning immunity from liability for wireless carriers and related issues in the provision of mandatory E-911 services,¹ due to uncertainty created by the Commission's *R&O*² and *Reconsideration Order*³ regarding these issues. On February 17, 1998, BellSouth filed a petition for reconsideration of the Commission's *Reconsideration Order* requesting

¹ See Letter Request for Emergency Declaratory Ruling from Leah A. Senitte, 9-1-1 Program Manager, Emergency Telephone Systems Section, Telecommunications Division, Department of General Services, State of California, to William F. Kennard, Chairman, Federal Communications Commission (July 20, 1998) ("Letter Request").

² *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Report and Order and Further Notice of Proposed Rulemaking*, 11 F.C.C.R. 18676 (1996) (*R&O*), *recon.*, 12 F.C.C.R. 22665 (1997).

³ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Memorandum Opinion and Order*, 12 F.C.C.R. 22665 (1997) (*Reconsideration Order*).

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limits on liability for wireless carriers,⁴ and it agrees with the State of California that the time is now for an immediate ruling on this issue.

DISCUSSION

Since 1995, BellSouth⁵ and others⁶ have stressed to the Commission the importance of establishing limits on liability for wireless carriers in their provision of E-911 service. Yet the Commission has repeatedly declined to immunize wireless carriers or otherwise provide them with liability protection, finding such protection to be premature and unnecessary to ensure effective E-911 implementation.⁷ The State of California's request, however, demonstrates that the lack of federal action in this area is, in fact, an obstacle to effective E-911 implementation that requires immediate resolution:

*The issue of immunity from liability is now the only substantive obstacle preventing trials and commercial deployment of wireless E9-1-1 service and we believe all parties would benefit from clarification of the Commission's policy on this subject.*⁸

⁴ BellSouth Petition for Reconsideration of *Reconsideration Order* (Feb. 17, 1998).

⁵ See BellSouth *NPRM* Reply Comments at 6 (Mar. 17, 1995); BellSouth *Consensus Agreement* Comments at 8-9 (Mar. 4, 1996); BellSouth Petition for Reconsideration of *R&O* at 9-10 (Sept. 3, 1996); BellSouth Petition for Reconsideration of *Reconsideration Order* at 3-7 (Feb. 17, 1998).

⁶ See, e.g., AT&T *NPRM* Comments at 40-41 (Jan. 9, 1995); Bell Atlantic *NPRM* Comments at 11 (Jan. 9, 1995); CTIA *NPRM* Comments at 20-21 (Jan. 9, 1995); Motorola *NPRM* Comments at 17-18 (Jan. 9, 1995); Nextel *NPRM* Comments at 9 (Jan. 9, 1995); PCIA *NPRM* Comments at 27-28 (Jan. 9, 1995); SBC *NPRM* Comments at 24-25 (Jan. 9, 1995); U S West *NPRM* Comments at 24-25 (Jan. 9, 1995); Ameritech Petition for Partial Reconsideration of *R&O* at 11-15 (Sept. 3, 1996); AT&T Petition for Reconsideration and Clarification of *R&O* at 7-8 (Sept. 3, 1996); Omnipoint Petition for Reconsideration of *R&O* at 6 (Sept. 3, 1996); SBMS Petition for Reconsideration and/or Clarification of *R&O* at 8-11 (Sept. 3, 1996).

⁷ *R&O*, 11 F.C.C.R. at 18727; *Reconsideration Order*, 12 F.C.C.R. at 22731-33.

⁸ Letter Request at 1 (emphasis added).

Accordingly, the State of California seeks clarification regarding three issues: (1) whether states must enact immunity from liability legislation before wireless carriers are required to provide E-911 (Phase I); (2) whether states without liability legislation must reimburse carriers for the cost of insurance to cover wireless E-911; and (3) what is meant by selective routing of 911 calls to the “appropriate” or “designated” public safety answering point (“PSAP”).⁹

The State’s confusion is understandable. When the Commission first addressed the liability issue in its *R&O*, it declined to exempt providers of E-911 service from liability for certain negligent acts or to provide them with the same broad immunity available to landline local exchange carriers (“LECs”) in their provision of 911 service, finding that:

[L]ocal exchange carrier immunity generally is a product of provisions contained in local exchange carrier tariffs. We conclude that [wireless] carriers can afford themselves similar protection by including similar provisions in contracts with their customers.¹⁰

BellSouth and others argued in response, however, that because wireless carriers are required to provide E-911 service to *all* callers, not just those with whom they have a contractual relationship, they cannot contractually indemnify themselves from liability when nonsubscribers use their systems.¹¹ Moreover, wireless carriers cannot protect themselves via tariffs the way LECs can because the Commission has forbore requiring tariff filings for commercial mobile radio service (“CMRS”) carriers.¹²

⁹ Letter Request at 1.

¹⁰ *R&O*, 11 F.C.C.R. at 18727.

¹¹ See BellSouth Petition for Reconsideration of *R&O* at 9 (Sept. 3, 1996); see also Ameritech Petition for Partial Reconsideration of *R&O* at 11 (Sept. 3, 1996); AT&T Petition for Reconsideration of *R&O* at 7 (Sept. 3, 1996); Omnipoint Petition for Reconsideration of *R&O* at 6 (Sept. 3, 1996); SBMS Petition for Reconsideration of *R&O* at 8-11 (Sept. 3, 1996).

¹² See BellSouth Petition for Reconsideration of *R&O* at 10 (Sept. 3, 1996); see *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Gen. Docket No. 93-252, *Second Report and Order*, 9 F.C.C.R. 1411, 1480 (1994).

The Commission's *Reconsideration Order* recognized these concerns, yet failed to provide a solution:

We recognize . . . petitioners' claim that they cannot contractually insulate themselves from liability when non-subscribers use their systems. Because covered carriers are required to transmit 911 calls from *all* handsets regardless of subscription, we agree . . . that it would appear reasonable for a carrier to attempt to make the use of its network by a non-subscriber subject to the carrier's terms and conditions for liability.¹³

Despite this recognition that contractual protection cannot be achieved where no contract exists, the Commission nevertheless concluded that "it is premature or unnecessary to preempt state laws at this time."¹⁴ BellSouth again sought reconsideration, proposing that the Commission permit CMRS providers to file limited federal tariffs for the purpose of limiting liability associated with the provision of E-911 service, thereby avoiding any need to preempt state laws.¹⁵ BellSouth also requested that the Commission clarify that it will not require wireless carriers to provide E-911 until states pass legislation limiting the liability associated with the provision of such service.¹⁶ No decision has been forthcoming from the Commission on these requests. The State of California's request demonstrates that the time is now to adopt BellSouth's pending proposals to resolve the liability issue.

I. WIRELESS CARRIERS SHOULD NOT BE REQUIRED TO PROVIDE E-911 SERVICE UNTIL ADEQUATE LIMITATIONS ON LIABILITY ARE AVAILABLE

The State of California first asks whether wireless carriers should be required to deploy E-911 in states that do not provide immunity from liability for the provision of E-911 service. In

¹³ *Reconsideration Order*, 12 F.C.C.R. at 22733 (footnotes omitted).

¹⁴ *Id.*

¹⁵ BellSouth Petition for Reconsideration of *Reconsideration Order* at 3-6 (Feb. 17, 1998).

¹⁶ *Id.* at 6-7.

asking this question, the State of California clearly illustrates the difficulty carriers have in providing E-911 in states without such legislation — the procurement of insurance to cover their potential liability in the absence of a statute or other limitations on liability. Specifically, a limited duration insurance policy to cover only four carriers for just 90 days during E-911 trials is estimated to cost \$150,000; statewide projections to insure all California wireless carriers annually are estimated to be at least \$50 million.¹⁷ Obviously, the cost to insure carriers nationwide could go much higher. As the State of California notes, E-911 trials in California cannot be completed as planned until this issue is resolved.¹⁸

This evidence runs counter to the Commission’s statement in its *Reconsideration Order*:

Petitioners’ claims that the limitation of liability is necessary are not convincing, particularly considering the fact that . . . *no evidence of liability problems is presented* in the record of our reconsideration proceeding. Contrary to petitioners’ speculative claim that current state laws are not “likely” to provide wireless carriers with adequate protection against liability, the record indicates that state legislative bodies and state courts are developing their own solutions to liability issues. While we recognize that not all states currently provide specific statutory limitation of liability protection for wireless carriers, we believe that state courts and state legislatures are the proper forums in which to raise this issue, not the Commission.¹⁹

Clearly, evidence of liability problems in California is very real, and, despite good faith efforts, the State and local carriers have not been able to resolve the problems.²⁰ Federal action in this area is required. As BellSouth stated in its petition, this action should come two ways. First, the Commission should amend Section 20.18 of its rules, 47 C.F.R. § 20.18, to make clear that carriers should not be required to provide E-911 within a state until that state enacts appropriate limitation

¹⁷ Letter Request at 2.

¹⁸ *See id.*

¹⁹ *Reconsideration Order*, 12 F.C.C.R. at 22732 (emphasis added).

²⁰ *See* Letter Request at 2.

of liability legislation.²¹ Second, consistent with recent Commission precedent, carriers should also be permitted to file federal tariffs governing the terms and conditions of E-911 service.²² In the Commission's *Interstate, Interexchange* service proceeding, the Commission acknowledged the legitimate need for the use of tariffs, even in services that are otherwise detariffed, when carriers provide service to customers with whom they have no established contractual relationship.²³ The Commission should do the same here. Neither of these two solutions — the proposed amendment to Section 20.18(d) nor the allowance of federal tariffs — requires a preemption of state law, and collectively, both will serve to obviate the costly insurance issue now faced by California.

II. COST-RECOVERY SHOULD INCLUDE INSURANCE COSTS

The State of California also asks whether a state's cost-recovery program should be required to reimburse carriers for insurance policies necessary for them to deploy wireless E-911. Commission precedent supports the recovery of costs incurred pursuant to a government mandate to provide a service found to be in the public interest, where (1) the Commission required implementation of the service, (2) the Commission dictated the terms and conditions and schedule for offering it, and (3) the costs sought to be recovered were specifically incurred for the implementation and operation of the service.²⁴

²¹ BellSouth Petition for Reconsideration of *Reconsideration Order* at 6-7 (Feb. 17, 1998). Alternatively, the Commission could clarify that any cost-recovery mechanism adopted by a state must contain a limitation of liability for the provision of E-911 service. *See id.* at 7. Either option would allow a state to limit liability in the manner it deems appropriate.

²² *Id.* at 3-6. BellSouth proposed in its petition that such tariffs cover subscribers and non-subscribers alike to address sound public policy concerns, including complex choice of law issues arising from the provision of E-911 service in a multi-state environment. *Id.* at 5-6.

²³ *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act, as amended*, CC Docket No. 96-61, *Order on Reconsideration*, 12 F.C.C.R. 15014 (1997).

²⁴ *See 800 Data Base Access Tariffs*, CC Docket No. 93-129, 11 F.C.C.R. 15227, 15250-51 (1996), *recon. granted in part on other grounds*, 12 F.C.C.R. 5188 (1997).

Specifically, in the Commission's *800 Data Base Access Tariffs* proceeding, the Commission established 800 number portability to enable an 800 number subscriber to change its interexchange carrier ("IXC") without having to change its number. To implement this service, the Commission imposed a variety of requirements on LECs, including the deployment of new technologies to access a data base capable of routing 800 calls to the subscriber's IXC of choice. The Commission allowed the LECs to recover their exogenous costs — defined as "those costs triggered by administrative . . . action that are beyond the control of the carrier" — associated with the provision of 800 data base service, summarizing its action as follows:

Because the Commission effectively required the implementation of the service and dictated the terms conditions and schedule for offering it, it concluded that the reasonable costs specific to offering basic 800 data base service are outside the carrier's control and may, therefore, be treated as exogenous [and recovered]. The Commission emphasized, however, that exogenous treatment will only extend to those costs incurred specifically for the implementation of basic 800 data base service.²⁵

The Commission concluded by allowing the recovery of administrative and other direct costs, which it distinguished from overhead costs not entitled to exogenous treatment.²⁶

Like LEC provision of 800 data base service, the Commission clearly has required that wireless carriers implement E-911 service,²⁷ and has dictated the terms, conditions and schedule for offering it.²⁸ Just as drivers of automobiles must purchase auto insurance to cover themselves in case of liability for negligence, wireless carriers must procure insurance to cover themselves in the event of liability for dropped E-911 calls or other errors. As discussed above, these costs are increased in

²⁵ *Id.* at 15234, 15250.

²⁶ *Id.* at 15256.

²⁷ *See Reconsideration Order*, 12 F.C.C.R. at 18682-84 (summarizing mandatory 911 requirements imposed upon wireless carriers).

²⁸ *See id.* at 18678 (stating that in the case of enhanced 911, "it is critically important that rigorous enhancement criteria be established, [and] that firm target dates for implementation be set").

the absence of state statutes and federal tariff protections limiting wireless carriers' liability for E-911 service provision. If carriers cannot procure insurance, they cannot operate the service in the first instance without risk of severe financial consequences due to costly litigation, up to and including bankruptcy. Obviously such a result would curtail a carrier's ability to provide any wireless service, including E-911, to the detriment of the public.

The only question, then, is whether insurance costs are administrative or direct costs "incurred specifically for the implementation" of E-911 service, in which case they are properly included in a state's cost-recovery program, or whether they are merely overhead. The Commission has previously found that insurance costs fall under the former classification: "[w]e agree . . . that insurance costs are distinguished from general overhead because insurance costs can be attributable" to the cost of providing a service.²⁹ Accordingly, because E-911 insurance costs are directly related to a wireless carrier's ability to deploy E-911, and because these costs would not be incurred but for the Commission's E-911 requirements, these administrative costs must be included in any state's cost-recovery program.

III. THE STATES ARE BEST EQUIPPED TO DEFINE "DESIGNATED" OR "APPROPRIATE" PSAP

In Phase I of E-911 deployment, Section 20.18(d) of the Commission's rules, 47 C.F.R. § 20.18(d), requires carriers to route the telephone number of the originator of a 911 call, as well as the location of the cell site or base station receiving a 911 call, to the "designated PSAP," also

²⁹ See *TCI Cablevision*, 12 F.C.C.R. 15287, 15296-97 (Cable Serv. Bur. 1997). In *TCI*, the Commission agreed with a local cable franchisee that insurance costs associated with the installation and maintenance of customer premises equipment (part of the provision of cable service) were distinguishable from general overhead and could be recovered. Because the franchisee had already recovered the costs through its program service rates, however, the Commission rejected its attempts to recover the insurance costs again through its equipment basket.

referred to as the "appropriate PSAP." The State of California asks the Commission what is meant by "designated" or "appropriate" PSAP.³⁰ In its *Reconsideration Order*, the Commission clarified that "[t]o the extent that the terms 'appropriate' and 'designated' PSAPs . . . may be unclear, we wish to clarify that the responsible local or state entity has the authority and responsibility to designate the PSAPs that are appropriate to receive wireless 911 calls."³¹ BellSouth agrees and will defer to the states on this issue, which are best equipped to determine how E-911 calls should be routed for purposes of defining the "appropriate PSAP."

CONCLUSION

Wherefore, BellSouth respectfully requests that the Commission resolve the liability issues addressed herein consistent with the foregoing and BellSouth's pending petition for reconsideration of the Commission's *Reconsideration Order*.

Respectfully submitted,

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August 14, 1998

³⁰ Letter Request at 1.

³¹ *Reconsideration Order*, 12 F.C.C.R. at 22713.

CERTIFICATE OF SERVICE

I, Brooke Wilding, hereby certify that on this 14th day of August, 1998, copies of the foregoing "Comments of BellSouth Corporation" in response to DA 98-1504 in CC Docket No. 94-102 were served via hand delivery on the following:

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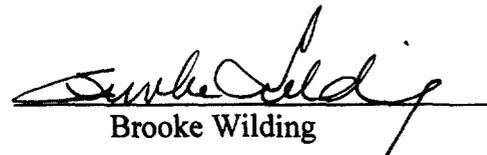
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