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February 26, 1999

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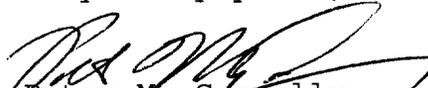
Re: CC Docket 94-102, RM-8143

Dear Ms. Salas:

Herewith transmitted, on behalf of United States Cellular Corporation, are an original and four copies of a "Request To Accept Late-Filed Pleading" and "Reply" in the above-referenced proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,


Peter M. Connolly

Enclosures

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OFFICE OF THE SECRETARY

In the Matter of)
)
Request For Emergency)
Declaratory Ruling By) CC Docket No. 94-102
California State 9-1-1) RM-8143
Program Manager)

REQUEST TO ACCEPT LATE-FILED PLEADING

United States Cellular Corporation ("USCC") hereby requests permission to file the attached "Reply" late.

A death in the family of undersigned counsel prevented the pleading from being filed within it otherwise would have been due, on February 19, 1999.

Counsel to the National Emergency Number Association ("NENA"), the California State 9-1-1 Program ("California Program") and Omnipoint Communications, Inc. ("Omnipoint") have stated that they have no objection to this late filing.

Accordingly, for the foregoing reasons, we ask that this request be granted and attached "Reply" be accepted.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

By: *Peter M. Connolly*
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Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D.C. 20036

February 26, 1999

Its Attorneys

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEB 26 1999

FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Program Manager)

REPLY

United States Cellular Corporation ("USCC"), pursuant to Section 1.115(d) of the FCC's Rules, hereby replies to the Oppositions to its Application For Review filed by the National Emergency Number Association ("NENA") and the California State 9-1-1 Program ("California Program").

**I. The NENA and California Program
Oppositions Fail To Disprove
USCC's Argument That Liability
Protection Is Essential To
The Provision of E-911 Service**

In our Application For Review, USCC demonstrated that the Wireless Telecommunications Bureau ("WTB") Declaratory Ruling erred in holding: (a) that carriers have an obligation to deploy wireless E-911 service even if state statutes do not provide immunity from liability for the emergency service provided; and (b) that the states need not reimburse carriers, under E-911 cost recovery rules, for the cost of liability insurance policies covering the provision of wireless E-911 service. USCC also showed that the WTB should have made it clear that wireless carriers cannot be held

liable for following state statutes with respect to designation of the appropriate PSAP to which 911 calls should be transmitted.

Also, as USCC discussed in its Application, the failure of California and other states to provide for adequate cost recovery with respect to the costs of E-911 liability insurance warrants FCC preemption under Sections 253 and 332 of the Communications Act and may well also constitute a "taking" in violation of the Fifth Amendment to the U.S. Constitution.

The opposition of the California Program¹ to USCC's Application does not respond adequately to USCC's arguments.

The California Program maintains that USCC's warnings concerning possible liability for E-911 calls are merely "undocumented threats and unsupported speculation" (Opposition, p. 4) and argues that any potential liability problem can be "handled" easily under California law by means of state or federal "informational tariffs" by which such liability can allegedly be limited (Opposition, pp. 5-7).

This response fails on many levels. First, it is limited to California and thus ignores the national nature of the E-911 liability crisis and the importance to every state of the WTB's ruling that E-911 services must be provided regardless of state liability protection for wireless carriers. Even if the California

¹ NENA made no arguments directed specifically to USCC's arguments.

liability issue can be resolved in a satisfactory manner, the problem will remain acute in other states until and unless the FCC acts.

Second, the Declaratory Ruling and the California Program's arguments overlook the basic structural fact that the FCC, a federal agency, has established a national E-911 program. The program is to be implemented by the states, but there is a clear need for national standards concerning a matter as basic as liability protection.²

Finally, the California Program's arguments ignore the essential inequity of wireless carriers' present E-911 predicament. Such carriers must, pursuant to Section 20.18(b) of the FCC's Rules, provide E-911 service to customers and non-customers alike. Yet carriers must do so with no assurance that they will be shielded from potentially ruinous liability judgments arising out of E-911 calls. This is profoundly unfair. No provider of a hitherto unknown telecommunications service which confers a valuable benefit on the public should be held liable for an occasional failure of that service to achieve its intended result, in the absence of willful misconduct or grossly negligent behavior on the part of the carrier. The Declaratory Ruling leaves open the

² The Declaratory Ruling would permit such obviously wrong results as two liability standards being applied to a single wireless telephone call which involves the crossing of a state boundary.

possibility of (and indeed encourages) precisely the sort of standardless liability judgments which wireless carriers reasonably fear.³

The WTB's preferred alternative solution to this problem, namely the filing of "informational tariffs" limiting carrier liability, is patently inadequate. First, wireless carriers are entirely deregulated in many states. In those states, filing tariffs is not permitted.⁴ In such states FCC encouragement of informational tariffs offers no protection at all to wireless carriers.

Further, the filing of such tariffs, whether at the state or federal level, would be at odds with the deregulatory paradigm developed over the past fifteen years by the FCC in relation to wireless carriers and ratified by Congress in its enactment of Section 332 of the Communications Act in 1993. The filing of tariffs, with all their associated legal and other costs, would be

³ The California Program argues, in essence, that since there have not yet been such judgments, there is no reason to be concerned about them. Leaving aside the issue that such cases are indeed beginning to work their way through the courts, if such judgments would be wrong in principle why not preclude them now?

⁴ USCC's records indicate that wireless systems have been entirely deregulated in the following states: Alabama, Colorado, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, North Carolina, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, Wisconsin and Wyoming.

a regressive step back into the discredited telecommunications past. The question ignored by the WTB and the California Program is, "Why are tariffs preferable to immunity?"

Moreover, the California evidence is that tariffs do not achieve their intended purpose of protecting wireless carriers from liability. The California Program itself cites a California intermediate appellate court ruling in a case involving alleged fraud, negligence and false advertising on the part of a cellular carrier in connection with a 911 call which did not get through while a carjacking was in progress, resulting in injury to the victim.⁵ The appellate court reversed a lower court holding of liability on the part of the carrier and did hold that the \$5,000 limitation in the carrier's state tariff limited its liability to that amount, at least with respect to the plaintiff's negligence claim.

However, the "false advertising" and misrepresentation claims in that suit, which is now a class action, are still being pursued.⁶

That case's complex history is actually an excellent reason why federally imposed immunity from liability, rather than state tariffs with limited applicability, is needed. Wireless carriers

⁵ Los Angeles Cellular Telephone Company v. Superior Court of Los Angeles County, 76 Cal. Rptr. 2d 894, 1998 Cal. App. LEXIS 664 (1988).

⁶ See Radio Communications Report, December 7, 1998, p. 1

which provide E-911 service in accordance with federal requirements should not have to navigate the maze of state tariffs in relationship to state tort laws, or answer to state courts and juries looking for deep pocketed defendants to help compensate victims for crimes or accidents. Wireless carriers are not tobacco companies or gun manufacturers, which arguably may have contributed to social evils for which legal redress is now being sought. In this context, wireless carriers are simply "good samaritans" and should not, in the absence of fraud or gross negligence, have to defend their federally-mandated E-911 service in state court systems.⁷

The simplest and best solution to this problem is for the FCC to require either that wireless carriers have the same protection from liability that wireline carriers now have in their states or that they need not provide E-911 service. We would stress that by this we do not mean that wireless carriers should be subjected to the same legal regime and general level of regulatory supervision to which wireline carriers are subject. The histories of the wireline and wireless industries are separate and distinct and they should not be treated alike. We only mean that wireless carriers are entitled to "liability parity" with their wireline competitors,

⁷ Further, even if liability suits are eventually won by wireless carriers, the costs of defending them will be very considerable, and will absorb resources which could otherwise be used on service improvements.

since with respect to E-911, they have comparable public interest responsibilities.

As we have noted previously, the "second best" solution is to require that state liability insurance costs be treated as a mandatory cost recovery item under the Commission's E-911 policies. However, the WTB's "solution," namely maintenance of the status quo, is actually no solution at all and will permit all the ill affects discussed in USCC's and Omnipoint's applications for review.

II. Contrary To The California Program's Assertions, The FCC Should Act Now

The California Program repeatedly asserts that USCC's warnings are "undocumented" and "unsupported" and thus that there is "no present crisis" to justify FCC action (Opposition, p.3).

This tone of calm dismissiveness is belied by obvious facts.

First, if there is no emerging national liability problem why did the California Program file its request for a declaratory ruling in the first place? Obviously, the California Program recognized the need for FCC guidance and action to deal with this matter. USCC also believes there is a need for action. We just disagree on what the action should be.

Second, with respect to the "undocumented" nature of the liability threat, the respected trade publication RCR in its December 20, 1998 issue, listed the California E-911 litigation referred to above as one of its "top 20 wireless news events of

1998." This issue is hardly "undocumented" or insignificant.⁸

Finally, with the Phase II Automatic Location Information ("ALI") becoming an E-911 requirement in 2001, the liability problem will become even more acute. By October of that year, wireless carriers will be held responsible not only for transmitting 911 telephone calls and cell site information to PSAPs, but also for transmitting data concerning the actual location of wireless callers.

Given the complexity of the operations wireless carriers will have to perform in Phase II, and the obviously increased possibility of error inherent in such processes, wireless carriers' potential liability will also be increased. In such circumstances, finding wireless carriers liable for E-911 problems will become both easier and more unjust. The FCC should act now to prevent such an outcome.

III. E-911 Liability Is a Serious Fifth Amendment "Takings" Issue

The California Program takes issue with USCC's argument that

⁸ The February 21, 1999 Chicago Tribune carried a story, attached hereto as Attachment A, about litigation filed against the City of Chicago and paramedical personnel concerning an allegedly inadequate response to a wireline 911 call, which is now before the Illinois Supreme Court. If such litigation becomes more widespread, it will obviously come to include, in many instances, the entities responsible for transmitting 911 calls as well as those which respond to such calls. If the 911 system is to remain viable, appropriate immunity for those responsible for operating it is essential.

the failure of the FCC and state governments to act to protect wireless carriers from liability judgments for E-911 service might, under appropriate circumstances, be deemed a "taking" for the purposes of the Fifth Amendment. The California Program notes, as did USCC, that unless a "physical invasion by the government" is involved, a Fifth Amendment "taking" will usually not be found by the courts.

However, the California Program overlooks USCC's other point, namely that a severe enough governmental interference with "rational investment-backed expectations" may be deemed a taking. That is precisely what is involved here. State governmental action and federal inaction are combining to produce a liability crisis, which will certainly prove injurious to the financial wellbeing of all and perhaps the survival of some wireless carriers. If a marginal wireless carrier were to be put out of business by an unjust liability judgment, which could have been prevented by reasonable liability protections comparable to those enjoyed by wireline carriers, that might indeed be seriously evaluated by the courts as a "taking."

Unjust takings of private property for public use need not always take traditional forms. If the FCC does not act now, wireless carriers will no doubt attempt to demonstrate to the courts in appropriate contexts that wireless carrier liability for E-911 calls is a form of unjust and unconstitutional governmental

action.

**IV. Congress May Soon Act and If
It Does Not, The FCC Should**

Luckily, the Congress of the United States may be in the process of recognizing the intolerability of this state of affairs.

On February 24, 1998, the House of Representatives adopted a bill (H.R. 438) which would, inter alia, "give wireless carriers liability protections similar to those wireline carriers enjoy in providing emergency service."⁹ Companion legislation will shortly be introduced in the Senate, according to CTIA staff members. Such legislation, if finally enacted, would be a great step forward toward the provision of E-911 service on fair and equitable terms.

Thus, it may be that Congress will soon recognize and solve this problem. However, if Congress does not act within a reasonable period of time, the FCC can and must do so. The time is ripe for action and we submit that in the interests of reason, fairness and regulatory parity the FCC must act in the absence of congressional action.

Conclusion

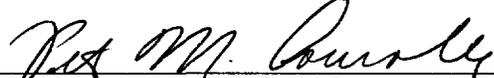
For the foregoing reasons and those given previously, the FCC should overturn the WTB's Declaratory Ruling and rule either that if wireless carriers are to provide E-911 service the states must provide adequate liability protection for them or that the states

⁹ See Telecommunications Reports, February 15, 1998, p. 8.

must consider liability insurance as a cost to be included in state cost recovery systems. We also ask that the FCC clarify that carriers cannot be held liable for following a state statute with respect to the appropriate PSAP to which E-911 calls must be transmitted.

Respectfully submitted,

UNITED STATES CELLULAR CORPORATION

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February 26, 1999

Its Attorneys

Chicago Tribune

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**911 call brought
paramedics but
no help**

February 21, 1999

911 transcript

911 CALL BROUGHT PARAMEDICS BUT NO HELP

By **Maurice Possley**
Tribune Staff Writer
February 21, 1999

Shortly before 8 a.m. on Oct. 24, 1995, Renee Kazmierowski was panic-stricken and struggling for breath when she called 911 from her North Side apartment.

"I need help," she wheezed. "I'm having an asthma attack. . . . I think I'm going to die."

Chicago Fire Department paramedics were dispatched to her third-floor apartment at 4520 N. Greenview Ave. and knocked on the door. Inside, a dog barked furiously, but no one came to the door. The paramedics notified the dispatcher, who telephoned the apartment, but the call went into an answering machine.

A neighbor opened his apartment so the emergency workers could knock on the back door. Again, there was no answer.

So, after 15 minutes, the paramedics left.

Alone, except for her dog, Red, Kazmierowski died. She was lying lifeless on her bed--half-dressed as if she were preparing for work-- when her boyfriend, Dave Hawkins, came home from work that afternoon.

Now, in a case that could profoundly affect how emergency services are delivered in Chicago, the Illinois Supreme Court has agreed to consider a lawsuit brought on behalf of Kazmierowski's estate, seeking damages



Dave Hawkins, holding a snapshot of his late girlfriend, Renee Kazmierowski, found her dead in their home on Oct. 24, 1995, despite her 911 call for help that morning. (Tribune photo by Jose Osorio)

AUDIO

- [Listen to Dave Hawkins, Renee Kazmierowski's boyfriend, and Tribune reporter Maurice Possley discuss the frantic 911 call.](#) (CLTV audio)
(Editor's note: This clip may contain audio disturbing to some listeners.)

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from the city and the paramedics because they did not try to open the door to help Kazmierowski.

The suit is particularly troubling because it claims that the door was unlocked and that paramedics could have reached her--perhaps in time to save her life--had they tried to turn the doorknob.

In court documents, the city concedes that "the paramedics may have forgotten a critical step by failing to turn the doorknob" but argues that the city nonetheless should not be held liable because of longstanding state immunity laws that, with narrow exceptions, insulate emergency personnel from damages.

The courts have upheld the immunity principle on the grounds that emergency personnel are faced with so many complicated situations that opening them to lawsuits for damages could cripple their actions.

The city also argues that not trying the knob "did not reflect a complete indifference to whether Kazmierowski would live or die.

"The paramedics acted with plain concern for her, knocking on the door, questioning the neighbor to ascertain the age and health of the caller and attempting access by the back door. No law required the paramedics to enter Kazmierowski's apartment."

Charles A. "Pat" Boyle, the lawyer for Kazmierowski's estate, called the city's contention that the conduct of the paramedics was not indifferent as "arrogant, untenable and astonishing. I would think the city's citizens will shudder at the prospect that this could happen to them when they reach for the phone to dial 911."

If the Supreme Court should reverse the lower court, finding that paramedics are not immune from damages in such situations, the city likely would have to reconsider procedures to avoid future damage claims--perhaps requiring entry in all circumstances in which there is no response when summoned.

The case also raises questions about what individuals should do if they find themselves stricken while alone and in need of an ambulance. Chicago Fire Department officials say that such callers should make it clear to 911 dispatchers that they are alone and leave their door ajar or summon a friend or neighbor until paramedics arrive. But other big cities, including Dallas, Denver and Los Angeles County, routinely break down doors if they have been called for help and get no response.

The decision by the Supreme Court last month to allow Boyle to file legal arguments resurrected a case that two years ago had been dismissed by Cook County Circuit Judge Kathleen Flanagan.

That dismissal, on Feb. 20, 1997, was upheld last July by the Illinois Appellate Court, which ruled that the paramedics and the city were immune from damages.

The appellate court rejected Boyle's contention that the conduct of the paramedics fell under the exception to an immunity clause for actions that are "inconsistent with a person's training or constitute willful or wanton misconduct."

Mike Cosgrove, a city Fire Department spokesman who is a paramedic, noted that the decision to enter a residence is a "judgment call" made by paramedics on the scene.

Cosgrove said paramedics infrequently confront such a situation--in which there is no answer at a door--and are instructed

to "try before you pry," meaning they should try to turn the door handle before deciding on a forcible entry.

If a decision is made to perform a forced entry, paramedics must call police to break into the residence, he said.

"They are not required to turn the knob," Cosgrove said. "If I was a paramedic, I would not try to open the door. What protects them if they open up a door and someone shoots them?"

But officials in some other major cities require paramedics to make a forced entry in such instances, and in Dallas, residents are reimbursed for damages caused by break-ins.

A tape recording of the 64 seconds that elapsed after Kazmierowski made her call to 911 and was routed to the Fire Department dispatcher was obtained by Boyle.

"It tears your heart out to listen to it," Boyle said.

On the tape, Kazmierowski, 28, was greeted by a 911 dispatcher who had difficulty understanding her pleading words, squeezed out in clearly audible wheezes.

"Please, I need help," she said when her call was picked up by a 911 dispatcher.

"What happened?" the dispatcher asked.

Kazmierowski: "I'm having an asthma attack."

911 dispatcher: "What?"

Kazmierowski: "It's so bad."

After several more exchanges, the call was transferred to a Fire Department dispatcher who took her address.

"I can't breathe," Kazmierowski pleaded.
"I think I'm going to die--hurry!"

The call ended when the dispatcher read back Kazmierowski's phone number, which she had laboriously supplied.

Though nearly four years have passed since Kazmierowski died, Hawkins remembers that day with acute clarity, imprinted by the shock of finding the body of a woman he calls "the shining light, the most important person in my life."

Hawkins, who was operating a fresh herb business, recalls that he left the front door to the apartment unlocked when he left about 5 a.m. to drive to Midway Airport to pick up some herbs. It was not the first time--he knew that the building was safe and that Kazmierowski would lock it when she left a couple of hours later to waitress at the Russian Tea Time restaurant in Chicago's Loop.

So Hawkins was puzzled when he returned in the early afternoon and found the door still unlocked. Surprise turned to horror when he discovered Kazmierowski.

"I walked into the bedroom and, because of the stillness and the way she was lying there--my heart sank," Hawkins said in an interview.

He dialed 911 and summoned Fire Department paramedics, then began mouth-to-mouth resuscitation. But it was pointless.

The paramedics arrived in minutes and confirmed that Kazmierowski could not be saved.

One of the paramedics then mentioned that he and his partner had come to the apartment that morning but left after they

knocked and got no answer.

In a haze of emotion and shock, Hawkins did not comprehend the comment immediately. "I said, 'What?' I didn't understand," he recalled. "One of them said, 'You don't know how many false alarms we get.' At that point, I didn't want to have that conversation. I just went into the other room."

Later, he learned the numbing truth.

"Since when do they knock and wait for an answer when someone calls and says 'I can't breathe?' " Hawkins asked. "We're counting on these people with our lives and they let her down.

"They knocked and they didn't hear a response. If she did respond, they probably wouldn't have heard her from the bedroom because of the dog barking. If the door's locked, they should break it down. If the dog is in the way, they should deal with it. Postmen have Mace. Mace the dog and save someone."

Jovonne Smythe, who lived in the apartment adjacent to Hawkins and Kazmierowski and has since moved, recalled in an interview with the Tribune that the paramedics banged on both apartment doors.

"They asked me if I had called an ambulance," Smythe said. "They banged on her door and there was no answer. They never tried to open the door. I remember distinctly that they did not try the door handle. They seemed intimidated by the barking of the dog."

The paramedics cannot recall whether they tried to turn the doorknob, according to a lawyer for the city.

Cosgrove noted that last year the department logged more than 242,000 paramedic responses and more than

60,000 false alarms-- which includes instances when people leave on their own before paramedics arrive.

A spot survey of other major cities indicates that some employ a more aggressive policy for paramedics who respond to a call but get no answer.

"We get in. There's no decision to be made," said Linda Stambaugh, acting section chief of emergency medical services in Dallas. "After we make sure we are at the correct address, we make a forced entry. . . . I've broken windows, kicked in doors. If there's no one there, we leave a note and a phone number. The city does pay to repair the damages."

Tom Tkach, director of the emergency medical services training academy in Denver, said similar procedures are followed there. "If they're convinced that there is a patient inside and there is the potential of the patient being down, the forced entry is done either by police or by the fire department," Tkach said.

Dennis Cross, a paramedic and public information officer for Los Angeles County paramedics, said, "If there is no answer, we will walk around the perimeter and look in windows. The person could not hear us or they could be down. We verify that the call came from the house. At that point, we make entry through a door or window."

Kazmierowski's father, Robert, an accountant in Sheboygan, Wis., said his daughter had suffered asthma attacks in the past, occasionally serious enough to require an emergency trip to a hospital. "She was independent and strong, so I never thought something like this would happen," he said.

"I would highly advise anyone who is alone to tell the 911 people that, if no one answers the door to break it down,"

he said. "They just gave up on Renee."

Hawkins, a folk rock musician with his own band, has not listened to the audio tape of Kazmierowski's last moments.

"That's not how I want to remember her," he said. "Renee and I were partners on many levels. We did collaborative paintings, she wrote poetry. We played music together--she played and co-wrote some of the songs that are on a CD released after her death.

"Her loss left a huge hole in my life. She's gone and no lawsuit is going to bring her back. I just hope this case makes some changes in the training or accountability of the system. It isn't working the way it should."

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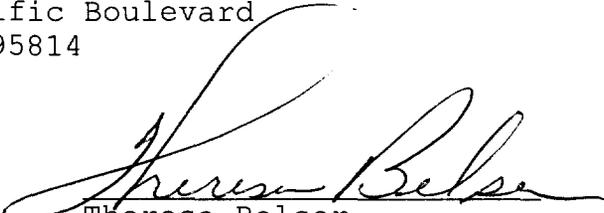
I, Theresa Belser, a secretary in the offices of Koteen & Naftalin, L.L.P., hereby certify that on this 26th day of February, 1999, copies of the foregoing "Request To Accept Late-filed Pleading" and "Reply" of the foregoing were served by first class mail, postage prepaid, on the following:

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