

EX PARTE OR LATE FILED

April 2, 1999

Ms. Magalie Roman Salas
 Office of the Secretary
 Federal Communications Commission
 The Portals
 445 Twelfth Street, S.W.
 12th Street Lobby, TW-A325
 Washington, D.C. 20024

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Re: Ex Parte Presentation
 CC Docket No. 94-102

Dear Ms. Salas:

On October 15, 1995, the Alliance proposed an amendment to the Commission's rules to require handsets operating in the analog mode to scan both cellular systems when 911 is dialed (Strongest Signal).¹ This proposal has been opposed by the wireless industry and those who seek its favor. On January 21, 1999, the Rural Cellular Association (RCA) filed a copy of their ex parte presentation in opposition to Strongest Signal. In this presentation, RCA says that wireless calls to 911 "literally save lives" *but that* "the costs [to the carrier] of implementation [of new 911 services] *should guide* [Commission] decisions regarding the requirements to be imposed." (Emphasis added). This is a clear concise statement of the wireless industry's position without all of the rhetoric which has cluttered the issues in this proceeding. We argue that the public interest and the need for consumer protection justify the mandate of Strongest Signal. We also argue that the other proposals, Automatic A/B Roaming and Double Push, do not meet the Commission's goal of directing the 911 calls to the system that will provide "the quickest and most reliable and accurate response."²

¹ When "operating in the analog mode" is intended to incorporate all phones which are capable of operating in the analog mode, such as dual mode and trimode phones.

² Report and Order, CC Docket 94-102, ¶ 145 (July 26, 1996)

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 List A B C D E

There are two questions. First, Strongest Signal will complete more emergency calls to 911 but at what cost to the carrier? Second, does the public interest and/or the need to protect consumers require Commission action to mandate Strongest Signal?

1. *What is the cost to the carrier to provide 911 service?*

a. *Out of pocket costs*

On December 15, 1995, RCA filed comments in opposition to Strongest Signal on the grounds that “[i]t is completely inequitable to reward the provider of the best quality service with increased economic and administrative burdens” of handling 911 calls. (P. 7). There is total agreement that a carrier should be reimbursed for its actual costs in providing 911 service. We do not have access to information concerning these costs. However, we have noted that, in California, the carriers have not applied for reimbursement for their costs from the state’s 911 fund. We suspect that the cost is too small to calculate.

b. *Displacement of revenue calls*

The argument concerning the impact of Strongest Signal on the carrier’s network has taken many forms such as “blocking,” “time delay,” “inefficient distribution of calls” and “unintended consequences.” Strongest Signal does not propose any changes to the network. It merely enables the handset to scan all of the cellular channels instead of just one side when 911 is called. From that point on the system handles the call just as it would any other call. The real question is how will Strongest Signal impact the revenue generating ability of the system?

Strongest Signal will connect more 911 calls thereby using more system capacity. The carriers have adopted a business strategy in which capacity lags behind demand. With increasing contention for capacity it is reasonable to assume that some of the time 911 calls will displace revenue calls.³ This issue is all about nonrevenue 911 calls using capacity which would otherwise be available for revenue calls. Lost profit is an item of expense that we agree should be recovered by the carriers.

RCA has previously told this Commission that rural areas have “moderate capacity demands.” (Reply Comments, 10/25/96, p. 5). At the same time, RCA argues that Strongest Signal would give carriers an economic incentive to be second best in the market, thereby resulting in “diminished availability of service.”

³ We have supplied the Commission with blocking data. We have also shown that some systems have a serious lack of capacity in some locations, e.g. AT&T Wireless in New York City. (See our letter of 3/8/99 on this subject).

(12/15/95 comments, p. 4). We do not know how to square these seemingly inconsistent arguments. We are astounded that RCA would even suggest that any of its members would engage in contumacious behavior of reducing coverage to avoid a public service obligation imposed by the Commission.

c. ***Potential liability for negligence***

The Commission concluded On June 12, 1996, that “displacing the jurisdiction of state courts over tort suits for negligence in installation, performance, provision, or maintenance of E911 systems is not necessary to the inauguration of E911 service.”⁴ Thereafter, the wireless industry sponsored legislation to limit liability which was adopted by 31 states. House bill HR 438 would federalize this limitation of liability. Mr. Sugrue, Chief of the Wireless Bureau, testified on February 3, 1999 before the House Subcommittee on Telecommunications and said” “legislation to set national policies could help resolve liability issues in ways that meet the legitimate needs of wireless carriers, local and State governments, and - more importantly - wireless users.” (P. 6). Thus, the Commission has concluded, for now, that this is a matter properly left to the states and Congress.⁵ Nevertheless, this issue remains as a real reason for wireless industry opposition to Strongest Signal.

2. ***Public interest and consumer protection considerations***

a. ***Saving lives and reducing the consequences of injury***

1) **Strongest Signal substantially improves the caller’s ability to reach and reliably communicate with the 911 operator.**

Attached hereto as “Attachment A” is a copy of a drawing we filed with the Commission on March 8, 1999, which shows the coverage within a single cell service area from the perspective of a portable phone user. This drawing shows that a portable telephone user will have reliable service in only 25 percent of the total area covered by the cell site. In 47 percent of the area, the portable user will experience poor coverage with static and a chance of dropped calls. In 28 percent of the area, the caller from a portable phone will experience “lock-in,” where the caller will hear nothing but dead air. This map confirms the Trott August 19, 1998, engineering report, filed with the Commission, which shows that portable

⁴ Report and Order, ¶ 100.

⁵ Ominipoint and US Cellular Corporation have appealed a Declaratory Ruling issued by the Wireless Telecommunications Bureau on December 18, 1998 contending that the Commission must specify a mechanism to recover cost of liability insurance.

phone users will be *unable to access the cellular system they subscribed to one third of the time in suburban and urban service areas*. This same fact is dramatically illustrated by the “Dirty Little Secret” map which appeared in an ad in the trade press. A copy of this map was filed with the Commission by the Alliance over a year ago. Finally, reference is made to the report that we filed with the Commission in February of 1999, describing the Blomme tragedy. This incident occurred in a rural area.

No one has disputed the Alliance’s engineering studies showing that Strongest Signal cures the above described problems over 85 per cent of the time. In terms of the experiences of real people, Strongest Signal would have connected Marcia Spielholz and Ms. Lechuga to 911 and would have almost certainly resulted in help arriving before the fire which killed Mr. Blomme in front of his wife and children. These are the most tragic but not the only stories which prove the point. For example, attached as “Attachment B” is an article describing 3 calls from cellular phones to 911 concerning an accident that occurred in Wyoming. “The good news is three people at the scene of the accident had cellular phones to get help. The bad news is only one call connected.” We have provided the Commission with a number of similar examples.⁶

- 2) **Automatic A/B Roaming, with or without Intelligent Retry, does not solve the problem of lock-in, dropped calls or low grade voice channels subject to static and cross-talk.**

After three years of saying that Strongest Signal was just based on antidotal stories, the wireless industry reluctantly acknowledged the problem of dead spots and CTIA proposed Automatic A/B Roaming as an alternative to Strongest Signal. Unfortunately, the cost to the carrier – not the public interest – is the cornerstone of this proposal. Using Automatic A/B Roaming: 4,000 emergency calls *will not be connected each day*, more than 5,000 emergency calls *will be dropped each day* and more than 15,000 calls *will be assigned to a poor channel each day*. Strongest Signal will connect almost all of these calls over a good channel of communication.

- 3) **Double Push is merely a manual version of Automatic A/B Roaming.**

Another belated proposal from Bell Atlantic would have the handset arbitrarily change sides if the caller dials 911, hangs up and dials 911 again. (“Double Push”). Double Push, which both we and CTIA

⁶ See “Review and Comparison of Automatic A/B Roaming and Strongest Signal” dated February, 1999, and filed with the Commission.

agree is a poor choice, depends on the presence of mind and the ability of the users to extricate themselves from lock-in, static, cross-talk and dropped call situations by hanging up and calling again. Such callers are sometimes in extreme circumstances (such as being dragged by a train) and do not have the time or comprehension to realize that they should hang up, replace the emergency call and perhaps get a better channel of communication. There is no assurance that a better channel of communication is available, whereupon the caller should hang up and dial again to return to the poor, but usable channel. It is a simplistic hit or miss proposition which falls far short of the mark in emergency situations. Finally, we note that Double Push would not have helped either Blomme or Lechuga.

4) **All parties agree that time is of the essence in connecting a 911 call.**

We agree with RCA that the public expects “practically instantaneous completion” of 911 calls. (Emphasis added). It takes from 4 to 6 seconds for a cellular phone to connect a call. Strongest Signal adds 50 milliseconds to the scanning process - - a time so short that it cannot be perceived by the calling party. In contrast, Automatic A/B Roaming will take 10 to 16 seconds for a call switched to the non-preferred side to be connected. Intelligent retry can extend that time further - up to 65 seconds.⁷ Double Push requires an indeterminate amount of time -- the time necessary for the emergency caller to realize that a better channel of communication might be found by hanging up and re-dialing 911. The record is clear that 12 seconds should be the maximum time limit for connection of a 911 call -- Strongest Signal will take half of that time.

b. ***Reliance and public expectations***

- 1) **The carriers’ decision to sell low power handheld portable phones, without upgrading their systems to provide portable grade coverage, has resulted in misplaced public reliance on wireless service to provide them with “safety and security” “anytime/anywhere.”**

RCA has previously warned the Commission that rural systems will be unable to support Phase II requirements because of the “wide geographic separation of sites.” (Reply Comments, 10/25/96, p. 4). This is due to the fact that cellular systems were constructed to serve 3 watt Class I Mobile phones -- not 600 milliwatt Class III portable phones. Nevertheless, rural carriers have sold low power portable phones to 80%

⁷ CTIA *ex parte* letter of 3/12/99.

or more of their subscribers without upgrading their systems to provide portable grade service to those phones. This creates the lack of coverage, or holes, problem with portable phones which is discussed in paragraph 2.a.1) above. One of the first thing that catches the eye when entering any wireless phone retail outlet are the coverage maps showing seamless coverage over large geographic areas. The phones on display with these maps are portable phones. The obvious and reasonable assumption on the part of the consumer is that these phones will work over the entire coverage area. In fact, they do not and the carriers fail to disclose that fact.

- 2) **Carriers have compounded these false public expectations with massive advertising campaigns which say wireless phones will provide the same “safety and security” as your wireline phone.**

We have filled the record with example after example of wireless carrier advertising that tells the public that you can use a wireless phone “anywhere, anytime.” Television advertisements show people in hazardous situations in remote areas who are “saved” by their portable wireless phone. “Safety and security” sells and has been used to sell 80 to 85 percent of the 68 million wireless phones in service. This leads the public to reasonably rely on portable phones for their safety without realizing that actual coverage is tenuous or non-existent in a large part of the service areas. Some users will discover that there are holes in the service area but 22 percent of subscribers do not use their phones which they have solely for safety and security reasons.

3. ***The Commission’s statutory obligation***

The Communications Act of 1934 (the “Act”) requires the Commission to promote “safety of life and property through the use of wire and radio communication.” 47 U.S.C. § 151. When it comes to matters of public safety the Commission cannot rely on the marketplace alone. A good example is seat belts. The automobile industry and the marketplace did not want seat belts, they were uncomfortable, they wrinkled the wearer’s cloths, etc. It was only after the life saving benefits became apparent that there was a gradual public acceptance of seat belts. Here the wireless industry does not want Strongest Signal for the reasons set forth above. The public is only dimly aware of the lack of coverage problem and not aware at all of the solution -- so there is no market pressure on the carriers to deploy Strongest Signal.

To carry the seat belt analogy forward, it would obviously not be in the public interest to approve seat belts that would only do the job of protecting the user some of the time. Automatic A/B Roaming does not protect the user when the signal is borderline (lock-in) and only gives marginal protection when the signal is poor (static, cross-talk, dropped calls). Double Push

requires callers, who are sometimes in extremis, to extricate themselves from these situations and may, in the doing, find themselves with even a worse, or no channel, circumstance. This introduces delay, which all commentators have agreed at one point or another, is not in the public interest. We submit that the public interest requires the Commission to select the alternative that will do the job – and that is Strongest Signal. If however, the Commission is inclined to allow the consumers a choice between “seat belts” that choice should be made directly by the consumer and not the carrier for the following reasons:

a) CTIA and the carriers control the handset “marketplace”

The term “marketplace” means that *consumers will decide* between various choices and options. However, the “consumers” in the wireless telephone equipment market are the carriers and their agents who resell the wireless phones to the true consumer, the end user. Agents are paid approximately \$200 for each customer delivered as a “subscriber” to a carriers’ system.⁸ This arrangement enables the carriers and their agents to **sell wireless telephones below the cost of manufacturing** because a substantial part of the equipment cost is transferred to the service charges. (For example, attached as “Attachment C” are materials showing the approximate price paid by a carrier in Los Angeles for certain wireless phones and the price tied to a service agreement).⁹

1) This Tying Arrangement is an unreasonable restraint on trade and is contrary to the public interest

A “tying arrangement” is one in which a company sells one product (wireless phones) to those who also buy another (service) at a combined price. By selling wireless telephones below cost as part of a tying arrangement, the carriers have precluded the development of a market for the sale of wireless phones directly to the consumer. The carriers’ leverage over the equipment manufacturers constitutes “economic power” which is sufficient to raise the question of unreasonableness under the Sherman Act § 1. The exercise of this power has lead to: the programming of all phones to operate on one side “only” instead of “preferred” which would give consumers greater access to other systems; CTIA certification program which extracts up to \$5 per phone from the manufacturers to duplicate, in essence, the Commission’s type acceptance procedures; and, the suppression of advertising such as the “Dirty Little Secrets” ad and other such ads that illustrate the existence of “holes” in coverage.

⁸ The price range is generally from \$180 to \$200 with bonus performance payments which result in an average of \$200.

⁹ We are continuing our investigation into these tying arrangements and will report further when we have obtained additional data.

2) This leverage over manufactures has also prevented the deployment of Strongest Signal

The Alliance tested an Audiovox 405 wireless phone over a year ago and found that it was using Strongest Signal when 911 was dialed. This fact was presented to the Commission's staff who, we understand, confirmed the use of Strongest Signal with an Audiovox engineer. Some time thereafter, CTIA announced that Audiovox was using Automatic A/B Roaming -- not Strongest Signal -- and Audiovox sent a letter to the Alliance demanding that they stop saying that Audiovox was using Strongest Signal.

b) A wise Commission decision will establish criteria necessary for the public's safety and the protection of consumers and will preserve *the users' right* to select among the alternatives that meet that criteria

It has been and still is our position that Strongest Signal is in the best interests of the public and should be mandated. However, we were invited by the Staff to submit a proposed rule language designed to allow Automatic A/B Roaming and Strongest Signal. We gave the matter considerable thought and submitted such a proposal under cover of a letter dated March 23, 1999, to Mr. Julius Knapp. Our proposal combines Strongest Signal and the Automatic A/B Roaming capability of staying on the user's system. (Automatic A/B Roaming is modified in our proposal to switch to the other side at the point where lock in is expected to occur).¹⁰ *The heart of our proposal is that the users -- not the carriers -- have the power to make an informed choice, which may be somewhere between Strongest Signal and Automatic A/B Roaming, and the ability to change that choice when and if desired by the user.*

Conclusion

Strongest Signal will result in the connection of more 911 calls over better channels of communication thereby saving lives and reducing the consequences of injury. The "technical" issues have been shown to be red herrings which cover the real concern of cost to the carriers. Although the carriers are permitted to recover their "costs," the conundrum is carriers do not want to reveal call blockage or profit information.¹¹ It is the "Camel's nose" syndrom -- the fear

¹⁰ Double Push could be included as an alternative choice however, we did not suggest such language because both the Alliance and CTIA agree that Double Push is a poor third choice and we did not think that this alternative was being seriously considered.

¹¹ We have found some information which indicates carrier's profit margins run between 40 and 50 percent. We also have found that capacity lags behind demand because the projected capital return on investment criteria is generally 40 percent.

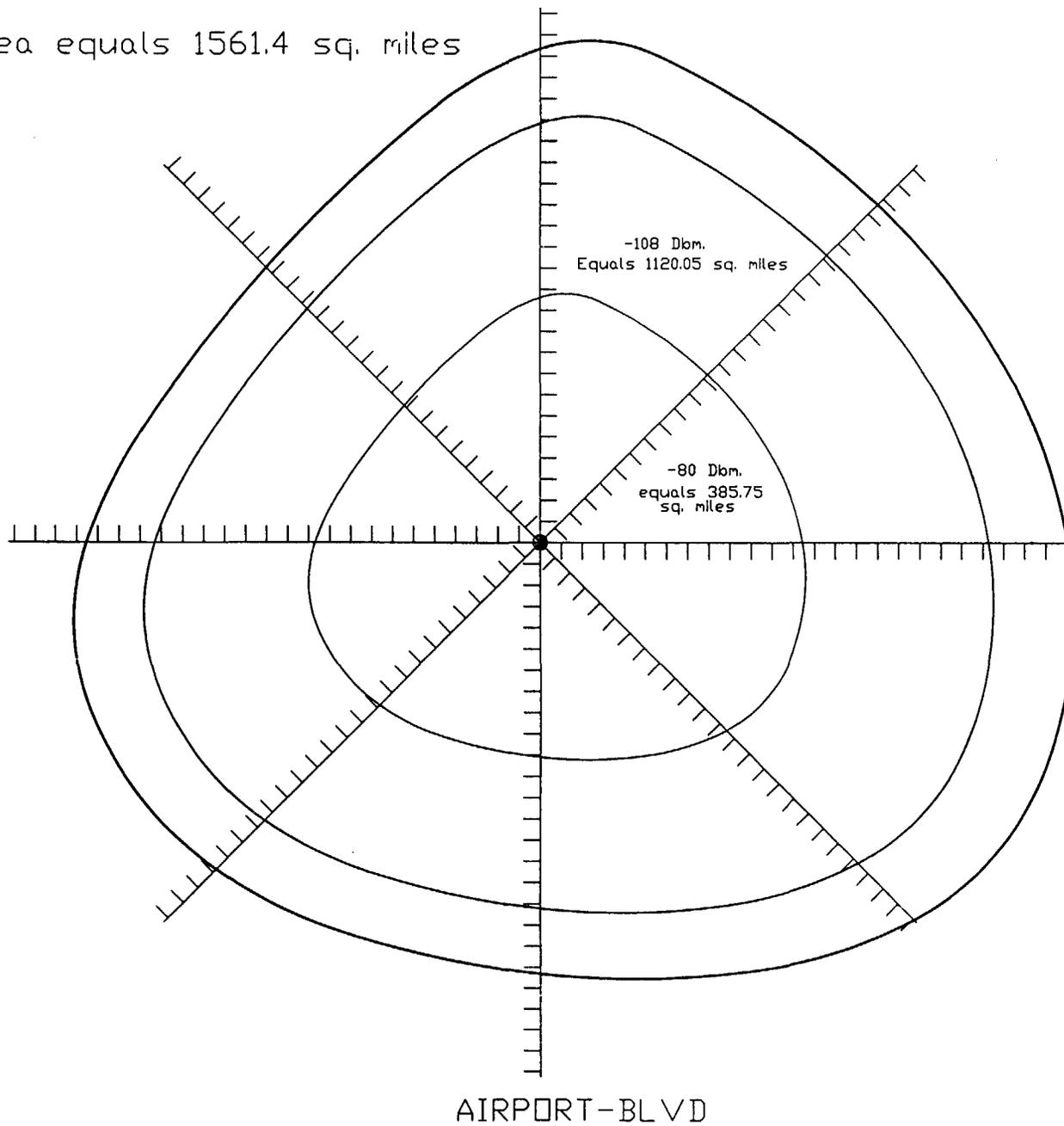
that the disclosure of high profits and network problems will lead the Commission to impose more regulation. This fear does not justify the tactics of stall and delay which are abundantly evident in this proceeding and do a disservice to the Commission and the public. CTIA's belated Automatic A/B Roaming proposal is a chimera which does not satisfy the overwhelming and unanswered showing of public need for Strongest Signal. If, however, the Commission feels that there is merit to the argument that some subscribers would prefer to stay on the system they subscribed to in 911 situations, without regard to the lack of quality of the voice channel then provided by that system, then the *sine qua non* of such a decision must be that the consumer (not the carrier) will have the choice to select, or change, the setting of the handset levels from the Strongest Signal down to the lowest usable level on the subscribed system. This is the effect of the rule change language we submitted in response to the Staff's invitation.

Sincerely,


Carl Hilliard

cc: Hon. Harold Furchtgott-Roth
Hon. Susan Ness
Mr. Ari Fitzgerald, Legal Assistant to Chairman Kennard
Mr. Paul Misner, Chief of Staff and Legal Assistant to Commissioner Furchtgott-Roth
Mr. William Trumpbour, Assistant to Commissioner Furchtgott-Roth
Mr. Dan Connors, Legal Assistant to Commissioner Ness
Mr. Peter Tenhula, Legal Assistant to Commissioner Powell
Ms. Karen Gulick, Legal Assistant to Commissioner Tristani
Mr. Thomas Sugrue, Chief, Wireless Telecommunications Bureau
Mr. John Cimko, Chief, Policy Division, Wireless Telecommunications Bureau
Mr. Dale Hatfield, Chief, Office of Engineering and Technology
Mr. Jim Schlichting, Deputy Chief, Office of Engineering and Technology

Total cell area equals 1561.4 sq. miles



Attachment A

my phone purchase for the rest of my life if my call could bring help.

But the call never connected.

Did I press the "send" button?

Perhaps in my haste, I hadn't. I started to redial, but noticed a man in front of our car who obviously was dialing 911 with his cellular phone. I put my phone down, puzzled about why I hadn't connected, grabbed the baby and went to see if I could be of any help.

The couple in the Bronco were fine. The young driver had reached for her Snapple, when she swerved and then over-corrected, ultimately ending up upside down in the ditch. Fortunately, both people were wearing seatbelts.

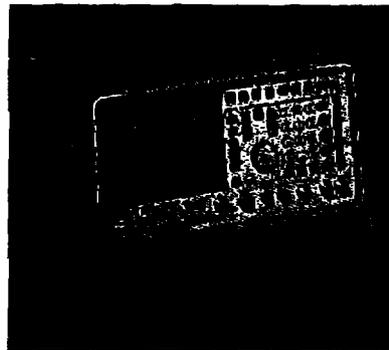
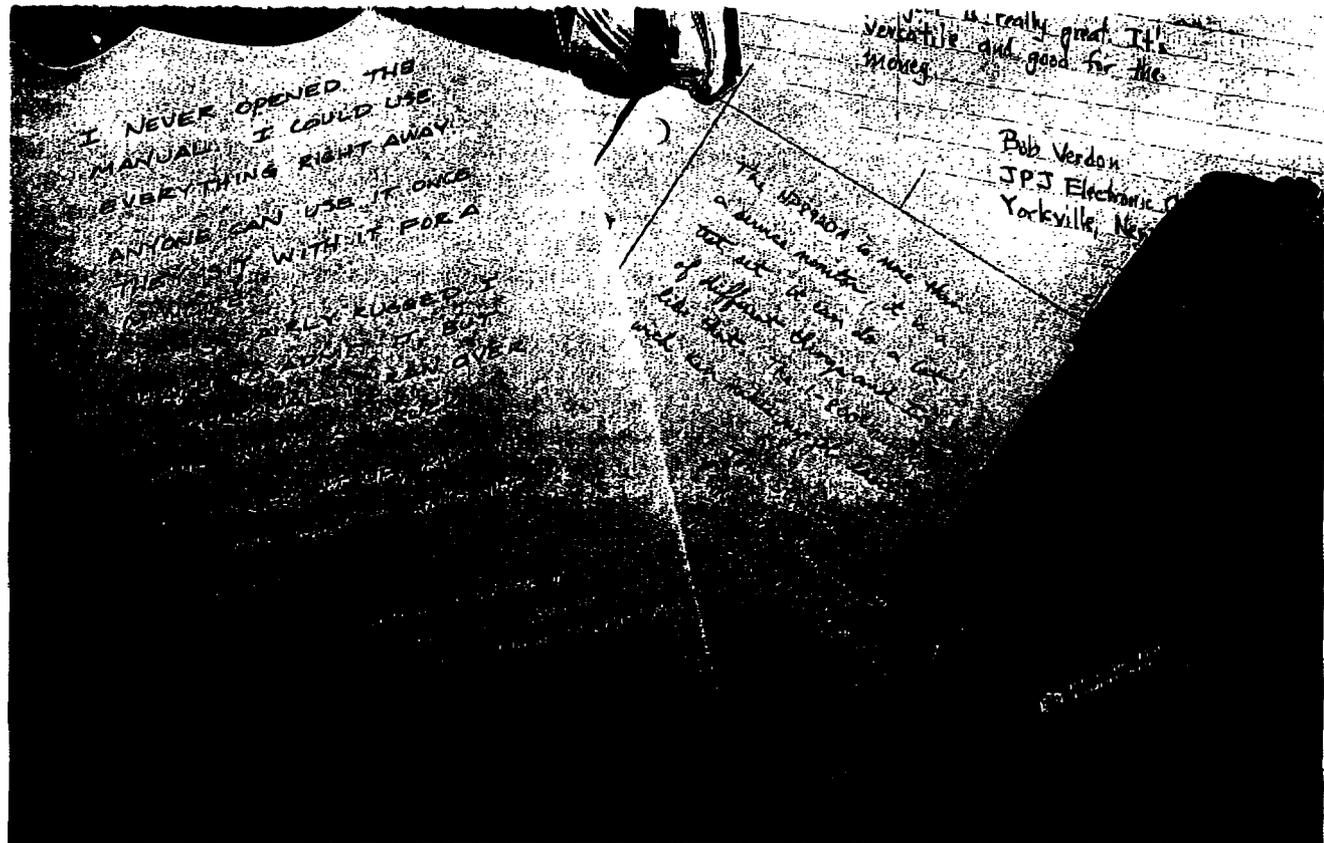
The man who I thought had called 911 from his portable cell phone couldn't get his phone to connect, either. A third person, who called from a transportable cellular phone, had actually placed the 911 call. He evidently had no trouble getting through.

As we left the accident, I called home to Denver to see if my phone was working. Sure enough, I connected immediately to my answering machine. There was coverage on the interstate.

What happened? Were the man and I who tried to place the 911 calls on our portables just in a bad coverage area? Should we have moved three feet to the right? Certainly, I pressed the "send" button. Sure, I was a bit panicked seeing the vehicle in front of us roll, but I knew I was going to speak calmly to the dispatcher to try to explain where we were. I had the presence of mind to press the "send" button.

Two thoughts on this experience: Those phones with the red 911 button suddenly make more sense to me. I wouldn't have needed to press the "send" button. More importantly, either manufacturers or carriers should highlight in their informational material to customers detailed information about how to place a 911 call so it pops into the mind of the user when he/she actually is placing the distress call. (If the call does not connect, walk 10 feet to a different place and try again).

The good news is three people at the scene of the accident had cellular phones to get help. The bad news is only one call connected.



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Analog Plans

<u>Phone</u>	<u>Cost*</u>	<u>Tying Price</u>
Audiovox MVX 502	\$ 85	\$ 9
Motorola Micro Tac 650e	160	39
Motorola StarTac 3000	232	49
Motorola StarTac 6500	283	149
Nokia 252	122	29

Digital Plans

<u>Phone</u>	<u>Cost*</u>	<u>Tying Price</u>
Audiovox CDM-3000	\$288	\$ 49
Motorola ST7760	445	299
Q Phone	588	279
Qualcomm QCP-820	292	99

We were unable to purchase a phone without service. There is no discount for service when the customer supplies his own phone.

* Based on the best available information.

Attachment "C"