

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

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )  
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 Petition by the United States Department of )  
 Transportation for Assignment of an )  
 Abbreviated Dialing Code (N11) to Access )  
 Intelligent Transportation System (ITS) )  
 Services Nationwide )  
 )  
 Request by the Alliance of Information and )  
 Referral Systems, United Way of America, )  
 United Way 211 (Atlanta, Georgia), United )  
 Way of Connecticut, Florida Alliance of )  
 Information and Referral Services, Inc., and )  
 Texas I&R Network for Assignment of 211 )  
 Dialing Code )  
 )  
 The Use of N11 Codes and Other Abbreviated )  
 Dialing Arrangements )

NSD-L-99-24

NSD-L-98-80

CC Docket No. 92-105 /

To: The Commission

**VERIZON WIRELESS  
PETITION FOR RECONSIDERATION**

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To: The Commission

**PETITION FOR RECONSIDERATION**

**SUMMARY**

Verizon Wireless respectfully seeks reconsideration of the Commission's *Third Report and Order and Order on Reconsideration* in this docket, FCC 00-256 (July 31, 2000) (*Order*), summarized, 66 Fed. Reg. 9674 (February 9, 2001), pursuant to 47 C.F.R. § 1.429. The *Order* unlawfully imposes two broad, new regulatory obligations on commercial mobile radio service (CMRS) and landline carriers: It grants government agencies exclusive access to the 511 dialing code for the provision of traffic information, and grants any entity that asks for it the use of the 211 dialing code for the provision of community information and referral services.

To quote a former President, “There you go again.” With this *Order*, the Commission continues to inject new regulatory obligations, despite a stated policy to limit CMRS regulation, despite professing reliance on competitive market forces, and despite lauding the CMRS market as a model for competition. Once again, the FCC intruded into the market with sweeping new requirements, without giving attention (as the law requires) to the unique competitive and operational realities governing CMRS. Once again, the Commission paid lip service to the Congressional mandate in both the 1993 and 1996 amendments to the Communications Act that directed it not to regulate CMRS absent a clear justification for doing so – and then to regulate as narrowly as possible. Had it looked at CMRS, the Commission would have learned that wireless carriers are already offering traffic information and other services to differentiate themselves from their competitors – precisely the way markets are supposed to work. Even though market forces already drive CMRS providers to offer services tailored to the needs of customers, once again the Commission intervened with still more unneeded regulation.

These errors perfectly echo the errors the Commission committed when it implemented rate integration in 1998 and 1999 – errors that the current FCC Chairman strongly criticized at the time – and that led to the Commission being reversed in court. There, too, the Commission imposed a regulatory regime on wireline carriers and, as an afterthought, extended it to CMRS, without any acknowledgment of the distinct competitive and operational characteristics that made rate integration for CMRS not only ill-fitting but counterproductive. Over the objections of then-Commissioner Powell, who criticized the majority for not properly addressing CMRS issues, the Commission refused to exempt CMRS from rate integration. The D.C. Circuit Court of Appeals reversed the Commission, finding its extension of rate integration to CMRS to be invalid.

The court's decision on CMRS rate integration should have meant that future FCC orders regulating CMRS would take to heart the lessons of that case. But the 211/511 *Order* unfortunately makes the same key errors, leaving it flawed in numerous respects:

- The Commission failed to discharge its statutory mandate to consider the particular impact of proposed regulation on CMRS. It lacked any record, and thus made no findings, that could support the requirements imposed on CMRS.
- The *Order* ignores the operational realities of CMRS and how mobile customers make calls, and instead presumes that the local government or “community” would use the 211/511 code. While this approach may work for landline services, it is clearly not appropriate for mobile services. As with rate integration, the FCC imposed new requirements on CMRS without the requisite separate cost/benefit analysis.
- The *Order* fails to discuss at all the technical burdens that will result from having to configure CMRS networks to offer 211/511 services as required. There is no recognition of the distinct call identification, routing and network issues that affect how CMRS providers implement abbreviated dialing services.
- The *Order's* grant of a government monopoly on 511 traffic service, where the only traffic information a carrier can provide on 511 is a government-selected “speaker,” raises serious First Amendment issues that were not even mentioned.
- The *Order* undercuts carriers' ability to differentiate themselves in the competitive CMRS market by offering competing traffic services. All CMRS carriers will now have to transmit the same government-produced traffic information, instead of differentiating their offerings and competing to provide the traffic information that best serves wireless customers. This undercuts the FCC's often-professed policy to rely on market forces in competitive markets; worse, it clearly disservices the public.
- The 211 mandate is equally intrusive. The *Order* requires wireless carriers provide 211 access to any entity that asks for it – including entities that may be for-profit or may have politically controversial goals – and without regard to cost or complexity. It does not recognize that wireless carriers do not provide service that is hardwired to a particular “community,” and likewise it does not limit how many entities are entitled to the same 211 access in any given place or how carriers should resolve competing claims.
- These major new regulatory mandates were not the product of notice and comment rulemaking. The full Commission never proposed adopting them. The *Order* is no less heavy-handed and binding than any rule, and Administrative Procedure Act procedures should have been followed. If they had, the Commission would have had a better opportunity to recognize *before* taking action that the mandates to implement 211 and 511 on CMRS are not only unnecessary but will if anything harm competition. Instead, the *Order* was adopted in violation of APA and Regulatory Flexibility Act requirements.

Chairman Powell has often defended the importance of relying primarily on competitive market forces in the CMRS industry to achieve public benefits. For example, in dissenting from an FCC order which granted only limited forbearance from certain existing CMRS regulations, he stated, “The current and foreseeable competitive developments in the CMRS market and the deregulatory, pro-competitive mandates of the 1996 Telecom Act require more faith in markets and in consumers.”<sup>1</sup> More recently he declared:

I do not believe that deregulation is like a dessert that you serve after people have fed on their vegetables and is a reward for competition. I believe that deregulation is instead a critical ingredient to facilitating competition, not something to be handed out after there is a substantial number of players in the market.<sup>2</sup>

The 211/511 *Order*, however, takes the opposite approach. Instead of promoting competition by encouraging carriers to differentiate their offerings in response to customer demands, the Commission decided that Government knows best what consumers need. The Commission should reconsider this decision, and allow CMRS carriers to determine how 211 and 511 should be used to serve wireless consumers.

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<sup>1</sup> *Personal Communications Industry Association Petition for Forbearance for Broadband Personal Communications Services*, WT Docket No. 98-100 (July 2, 1998), Separate Statement of Commissioner Michael Powell, Dissenting in Part, at 1.

<sup>2</sup> Chairman Michael Powell, speaking at his February 6 press conference, as reported in *The New York Times*. Steven Labaton, *New F.C.C. Chief Would Curb Agency Reach*, *The New York Times*, Feb. 7, 2001, at C1.

**I. THE FCC ERRED IN REQUIRING CMRS CARRIERS TO PROVIDE 211 AND 511 ABBREVIATED DIALING SERVICE**

**A. The Order Contravenes Congress’s Directive and FCC Policy On Imposing New CMRS Regulation.**

The Commission committed legal error and made unwise policy by cavalierly grafting policies intended for wireline telephone companies onto CMRS providers, without having any record that would support extending mandatory new N11 codes to CMRS.

First, CMRS providers provide service differently from the way wireline companies provide service. Mobility is the key to CMRS service — from both the technical perspective and the customer perspective. In any rules governing CMRS operational and service matters, it is essential to take into account the special circumstances that distinguish CMRS providers from wireline carriers. But the *Order* failed to do so.

Second, CMRS providers operate within a marketplace that is highly competitive at the local, regional, and national level. Congress has determined that the competitive nature of the CMRS marketplace requires reduced regulation. In the 1993 Omnibus Budget Reconciliation Act, it preempted state regulation of CMRS rates and entry and directed the Commission to forbear from unnecessary federal regulation that is more suited to traditional common carriers.<sup>3</sup> The Commission has openly acknowledged that it is under an obligation to minimize regulation of CMRS providers:

[T]he statutory plan is clear. Congress envisioned an economically vibrant and competitive market for CMRS services. It understood that such a market was still evolving, and it provided the resources (*e.g.*, additional spectrum) and administrative authority (*e.g.*, licensing through competitive bidding) to accelerate that process. Finally, *Congress delineated its preference for allowing this*

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<sup>3</sup> Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, Sec. 6002, codified in principal part at 47 U.S.C. § 332.

*emerging market to develop subject to only as much regulation for which the Commission and the states could demonstrate a clear cut need. The public interest goal of this Congressional plan is readily discernable. Congress intended to promote rapid deployment of a wireless telecommunications infrastructure. Robust investment is a prerequisite to achieving that goal. Thus, in implementing the statute, we have attempted to facilitate the achievement of this goal by ensuring that regulation creates positive incentives for efficient investment — rather than burdening entrepreneurial activities — and by establishing a stable, predictable regulatory environment that facilitates prudent business planning.*<sup>4</sup>

This Congressional directive to steer clear of imposing regulatory burdens on CMRS was reaffirmed by the Telecommunications Act of 1996, where Congress sought to facilitate more generally the development of a “pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecom services.”<sup>5</sup> Consistent with this overall philosophy, numerous provisions of the 1996 Act were enacted specifically to reduce existing regulatory burdens imposed on CMRS carriers.<sup>6</sup>

The Commission was obligated by Congress’s directives on CMRS regulation, and by its own policy, to determine whether the 211/511 mandate was clearly justified and necessary in the unique context of CMRS, where customers are mobile and there are multiple viable competitors. But the Commission ignored that obligation. Proper fidelity to the statutory and policy principles governing the Commission’s oversight of CMRS should have led the Commission to

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<sup>4</sup> *Petition of the Connecticut Dept. of Public Utility Control*, 10 F.C.C.R. 7025, 7031 ¶10 (1995) (footnotes omitted and emphasis added), *aff’d sub nom. Connecticut Dept. of Public Utility Control v. FCC*, 78 F.3d 842 (2d Cir. 1996).

<sup>5</sup> H.R. No 104-458, 104th Cong., 2d Sess., at 1 (1996).

<sup>6</sup> For example, the 1996 Act overrode the structural separation restriction in former Section 22.903 of the Commission’s rules to permit the joint marketing of CMRS with local and long distance telephone service and information services; overrode consent decrees placing limits on the competitive activities of several CMRS carriers; and provided that interexchange service offered by Bell-affiliated CMRS providers would not be subject to the restrictions on Bell affiliates’ entry into the interexchange market.

trust that market forces would meet any demands by wireless customers for new N11 services. Instead it abrogated the market. This was both unlawful and unwise.

This is not the first time that the Commission has wrongly imposed new regulation on CMRS without taking care to conduct a specific assessment of the resulting costs and benefits. It made the same error in applying rate integration to CMRS, only to have its decision set aside by the court. In its *Interstate, Interexchange* rulemaking, the Commission adopted rate integration rules that were premised solely on the circumstances of wireline interexchange carriers without any discussion of CMRS, and then on reconsideration applied those policies to CMRS providers without addressing the special circumstances posed by the wireless industry.<sup>7</sup>

Over then-Commissioner Powell's strenuous objections, the Commission refused to exempt CMRS providers from rules that made little sense when applied to CMRS, forcing the industry to appeal to court.<sup>8</sup> The D.C. Circuit struck down the Commission's extension of rate integration to CMRS. The court concluded that it was erroneous for the Commission to assume that statutory provisions that were applicable to interexchange carriers or local exchange carriers should necessarily be applied to wireless carriers as well.<sup>9</sup> The lesson of the rate integration proceeding is that there must be a careful analysis of the legal and factual basis for imposing new

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<sup>7</sup> There, as here, there was no notice of proposed rulemaking specifically proposing to subject CMRS providers to any policy or rule.

<sup>8</sup> *Interstate, Interexchange Marketplace*, CC Docket 96-61, *Report and Order*, 11 F.C.C.R. 9564 (1996), *First Memorandum Opinion and Order on Reconsideration*, 12 F.C.C.R. 11,812 (1997), *Order*, 12 F.C.C.R. 15,739 (1997), *Memorandum Opinion and Order*, 14 F.C.C.R. 391 (1998), *vacated and rev'd in relevant part sub nom. GTE Service Corp. v. FCC*, 224 F.3d 768 (D.C. Cir. 2000). See also *Interstate Interexchange Marketplace*, CC Docket 96-61, *Further Notice of Proposed Rulemaking*, 14 F.C.C.R. 6994 (1999); *Memorandum Opinion and Order*, FCC 00-308 (Aug.23, 2000).

<sup>9</sup> *GTE Service Corp. v. FCC*, 224 F.3d at 774-76.

CMRS requirements, and that the costs and benefits of CMRS regulation must be examined specifically. But once again here, the Commission did not engage in that analysis.

**B. The Order Failed To Conduct the Necessary Analysis of The Need for Imposing N11 Requirements on Wireless Carriers.**

The Commission did not consider whether the designation of 211 and 511 as mandatory abbreviated dialing codes reserved for community information and referral services and traffic information, with required access for specific information providers, was a necessary intercession in the CMRS market. Imposition of regulatory mandates to standardize service offerings obstructs carrier operations and lessens the intensity of competition among providers. For example, if all CMRS providers must offer access to the same traffic information service provided by the same government agency on the same 511 code, there ceases to be any basis for differentiation. Providers will all offer the same, lowest-common-denominator, “government-issue” service and will no longer be able to compete as vigorously on the basis of their traffic information service offerings. As a result, the public will not see improved services and the Commission will have squandered a valuable numbering resource.

The Commission failed in this respect to follow a critical standard it established in its *First Report and Order*<sup>10</sup> for assignment of N11 codes. The Commission there held that “the burden should be on those who urge the Commission to require . . . [assignment of] N11 codes to show that the benefits of such a requirement outweigh the costs.”<sup>11</sup> Neither of the petitions granted in the *Order* made such a showing with respect to CMRS in particular. Likewise, the

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<sup>10</sup> *The Use of N11 Codes and other Abbreviated Dialing Arrangements*, CC Docket 92-105, *First Report and Order and Further Notice of Proposed Rulemaking*, 12 F.C.C.R. 5572 (1997) (respective sections of which are referred to as the *First Report and Order* or the *Further NPRM*).

*Order* did not purport to assess the costs to CMRS providers or to CMRS consumers (in the form of foregone competition), much less weigh such costs against the specific benefits of mandating 211 and 511 for CMRS.

Given Congress's mandate to minimize regulation of CMRS, it was incumbent on the Commission, before imposing new CMRS regulation, to consider the need for that regulation, separately from any basis for wireline regulation. It did not do so. It did not seek comment on, or consider:

- The unique costs imposed on CMRS providers, customers, or competition.
- The unique technical burdens and operational issues that these services pose in the CMRS context.
- Whether there was a need for a mandatory 211/511 policy for CMRS carriers in light of the competitive circumstances of this segment of the telecommunications market, or whether alternatives such as voluntary guidelines would suffice.
- Whether services similar to those being required are already offered by CMRS providers.
- Whether there were other ways to achieve convenient dialing for the services at issue, given that all cellular, PCS, and enhanced SMR phones have speed dialing capability.

By not addressing any of these important issues, the Commission failed to discharge its statutory obligation to minimize regulation and further competition in the CMRS industry. The assignment of the 211/511 codes carried with it an immediate mandate to implement the code assignment, even though there are intractable implementation issues and burdens for CMRS providers in particular. For the FCC to impose an implementation obligation without consideration of the details of how CMRS providers are to carry it out was unreasoned decisionmaking.

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<sup>11</sup> *First Report and Order* at ¶ 19.

**C. The Order Ignored the Operational Realities of CMRS and Thus Imposed Unworkable Requirements on CMRS.**

The issues posed by 211 and 511 implementation for CMRS providers are wholly different from those faced by wireline carriers. Wireline LEC customers are located at known, fixed geographic locations, and LEC switches serve defined geographic areas. As a result, it is theoretically possible for a LEC to provide customers with 211 or 511 access to service providers that are associated with a particular community, geography, or governmental jurisdiction. Wireless operators, by contrast, have customers whose geographic locations can and do vary constantly. The customer's phone number is not an indicator of what "community" the customer is located in at any given time, and may not necessarily even reflect the "community" where the customer lives or works. There may be little correlation between the phone number and any of the customer's communities of interest.<sup>12</sup> Likewise, the phone number may not reflect the governmental jurisdiction where a customer is located, lives, or works. For example, a CMRS provider in the Washington area may serve a customer who uses his or her phone in downtown D.C., suburban Maryland, or Northern Virginia, or even while on vacation away from the area – and all of these locations may be served by the same system as part of its home calling area.

The very nature of wireless systems themselves pose the second complicating factor. Communications are established over a radio air links between the customer's mobile unit and a network cell site containing radio transmission equipment. Cell site coverage areas never adhere

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<sup>12</sup> Unlike wireline carriers, CMRS carriers do not draw numbers from every wireline rate center. Instead, they typically draw numbers from only a few rate centers and give their customers "local" outbound calling over an extended area, regardless of the rate center associated with the customer's number. By selecting from a limited number of rate centers in their calling areas, and associating them with their large wireless network, CMRS carriers provide customers with a very large local calling area. The end result is that the rate center of  
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to political boundaries and almost always span multiple communities and many times serve multiple counties or states. Cell site coverage areas overlap each other as they serve portions of the communities within the network. The manner in which network call routing is designed and decided is not only complex but is also unique to each wireless carrier's network.

Which community's services should the customer access via the 211 code when the customer is in these various places? Which governmental agency should provide the traffic information when the customer dials 511? As a practical matter, there will be a constant mismatch of mobile phone location and the desired community of interest or governmental jurisdiction. Some customers might want services associated with their present location; others might want services from their residential location; and others might want services associated with their place of work. Some customers might want all three, at different times. For example, a customer may want to know about traffic conditions on the route home from work, which is in a different political jurisdiction from the customer's place of employment. The *Order* never considered how its mandate would impact each CMRS operator, nor did it leave responsibility for deciding how best to serve the public with the carrier. Carriers were instead simply told to "take any steps necessary (such as reprogramming switch software) to complete 211 calls to a requesting entity in its service area." (*Order* at para. 12.) But the *Order* fails to explain how CMRS providers can possibly do so.

The issue of roaming makes the issue even murkier and more difficult to resolve. The order suggests that CMRS providers should facilitate some sort of special arrangements for

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the mobile numbers has little to do with the "local" calling area of the customers' pricing plans or their community of interest.

roaming customers' access to the 511 service.<sup>13</sup> The *Order* is silent, however on how a CMRS provider should direct 211 calls by roamers. Here again, the *Order* fails the most basic tenet of lawful regulation: to advise regulated entities what their obligations are.

The *Order* does not establish what size “community” the 211 services should be tailored to serve (assuming the service can be tailored to a specific community at all), nor does it establish which agencies are entitled to demand 511 access. Is a CMRS provider obligated to provide 211 or 511 access to an entity or government agency that seeks use of that number for an entire state, MSA, MTA, EA, DFA, or BTA? Is it obligated to provide 211 access to an entity seeking to use the number for services unique to a much smaller community, such as a county, town, village, or subdivision, or 511 access to each county or city transportation department?<sup>14</sup> Is the determination of the community size or governmental unit’s geographical scope to be made by the wireless carrier or the entity seeking use of the code?

Political boundaries do not make sense for determining which service provider should handle a given 211 or 511 call, because CMRS providers’ systems are not organized around

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<sup>13</sup> *Third Report and Order* at ¶ 15. Apparently, the Commission intended to encourage agreements that would permit a Washington, D.C. customer to access Washington-area traffic information services by dialing 511 when roaming in, say, Los Angeles, although why a customer might want this is questionable. In the absence of special roaming provisions for 511 access, a roamer would simply access the serving carrier’s local 511 service, which would appear to better meet a traveler’s needs for traffic information. The Commission’s confusing direction clearly underscores that it did not understand nor consider the impact its order would have on CMRS carriers.

<sup>14</sup> Given the mobility of CMRS customers, there will be jurisdictional issues with respect to both the government-provided traffic information and the community information and referral services. Obviously, a transportation agency of one jurisdiction has no governmental authority to provide traffic information for another, adjoining jurisdiction. Likewise, some community referral services may not be licensed to operate except in a specific state, county, or municipality. Even if a customer’s location could be determined with suitable precision and the issue of which “community” is relevant is solved, is a CMRS provider obligated to determine that a given governmental agency or entity is eligible to provide service to the mobile customer before making the connection? What if he or she crosses jurisdictions during the call?

governmental units or communities; they are organized around cell sites and market areas whose coverage does not follow political boundaries.<sup>15</sup> At any given location, a CMRS phone may receive signal coverage from any of several cell sites with overlapping coverage. This makes it unworkable for a CMRS provider to tailor the geographical scope of 211 or 511 coverage to match community or governmental boundaries.

**D. The Order Ignored The Technical Burdens It Will Impose on CMRS.**

Wireless providers typically deploy their abbreviated dialing codes on a market-wide or switch-wide basis to accommodate the needs of their customers while working within the practical limitations of their technology. This is usually accomplished through switch translation commands, entered into the mobile switch, directing that switch to translate and route calls made via the abbreviated dialing code to a single number. The translation command applies on a per-switch basis to every cell site served by that switch, without exception. In larger markets that employ multiple switches, the same translation command is loaded into each switch, effectively providing abbreviated dialing to the entire market.

Under the new 211/511 mandate, however, wireless carriers would need to engineer a substantially more complex and extremely labor-intensive technical fix and maintain it in order to accommodate the individual requests of each community or agency. By enabling each community to request calls to be routed to their unique information and referral service number, the Commission has inadvertently required wireless carriers to engineer a per-cell routing

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<sup>15</sup> The Commission has recognized the wider scope of CMRS calling areas by, for example, using large “Major Trading Areas” to determine the geographic area for what is deemed “local” traffic for interconnection purposes; in the rate integration proceeding, the Commission (before it was reversed) recognized that any rate integration requirement should apply to CMRS traffic that occurred between MTAs, not within an MTA.

requirement instead of a system-wide or per-switch solution. Per-cell routing would be burdensome, time consuming and painfully complex to establish and maintain:

-- Working first from cell site coverage maps and maps of the communities served, engineers would need to determine which cell sites or portions of cell sites served that particular community information and referral service. Care must be taken to ensure that calls originated from the community are routed to the community, but because radio propagation is imperfect there will be instances where customer calls will not be routed to the community information service in which their call originated.

-- Per-cell routing for those cells identified would require building translation tables for each cell or cell face. This involves sitting down at a terminal and typing in tables of how dialing patterns should be processed for that cell. A translator called DNMOD (dialed number mod) in the Lucent switches some carriers use in their networks would change the abbreviated digits dialed by the customer from that cell site/face to the number for the local community information and referral service.

-- Once the highly detailed tables have been created for each cell they must be maintained for all system changes that would affect these dialing plans. A number of everyday systems engineering changes may trigger translation table changes such as adding cell sites, sectoring cell sites, or re-homing cell sites. For instance, when new cells are added within the community, a new table would need to be created that accepts and translates the abbreviated dialing code. New cells are usually added along with a decrease in the coverage of existing cells. The same process that took place initially to map out cell coverage would need to be undertaken again for all modified cells to reverify that the cells continue to serve the community and if not the tables would be amended. These reviews and changes would also be required for other

changes in radio propagation when converting cells from omni to directional, downtilting or changing radios and changing radio power level settings.

These are very basic and difficult implementation issues. The Commission, however, supplied no answers to how its regulatory mandate is to be carried out.

Several of the commenters responding to the 511 petition pointed out the difficult routing, translation, and rating challenges posed by that petition.<sup>16</sup> CTIA summed them up:

[I]mplementation of an N11 code (or any other abbreviated dialing code) requires extensive coordination to resolve routing, interconnection, and jurisdictional issues. Reflecting the mobility of their customers, wireless carriers provide service without respect to state lines and other geopolitical boundaries. For example, the CMRS carriers serving Washington, DC, also service much of Virginia, Maryland, and even corners of Delaware and West Virginia. Default routing of N11 calls . . . [to various locations in this service area] requires extensive negotiation and coordination. Moreover, as AT&T notes, if an N11 call may be routed to more than one location, wireless carriers must translate the N11 code based on the cell site the mobile customer is calling from. On an operational basis, this is quite burdensome because it requires wireless carriers to perform multiple N11 translations within a single switch.<sup>17</sup>

But the *Order* failed to acknowledge, let alone address and resolve, any of these valid concerns.

The challenges posed by 211 are similar, but infinitely more complex, given that there could potentially be a plethora of different community service providers demanding access to a single code in different geographic areas of various sizes within a given CMRS system.

The *Order* does not address the many routing, rating, translation, and other technical difficulties in connection with *either* 211 or 511 service. Nevertheless, the Commission directed carriers to “take any steps necessary (such as reprogramming switch software) to complete 211

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<sup>16</sup> AT&T Comments at 2; Sprint PCS Comments at 2.

<sup>17</sup> CTIA Reply Comments at 3 (footnote omitted).

calls from its subscribers to the requesting entity in its service area.”<sup>18</sup> Again, the Commission appeared to believe that the “reprogramming” was a mere implementation detail, when it is an issue of major complexity for CMRS providers. This was incorrect.

**E. The 511 Mandate Raises Constitutional Concerns That Were Not Addressed.**

The Commission’s decision as to what types of services may be provided and who may provide them also raises profound First Amendment issues and concerns. Wireless carriers typically exercise considerable editorial discretion in determining what specialized services to provide to their customers and work with information service providers (such as weather and traffic advisory firms) to ensure that their customers’ needs are met. They may tailor the content and scope of those services to meet market demands they have identified. By taking away this discretion, the Commission has significantly burdened wireless carriers’ ability to exercise such editorial discretion.

The First Amendment concerns here are particularly serious because the order requires a carrier to provide only government-controlled speech. It mandates that only government traffic services may use the 511 code, and that a carrier may not choose another provider. In effect, the FCC has determined who will be the “speaker” to customers of wireless carriers when they dial a particular number, an issue not conceptually different from other restrictions on speech that have received First Amendment scrutiny. But the *Order* is utterly silent on what should have been a significant constitutional issue.

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<sup>18</sup> *Third Report and Order* at ¶ 21.

**F. The 511 Mandate Will Undermine CMRS Competition By Impairing Carriers' Ability to Differentiate Their Offerings in the Market.**

The 511 mandate was particularly ill-founded with respect to CMRS providers, because the Commission failed to consider the effect on competition of awarding a monopoly on the standardized 511 traffic information dialing code to federal, state and local governments. It limited the preferred dialing code to “government entit[ies],” giving “federal, state, and local government transportation agencies” the exclusive right to determine “the deployment schedule and the type of transportation information that will be provided using 511.”<sup>19</sup>

Forcing all competing carriers to offer only a government-run traffic service undercuts the FCC’s own goal of promoting consumer welfare through encouraging product differentiation and competition. The provision of travel information can be (and in fact is) a basis for CMRS competition and consumer choice.<sup>20</sup> One of the ways CMRS providers distinguish themselves from competitors in the marketplace *right now* is by the information services that they offer as part of an integrated service package. Many providers offer unique traffic information services, in particular. For example, Verizon Wireless offers two different traffic information services to its subscribers in the Washington area, “SmarTraveler” and “Star-JAM,” to differentiate its service from that of competitors. Requiring all CMRS carriers to provide access to the same government monopoly information services will actually diminish competition in the CMRS market as well as in the traffic information service provider market.

Awarding monopoly rights for 511 to government agencies will stifle consumer choice and retard rapid development of effective automated traveler information systems (“ATIS”).

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<sup>19</sup> *Third R&O* at ¶ 15.

<sup>20</sup> Sprint PCS Comments at 4-5.

Currently, there are many private entities that develop and provide traffic information, in some cases as part of an ATIS.<sup>21</sup> Granting only government access to 511 will discourage competitive development of services that respond to consumer needs, by eliminating opportunities for entrepreneurial provision of such information.<sup>22</sup> In addition, the designation of 511 for only government-provided service prevents consumers from accessing traveler information via 511 in areas where no government agency has decided to deploy or fund ATIS systems. Even if a CMRS provider or a private commercial traffic information company wishes to use 511 in such areas, the *Third Report and Order* bars such use. Commenters warned that government has little incentive to roll out service in less populated rural America, especially where services there would require changes to the content provided because of their primary interest in weather and construction delays rather than in local traffic congestion, but this concern was ignored.

Another problem with the designation of governments as the monopoly providers of traffic information service via the 511 code is that the availability of the service depends entirely on the ability of government agencies to fund the service. The Commission does not condition the assignment of the code to government on the development of a cost recovery program, however. Thus, if local or state authorities do not have the funds available to provide a responsive, well-informed traffic information service,<sup>23</sup> there will be no 511 service in the area,

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<sup>21</sup> Sprint PCS Comments at 4; SmartRoute Systems Comments at 1-2.

<sup>22</sup> SmartRoute, the provider of the SmartTraveler service available from Verizon Wireless, supported the DOT proposal in the apparently mistaken belief that designation of 511 would permit private providers to use the abbreviated code for deploying ATIS SmartRoute Systems Comments at 6. The *Order*, however, precludes all private providers from using 511.

<sup>23</sup> Local governments have been severely challenged by the costs involved in making enhanced 911 service available. If funding for deploying vital emergency telecommunications services is scarce, funding for less essential services such as 511 traffic information is likely to be even slower in becoming available.

whether or not a private entity would be willing to provide it in the interest of making a profit.

As a result, rural areas are likely to encounter significant delays in obtaining 511 service.

**G. The Order Fails to Explain How Carriers Are to Respond to Demands from Entities for The 211 Code.**

What if a CMRS carrier receives competing, conflicting requests from the Salvation Army, United Way, or other organizations? What if a for-profit group argues that it should have access because it can provide better informational services than other entities? What if a non-governmental entity charges that granting access to a government agency violates the First Amendment? The *Third Report and Order* must also be reconsidered because it imposes undefined, potentially open-ended, obligations on telecommunications providers with respect to the 211 mandate.<sup>24</sup> The Commission provides that if a carrier receives a request from “an entity” for use of the 211 code in providing community information and referral services, the carrier “*must*” terminate nonconforming uses and do whatever is necessary to provide the new entity with 211 access. Unfortunately, this raises as many questions as it answers.

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<sup>24</sup> While the obligations imposed by the 511 mandate are also undefined, the order does provide that federal, state, and local transportation authorities have the discretion to work out a deployment schedule. Accordingly, a carrier would not be obliged to provide 511 access until the various governmental authorities have arrived at an agreement. To the extent this is not the case, the *Third Report and Order* provides no guidance as to how a CMRS provider is to deal with conflicting 511 requests from multiple governments. For example, in the New York MSA, the Port Authority of New York and New Jersey might request that 511 calls from the bridges, tunnels, and airports under its jurisdiction be directed to it, while the New Jersey Turnpike Authority demands all calls from the Turnpike, and the New Jersey Department of Transportation demands all calls from non-Turnpike highways. This would lead to an impossible jurisdictional mess — around Newark Airport, all three jurisdictions have an intertwined presence, and it would be impossible for a CMRS provider to direct 511 calls as requested. At the same time, a traveler dialing 511 might not care to reach the official source for the highway on which he or she is traveling, and might prefer simply to reach a service that can provide information on traffic congestion miles away, such as in New York City or on the New York Thruway or the Pennsylvania Turnpike. There is no guarantee that the Port Authority will be the best source for such information.

There is no apparent limitation on which “entities” now have an FCC-granted right to demand access in this way. Under the strict language of the order, any entity arguably has the right to ask for and receive the exclusive right to receive all of a wireless carrier’s 211 calls. The *Order* does not limit the eligibility of an “entity” to demand 211 access to a nonprofit group or an entity currently providing such services; nor is “entity” limited to those that are legally, operationally, and financially qualified for the undertaking or have the capacity to provide such services on an appropriate scale. There is no requirement that the entity agree to provide its community information and referral services without charge, or even for a reasonable charge. In short, there are no explicit limits on carriers’ obligations to provide 211 access under this open-ended mandate.

Equally disturbing is the fact that the *Order* does not instruct carriers in how to comply with mutually exclusive demands for 211 access. If a CMRS provider receives demands from entities seeking use of 211 throughout the service area as well as for a variety of smaller jurisdictions or communities, how is the carrier to comply with the mandate that it *must* respond to each request by taking all necessary steps to provide 211 access to the requester? After a provider has taken such steps to provide access to one entity, is it obligated to provide access to another entity for the same area or an overlapping area? Is the provider entitled or obligated to evaluate the merits of each provider’s proposal, or is it forbidden from doing so? The *Order* supplies no clue.

## **II. THE ORDER VIOLATED THE ADMINISTRATIVE PROCEDURE ACT AND THE REGULATORY FLEXIBILITY ACT.**

The CMRS implementation issues discussed in the preceding section were not addressed in the *Third Report and Order* because the Commission never proposed to impose mandatory,

exclusive 211 and 511 dialing codes on CMRS providers, or to assign the 511 code exclusively to government agencies. If the Commission had issued a notice of proposed rulemaking on these code assignments, CMRS providers would have had a fair opportunity to raise objections to the specifics of the proposal and to discuss problems with it.

The Commission's decision to proceed without a notice of proposed rulemaking not only led to uninformed adoption of rules that are unworkable; its action was also contrary to the Administrative Procedure Act ("APA"). The APA requires the Commission to employ rulemaking procedures when it adopts rules, and adopt rules is precisely what the Commission did here. Moreover, the Commission compounded its error by failing to observe other requirements of administrative law.

**A. The Order Constitutes a "Rule" Subject to the APA.**

Under the APA, the Commission is required to follow rulemaking procedures when it adopts a rule of general applicability. The mandatory designation of 211 and 511 as abbreviated dialing codes exclusively committed to specific uses constitutes a "rule" as defined by the APA, because it is mandatory in character and prescribes certain facilities, services, and practices.<sup>25</sup> The fact that the assignment of the 211 and 511 codes is not codified as a C.F.R. regulation does not determine whether it is a "rule" for purposes of the APA. Rather, the issue is whether this action is intended to have a binding effect.<sup>26</sup> The Commission's designations of the 211 and 511

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<sup>25</sup> Under the APA, a "rule" is defined as "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of . . . corporate or financial structures[,] . . . facilities, appliances, services . . . , or practices bearing on any of the foregoing." 5 U.S.C. § 551(4).

<sup>26</sup> See *Public Citizen, Inc. v. United States Nuclear Regulatory Commission*, 940 F.2d 679, 681-82 (D.C. Cir. 1991); see also *United States Telephone Association v. FCC*, 28 F.2d 1232 (D.C. Cir. 1994) (reversing FCC for failure to comply with APA).

codes clearly constitute statements of general applicability and future effect designed to implement or prescribe law or policy, and its action clearly binds the public and the agency:

*Once we assign or designate an N11 for national use, essentially all that remains to do is to implement that assignment and monitor the uses of the N11 codes. . . . Assignment or designation involves announcement to the industry that a particular N11 code will be used for certain defined purpose(s). This announcement alerts current users of the N11 code that nonconforming uses must cease as part of the implementation process.*<sup>27</sup>

Moreover, the ordering clause assigning the 511 code specifically states that this code is “to be used *exclusively* for access to travel information services as of the effective date of this *Third Report and Order*.”<sup>28</sup> These statements leave no doubt that the Commission intended the *211/511 Order* to be a binding statement of general applicability and future effect designed to implement law or policy. In other words it is a rule subject to the APA.

**B. No Notice of Proposed Rulemaking Was Issued, in Violation of the APA.**

Under the APA, the Commission may not promulgate a rule without publishing a notice of proposed rulemaking that contains “either the terms or substance of the proposed rule or a description of the subjects and issues involved,”<sup>29</sup> and providing an opportunity for public comment after publishing such notice.<sup>30</sup> Here, the Commission did not follow this requirement.

The Commission issued three notices of proposed rulemaking in this docket, but none of them proposed to require CMRS carriers to set aside abbreviated dialing codes for transportation

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<sup>27</sup> *211/511 Order* at ¶ 43 & n.123 (emphasis added).

<sup>28</sup> *Id.* at ¶ 51.

<sup>29</sup> 5 U.S.C. § 553(b)(3).

<sup>30</sup> *See* 5 U.S.C. § 553(c).

information and community referral services.<sup>31</sup> The Commission's designation of 211 and 511 for transportation and community referral purposes in the *Third Report and Order* did not purport to be pursuant to any of these notices or in response to the comments on these notices.<sup>32</sup> Instead, it was in response to petitions filed long after adoption of the *First Report and Order* by the Department of Transportation (which specifically asked for the initiation of a further *rulemaking* procedure) and by an alliance of community groups.<sup>33</sup>

Instead of issuing a further notice of proposed rulemaking to seek comment on a specific proposal contemplated by the Commission, the staff merely issued public notices seeking comment on the petitions that had been filed. Staff-issued public notices do not indicate that the

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<sup>31</sup> In the *First NPRM*, the Commission proposed the general principle of adopting rules to make N11 codes available for abbreviated dialing, focusing exclusively on wireline local exchange carriers. *The Use of N11 Codes and other Abbreviated Dialing Arrangements*, CC Docket 92-105, *Notice of Proposed Rulemaking*, 7 F.C.C.R. 3004 (1992) (*First NPRM*). In the *Further NPRM*, the Commission proposed an abbreviated dialing code for the Telecommunications Relay Service and also proposed rules and policies concerning number administration and code transfers. Finally, in the *Third NPRM*, the Commission proposed rules to implement the use of 911 as a national emergency number. *The Use of N11 codes and other Abbreviated Dialing Arrangements*, CC Docket 92-105, *Fourth Report and Order and Third Notice of Proposed Rulemaking*, 20 Comm. Reg. (P&F) 489, FCC 00-327 (2000) (respective sections of which are referred to as the *Fourth Report and Order* or the *Third NPRM*).

<sup>32</sup> The *Third Report and Order* does not cite any of the notices of proposed rulemaking as a basis for its action on these codes, unlike the adoption, in the same order, of rules and policies concerning N11 administration and code transfers, which were expressly based on the *Further NPRM*. See *Third Report and Order* at Section III.D ("Further Notice of Proposed Rulemaking Issues"). Nor can any of the notices of proposed rulemaking constitute an implicit basis for the action here. The *First NPRM* does not suffice because the Commission had already completed action on that notice in the *First Report and Order*, long before the 211 and 511 petitions were filed. Moreover, the *First NPRM* made no reference to CMRS carriers; it indicated only that abbreviated dialing codes would have to be implemented by exchange carriers. The *Further NPRM* and the *Third NPRM* were narrowly focused on other issues.

<sup>33</sup> The petition by the Alliance of Information and Referral Systems, United Way of America, United Way 211 (Atlanta, GA), United Way of Connecticut, Florida Alliance of Information and Referral Services, Inc., and Texas I&R Network was filed on May 28, 1998; the Department of Transportation petition was filed March 8, 1999. The *First Report and Order* was released on February 19, 1997, long before either of these petitions was filed.

Commission tentatively proposes to take action, because they do not set forth a concrete FCC proposal. That can only be done in a notice of proposed rulemaking, which the staff is specifically precluded from issuing.<sup>34</sup> The public notices merely solicited comment on two proposals from outside the agency, neither of which expressly sought to bind CMRS carriers. This did not meet APA requirements.<sup>35</sup>

**C. Making the Rules Effective Immediately Violated the APA.**

The Commission also violated the APA when it made the mandatory, exclusive assignments of the 211 and 511 codes effective immediately upon publication in the Federal Register. The APA provides that rules must be published at least 30 days before becoming effective, with limited exceptions for:

- (1) a substantive rule which grants or recognizes an exemption or relieves a restriction;
- (2) interpretative rules and statements of policy; or
- (3) as otherwise provided by the agency for good cause found and published with the rule.<sup>36</sup>

The Commission did not provide the required 30 days' notice after publication. Instead, it made the rules effective on the same day as they were published. Neither of the first two exceptions quoted above are remotely relevant. The Commission also did not satisfy the third exception, the "good cause" exception. There is no "good cause" finding, and there is no such finding in the *Federal Register* preamble published with the rule. It is difficult to imagine what exigency could have justified making the decision effective immediately upon publication,

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<sup>34</sup> See 47 C.F.R. § 0.291(g) ("The Chief, Common Carrier Bureau, shall not have authority to issue notices of proposed rulemaking, notices of inquiry, or reports or orders arising from either of the foregoing . . .").

<sup>35</sup> See *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988).

especially in light of the considerable delay before the ruling was published, but no exigency was asserted in any event. In the complete absence of an explicit “good cause” determination, the Commission’s decision to make the rule effective immediately was also unlawful.

**D. The Order Also Failed to Comply with the Regulatory Flexibility Act.**

The *Order* also did not comply with the Regulatory Flexibility Act (“RFA”) because it did not contain the requisite analysis for imposing the 211/511 mandate on CMRS providers.<sup>37</sup> The *Order* merely explains the Commission’s rationale for not including a Final Regulatory Flexibility Analysis (“FRFA”) for two issues that had been set for rulemaking in the *Further Notice*, namely “(1) the technical feasibility of implementing 711 access for telecommunications relay services and (2) the proprietary nature of N11 codes and the transfer of the administration of N11 codes.”<sup>38</sup> Specifically, it states that the first of these is being addressed in a separate order, and that there is no need for a FRFA on the second issue because the Commission decided not to adopt the rules it set forth in the *Further Notice*.<sup>39</sup> However, there is *no discussion whatsoever* of why the Commission did not issue a FRFA addressing the effect of the 211 and 511 designations on small businesses.

Under the RFA, the Commission is required to issue an Initial Regulatory Flexibility Analysis (“IRFA”) when it issues a notice of proposed rulemaking and a FRFA when it adopts a rule that is subject to the APA’s notice and comment rulemaking requirement.<sup>40</sup> As discussed

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<sup>36</sup> 5 U.S.C. § 553(d)(1)-(3).

<sup>37</sup> 5 U.S.C. § 601 *et seq.*

<sup>38</sup> *Third Report and Order* at ¶ 45.

<sup>39</sup> *Id.* at ¶¶ 46-47.

<sup>40</sup> See 5 U.S.C. §§ 603(a) (IRFA requirement), 604(a) (FRFA requirement); *cf. id.* § 601(2) (defining “rule” consistent with APA).

above, the designation of 211 and 511 as mandatory, exclusive, abbreviated dialing codes constitutes a rule. Its action is thus independently unlawful because it violated the RFA.

**III. AT MOST, ASSIGNMENT OF 211 AND 511 SHOULD BE A VOLUNTARY GUIDELINE FOR CMRS PROVIDERS.**

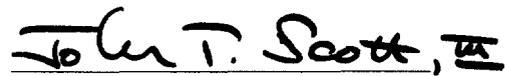
Given the technical and operational difficulties that the Commission's 211 and 511 mandatory assignments create for CMRS providers, the lack of direction as to how CMRS providers are to implement the mandates, and the *Order's* legal flaws discussed above, the best solution would be to make the code assignment a voluntary guideline for CMRS. By taking this course of action, the Commission can further its objectives of national uniformity in the dialing plan, while recognizing that it is neither necessary nor advisable, much less legal, to force CMRS providers to offer the use of these numbers to specific entities.

CMRS providers are responsive to the CMRS marketplace. They have developed and implemented abbreviated dialing programs to provide their customers with access to emergency assistance, travel and information services, access to roadside assistance, customer service, roamer access and other services – *without* an FCC mandate. Carriers deploy these offerings in a manner that provides the best possible services to their customers in the most efficient manner based on the unique characteristics of their wireless networks. They compete for customers based on a differentiation of these services, and can be expected to do so with 211 and 511 as well. Nothing in the record, and certainly no finding in the *Order*, is to the contrary. The Commission should give the wireless industry the flexibility to determine how to offer these and other services in response to market demand, not as ordered by Government fiat.

## CONCLUSION

The Commission should reconsider the *Third Report and Order*, remove its mandate that CMRS carriers offer specific services on 211 and 511, and allow CMRS carriers to determine how to use those numbers to serve customers and offer the services that the market demands.

Respectfully submitted,



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