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May 14, 2001

EX PARTE OR LATE FILED

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

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MAY 14 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Notice of Written Ex Parte Communication – W.T. Docket No. 01-72
Cellular Telecommunications and Internet Association's
Petition for a Rulemaking to Establish Fair Location Information Practices

Dear Ms. Salas:

I am writing to inform you that on Monday May 14, 2001, Nextel Communications, Inc. submitted the attached letter to Mr. Thomas Sugrue, Chief of the Wireless Telecommunications Bureau, with copies to Messrs. James Schlichting, Bryan Tramont and David Furth and Ms. Barbara Reideler, all of the Wireless Telecommunications Bureau.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter are being submitted to the Secretary's office for the above-captioned docket and a copy of this letter is being provided to the recipients of the submission. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,



To-Quyen Truong
Counsel for Nextel Communications, Inc.

Attachment

cc: Thomas Sugrue
James Schlichting
Bryan Tramont
David Furth
Barbara Reideler

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List A B C D E



May 14, 2001

Mr. Thomas J. Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

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MAY 14 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

Re: W.T. Docket No. 01-72
Cellular Telecommunications and Internet Association's
Petition for a Rulemaking to Establish Fair Location Information Practices

Dear Mr. Sugrue:

In the interest of creating a fuller record to enhance the Commission's consideration of the Cellular Telecommunications and Internet Association's ("CTIA") Petition for a Rulemaking to Establish Fair Location Information Practices (the "Petition"), Nextel Communications, Inc. ("Nextel") respectfully submits these brief comments regarding the Petition. Nextel supports the Commission's adoption of flexible policy guidelines regarding the use and disclosure of location information to protect consumers and facilitate the development of location-based mobile services. A wireless carrier that takes reasonable care to comply with these guidelines should be provided a safe harbor against litigation and disparate state regulations.

**Nextel Supports the Initiation of a Commission Proceeding to
Adopt Policy Guidelines for the Use and Disclosure of Location Information
and to Establish a Safe Harbor for Compliant Carriers.**

Nextel joins the commenters' virtually unanimous endorsement of the CTIA Petition's principles of (1) notice to customers of the service provider's location information practices; (2) express customer consent to the use and disclosure of location information; (3) security and integrity of location information; and (4) technological neutrality among wireless devices and location technologies. Nextel also supports the suggestion of Sprint PCS and VoiceStream Wireless Corporation that the Commission adopt these guidelines in a policy statement and create a safe harbor for compliant carriers to "strike the right balance between predictability of Commission policy and needed flexibility for operators."¹ Such Commission action would give consumers the confidence they seek as users of new location-based services. It also would

¹ Reply Comments of VoiceStream Wireless Corporation at 3; Comments of Sprint PCS at 18.

provide carriers the guidance and certainty they need to develop and deploy new services and protections for their customers.

Nextel likewise joins other commenters in their support of the establishment of a safe harbor for carriers who exercise reasonable care in following the Commission's guidelines for the protection of location information.² The exercise of reasonable care to comply with these guidelines should shield carriers from liability in Commission complaint proceedings and in federal and state court litigation relating to the use and disclosure of location information. Carriers should have a safe harbor from liability for any unauthorized access, interception or disclosure of location information by a third party, including the collection of location information by overlay location providers without carriers' knowledge or consent.

The Commission also should clarify that, under the express language of Section 222,³ the statutory requirement for customer "express prior authorization" and the foregoing location information policy guidelines do not apply to (a) the collection of location information (as opposed to the use, access or disclosure of such information), (b) the sharing of location information with emergency services, legal guardians and information or database management services for the purpose of assisting in delivery of emergency services and (c) the treatment of non-personally identifiable aggregate customer information.

As demonstrated by the broad support voiced by the commenters, CTIA's Petition provides a useful starting point for the Commission's development of location information policy guidelines. Nextel recommends that the Commission propose specific language to articulate fair location information practices for adoption in a Commission policy statement. The Commission then should conduct a proceeding and provide an opportunity for public comment to ensure that the Commission's policy guidelines are well-supported and take account of all relevant information and viewpoints.

The Commission's Authority Is Limited to the Adoption of Flexible Policy Guidelines for the Use and Disclosure of Location Information.

In the Wireless Communications and Public Safety Act, Congress classified wireless location information as one type of customer proprietary network information ("CPNI").⁴ Congress required that telecommunications carriers obtain customers' "express prior authorization" for "the use or disclosure of or access to" such CPNI.⁵ Among other exceptions,

² See, e.g., Comments of Verizon Wireless at 9-10; Comments of Cingular Wireless LLC at 4-5; Comments of Dobson Communications Corporation at 4; Comments of Wireless Location Industry Association at 6; Reply Comments of VoiceStream Wireless Corporation at 3; Reply Comments of United States Cellular Corporation at 5; Reply Comments of the Center for Democracy and Technology at 11-12; Reply Comments of Electronic Privacy Information Center at 8-9.

³ 47 U.S.C. § 222.

⁴ 47 U.S.C. § 222(h).

⁵ 47 U.S.C. § 222(f).

Congress provided that this requirement did not apply to the sharing of location information in specified emergency situations⁶ nor to “aggregate customer information . . . from which individual customer identities and characteristics have been removed.”⁷ Accordingly, the express terms of the statute excludes from regulation (a) the collection of location information (as opposed to the use or disclosure of or access to such information), (b) the sharing of location information in specified emergency situations and (c) the treatment of non-personally identifiable aggregate customer information.

Nextel agrees with Verizon Wireless and Sprint PCS that the statutory prohibition on the use or disclosure of location information without customers’ “express prior authorization” is self-executing.⁸ Congress gave no indication in Section 222 or its legislative history that Congress expected or wanted the Commission to adopt additional regulations.⁹ Consequently, Commission lacks authority to do more than adopt flexible policy guidelines as the CTIA has requested and many of the commenters have supported, especially in the absence of a showing that the statutory prohibition is inadequate to protect consumers from proven harms.

Case law provides additional support to the requirement for concrete evidence to justify detailed regulation. The Tenth Circuit Court of Appeals stated in vacating the Commission’s prior CPNI rules that the First Amendment requires the government to “demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”¹⁰ The court there held that the Commission’s hypotheses that carriers’ use of CPNI would harm consumers constituted “mere speculation or conjecture” and could not justify restrictions under the First Amendment.¹¹ In that case, as now with respect to location information practices, the Commission was unable to show that less restrictive alternatives to detailed regulations, such as an opt-out strategy for obtaining consumer consent, would be insufficient to protect consumers.¹² Similarly, given the embryonic status of location-based mobile services, advocates of detailed location information regulation cannot base their arguments on anything but speculation and conjecture, which cannot withstand judicial review.

Providers barely have begun to experiment with location-based services and the means to provide them. Attempts to craft detailed regulations are unlikely to be successful in anticipating the precise applications and potential abuses that may develop in this highly dynamic market. Lack of information regarding actual providers’ relationships and practices, customers’ preferences and behavior and future technology and product developments raise an unacceptable

⁶ 47 U.S.C. § 222(d)(4).

⁷ 47 U.S.C. § 222(h).

⁸ Comments of Verizon Wireless at 8; Reply Comments of Sprint PCS at 10.

⁹ Comments of Verizon Wireless at 8.

¹⁰ *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1237 (10th Cir. 1999) (citations and internal quotation marks omitted).

¹¹ *Id.* at 1237-38.

¹² *Id.* at 1239.

risk that the Commission's regulations would be based on invalid market predictions and would harm rather than protect consumers' interests. This lack of market evidence also makes it improbable that the Commission could tailor detailed regulations that avoid unduly burdening service providers' commercial speech, as required by the First Amendment.

The only market certainty is the undisputed economic imperative for service providers to innovate with a wide variety of business and technology solutions to offer the optimal blend of privacy, personalized service and pricing desired by their customers. In the highly competitive wireless marketplace, the best protection for consumers will be secured by consumers' ability to vote with their feet, the availability of privacy enhancing technologies tailored to individual preferences, and carriers' need to maintain their customers' trust and to stimulate customer demand for new location-based services. No market failure has occurred to justify the imposition of sweeping regulation. The adoption of detailed, rigid regulations at this early stage is likely to distort and discourage the development of new services and innovations.

Regulatory restraint is especially needed if the Commission does not assert its ancillary jurisdiction to regulate non-carriers' use and disclosure of location information to the same extent as carriers. The XNS Public Trust Organization and Sprint PCS noted that non-carrier overlay location providers currently have the technology to collect customers' location information without carriers' knowledge.¹³ Carriers do not control the use and disclosure of location information by these non-carrier overlay location providers and applications service providers further down the service chain. The adoption of sweeping regulations applicable solely to carriers would provide a competitive advantage to non-carriers in the provision of location-based services, thereby distorting market development of these services. Furthermore, such regulations and their attendant costs would encourage service providers to bypass carriers in obtaining location information and thus subvert the Commission's goal of protecting customers' location information. Finally, such asymmetric regulation of location information practices would cause consumer confusion and undermine consumer confidence in location-based services, thereby stifling the growth of these innovative mobile services.

Accordingly, Nextel agrees with those commenters who have expressed broad consensus that the FCC should not adopt detailed regulation applicable only to carriers' location information practices. The requirements of the First Amendment, Section 222 and the Commission's policy of promoting new services and competition all support the adoption of flexible policy guidelines, rather than rigid prescriptive regulations, for the development of location information practices.

¹³ Comments of XNS Public Trust Organization at 3 ("there are already examples of stand-alone GPS chipsets being fitted into batteries which, when connected to cell phones, require no processing by the carrier in order to reveal their location. In the currently available products[,] the handset GPS receiver calculates its own position and then sends this over the voice channel or the data channel (where available). The carrier knows only that they are *sic* handling a circuit switched voice or data call (or packet data session) but does not know the contents. The carrier is therefore no longer in control of the release of the subscriber's location information."); Comments of Sprint PCS at 17-18.

The Commission Should Preempt State Regulation of Wireless Location Information.

Finally, Nextel urges the Commission to heed the broad consensus of commenters – from the U.S. Department of Transportation, to wireless carriers to privacy groups – in support of Commission preemption of state laws dealing with wireless location information practices.¹⁴ The Commission’s authority to preempt state CPNI rules is well established.¹⁵ The Commission’s failure to exercise that preemption authority would lead to a patchwork of disparate state regulations that would cause direct harm to consumers.

As Sprint PCS explained, “[s]tate laws are not workable, either for carriers (which have built networks based on multi-state regional markets), or for consumers (who expect to receive, regardless of where they may travel, a uniform set of privacy protections and a uniform set of services).” The Center for Democracy and Technology recognized that preemption of state laws is necessary to meet consumers’ need for consistent and predictable standards on which they can rely.¹⁶ The United States Cellular Corporation pointed out that “[i]t is the essence of mobile wireless telephony for the location of wireless customers to change and sometimes for such customers to cross state lines, even during a single call.”¹⁷ The existence of disparate state regulations regarding wireless location information practices would rob consumers of much needed consistency and predictability in their mobile services and raise endless jurisdictional issues. Instead of a uniform set of services and protections, the customer would have to wage battle to determine whether the applicable state law is that of his/her billing address, his/her location at specific points during the call, or the location of one of the providers in the service chain. Such jurisdictional battles and inconsistent state practices would cause unparalleled confusion for mobile consumers and destroy consumer confidence in location information protections and services.

Without preemption of state laws, carriers would have to struggle with the daunting task of complying with myriad disparate state laws. Carriers would have to retrofit their multi-state networks and national customer care centers and micro-manage their interaction with mobile customers and countless service, technology and product providers in the service chain. The

¹⁴ Reply Comments of the United States Department of Transportation at 3; Comments of Sprint PCS at 14-16; Comments of Verizon Wireless at 10; Comments of Cingular Wireless LLC at 5; Comments of Dobson Communications Corporation at 4-5; Reply Comments of CTIA at 4-5; Reply Comments of VoiceStream Wireless Corporation at 2-3; Reply Comments of United States Cellular Corporation at 6; Reply Comments of Wireless Location Industry Association at 4; Reply Comments of the Center for Democracy and Technology at 13.

¹⁵ *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 1427 (1995) (affirming Commission’s preemption of state CPNI rules); *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers’ Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Order on Reconsideration and Petition for Forbearance, 14 F.C.C.R. 14409, 14465-67 (1999) (Commission will exercise its preemption authority with respect to inconsistent state CPNI rules).

¹⁶ Reply Comments of the Center for Democracy and Technology at 13.

¹⁷ Reply Comments of United States Cellular Corporation at 6.

Mr. Thomas J. Sugrue

May 14, 2001

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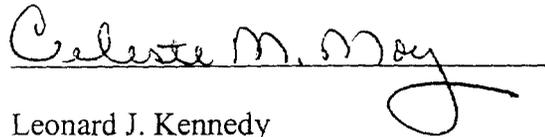
resultant delays, costs and losses in economies of scale and scope would translate into slower deployment, fewer innovations and higher prices for customers.

Accordingly, the Commission's mission to protect consumer interests and promote the growth of advanced services necessitates the preemption of state regulation of wireless location information practices. Moreover, the Commission's adoption of policy guidelines – based on the principles of consumer notice, consent, security/integrity and technological neutrality – would fulfill the goals of state authorities to protect consumers' privacy, thus eliminating the need for state regulation and its attendant costs on precious state resources.

For all the foregoing reasons, Nextel respectfully urges the Commission to (a) adopt a flexible set of policy guidelines for the use and disclosure of location information, (b) establish a safe harbor for carriers who take reasonable care to comply with these guidelines and (c) preempt state regulation of location information practices.

Respectfully submitted,

NEXTEL COMMUNICATIONS, INC.



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