



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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Revision of the Commission's Rules) CC Docket 94-102 /
To Ensure Compatibility with)
Enhanced 911 Emergency Calling Systems)

To: The Wireless Telecommunications Bureau

Additional Comments of the Rural Cellular Association

The Rural Cellular Association ("RCA"),¹ by its attorneys, hereby submits these additional comments in response to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on July 10, 2001 in the above-captioned proceeding.²

In its Second Public Notice, the Wireless Telecommunications Bureau ("Bureau") seeks additional comment on a request for clarification and/or a declaratory ruling filed by the City of Richardson, Texas ("Richardson") concerning the process by which a PSAP requests Phase II enhanced 911 ("E911") service from a wireless carrier. Specifically, the Commission requests comment as to whether the Commission's rule that set forth this process, Section 20.18(j),

¹ RCA is an association representing the interests of small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide Commercial Mobile Radio Service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing rural wireless service providers.

² *Wireless Telecommunications Bureau Seeks Further Comment on the Commission's Rule Concerning Public Safety Answering Point Requests for Phase II Enhanced 911*, DA 01-1623 (rel. July 10, 2001) ("Second Public Notice").

should be amended. Section 20.18(j) establishes that before a carrier is obligated to provide E911 services, the Public Safety Answering Point (“PSAP”) must be capable of receiving the data elements associated with the service. In seeking to amend the rule, the Bureau ignores the fully developed record established in this proceeding that fully supports the policy that underlies the existing rule. The Bureau’s proposed revision would change an existing Commission rule in the absence of the proper notice and comment procedures. Additionally, the Bureau has failed to properly assess the effects the proposed rule change would have on the smaller wireless carriers serving rural service areas. Accordingly, the Bureau should terminate this proceeding and abide by the Commission’s existing rule and policy that a wireless carrier is not obligated to provide E911 service - in the Commission’s own words - “until the actual time at which the PSAP can take advantage of the E911 service.”³

I. The Bureau Has No Authority To Amend Commission Rules

In its Public Notice released April 5, 2001, the Bureau sought comment on the request by Richardson for clarification and/or a declaratory ruling concerning the process by which a PSAP requests Phase II E911 service from a wireless carrier. The focus of the request is the meaning of the phrase “is capable of receiving the data elements associated with the service” found in Section 20.18(j).⁴ Commenters overwhelmingly agreed and demonstrated that Section 20.18(j) clearly requires PSAPs actually to have the capability of receiving and utilizing data elements at

³ See Footnote 7 *infra*.

⁴ 47 C.F.R. § 20.18(j).

the time of making the request of a wireless carrier for Phase II E911 service.⁵

In support of this conclusion, RCA, in its Reply Comments, reminded the Bureau that the Commission has already determined that a wireless carrier is not obligated to provide E911 service until the actual time at which the PSAP can take advantage of the E911 service because to do otherwise would trigger an expensive and time-consuming process which potentially, and otherwise unnecessarily, strands investment.⁶ The Commission's position and the underlying basis for its policy are clearly set forth in its Second Memorandum Opinion and Order where it stated:

Fourth, we retain the provision to ensure that carriers are not required to make unnecessary expenditures in response to a PSAP that is not ready to use the E911 information. Carriers should not be forced to make investments in their networks to provide E911 services that cannot be used by the PSAP. Apart from the significant costs involved . . . the public, the PSAP and the carrier benefit from a requirement that is not triggered until the actual time at which the PSAP can take advantage of the E911 service.⁷

Irrespective of the clarity of the existing rule and the Commission's policy statement set forth above, even a commenter who thinks there is a need for clarification points out that the

⁵ See, Western Wireless' Comments at 1-2; Cingular Wireless' Comments at 1-2; Verizon Wireless' Comments at 1; Voicestream's Comments at 5; Quest Wireless' Comments at 2; United States Cellular Corporation's Comments at 1-2. See also, Sprint's Comments at 3; CTIA's Comments at 1.

⁶ See RCA's Reply Comments filed May 3, 2001 at 3.

⁷ *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems: Second Memorandum Opinion and Order*, 14 FCC Rcd 20850 at para. 69 (1999) ("Second Memorandum Opinion and Order").

Richardson-sought reinterpretation of the rule is not consistent with the meaning of the rule.⁸

The Bureau, however, apparently seeks to depart from the Commission's established rule and policy. In its Second Public Notice, the Bureau announced its purpose in seeking additional comment was to determine "whether the rule should be amended to clarify its meaning and/or adopt some criteria between the two extremes"⁹ According to the Administrative Procedure Act ("APA") and the Commission's own rules, however, the Bureau is not authorized to take such action. Section 553(b) of the APA requires the Commission to give formal notice of proposed rule making before it adopts any new rule."¹⁰ This requirement to adhere to a formal notice and comment proceeding includes amendments to existing rules.¹¹ Further, the Commission has not delegated to the Bureau the authority to amend Commission rules. Section 0.331(d) of the Commission's rules specifies that the Bureau "shall not have the authority to act upon notices of proposed rulemaking and inquiry, final orders in rulemaking proceedings and inquiry proceedings, and reports arising from any of the foregoing except such orders involving

⁸ See, e.g., Blooston's Comments at 3 (citing the Second Memorandum and Order and stating, "[t]he Commission's plain language clearly states that the PSAPs must be able to use Phase II E911 information before a carrier is required to take any action").

⁹ Second Public Notice at 2.

¹⁰ 5 U.S.C. § 553(b).

¹¹ See *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (Supreme Court holding that compliance with the notice and comment rulemaking in APA procedures is "required" when an agency "adopts a new position inconsistent with . . . existing regulations"); *National Wildlife Federation v. Clark*, 577 F.Supp. 825, 828 (D.C. Dist. 1984) (citing Section 551(5) of the APA as defining rulemaking as the "agency process for formulating, amending, or repealing a rule" and noting that Section 553 sets forth minimal requirements of notice and comment for such rulemaking).

ministerial conforming amendments to rule parts . . .”¹² The proposals that the Bureau has suggested as amendments to Section 20.18(j) are substantive in nature and constitute a departure from the Commission’s existing rules and policies. Accordingly, consideration of the Bureau’s proposals in this Forum is a prohibited activity. The Bureau must accordingly cease its attempts to amend Section 20.18(j) and continue the effectiveness of the Commission’s previously adopted E-911 rule.

II. The Initial Regulatory Flexibility Analysis Fails to Properly Assess the Impact of the Proposed Amendment on Small and Rural Wireless Carriers

If the Bureau’s proposed change of Section 20.18(j) were the subject of appropriate administrative procedural consideration, the application of the Bureau’s proposal, nonetheless, could not reasonably be applied to small wireless carriers. The Regulatory Flexibility Act (“RFA”) requires the Commission to assess the impact of proposed and adopted regulations on small businesses.¹³ According to the Second Public Notice, and pursuant to the RFA, the Bureau prepared an Initial Regulatory Flexibility Analysis (“IRFA”) of the “possible significant economic impact on small entities by the rule amendments suggested in the Public Notice.”¹⁴ This IRFA, however, is woefully deficient. First, the Bureau totally ignores any negative impact its proposed amendment would have on small and rural wireless carriers and instead focuses only

¹² 47 C.F.R. § 0.331(d). *See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band: Second Memorandum Opinion and Order on Reconsideration*, 14 FCC Rcd 21068 at para. 5 (1999) (Commission noting that prohibited activities set forth in Section 0.331 include notices of proposed rulemaking and that the Bureau’s actions cannot affect substantive issues).

¹³ *See* 5 U.S.C. § 604(a).

¹⁴ Second Public Notice at Appendix A.

on the possible impact that the amendment would have on PSAPs.¹⁵ Second, the Bureau erroneously claims that the amendment would in fact benefit small carriers in that they “would find it less burdensome to confirm that a PSAP is indeed capable of participating in E911 service provision.”¹⁶ RCA affirms on behalf of its members that this claim is without merit and void of any factual support. Third, in its IRFA, the Bureau all too quickly dismisses the requirement to consider ways to minimize significant economic impact on small entities by alleging that it is “severely limited in this proceeding as to minimizing the burden on small entities.”¹⁷ The Bureau, however, is not limited; burden on small carriers can be minimized by maintaining the application of the Commission’s existing rule and policy.

III. Conclusion

As demonstrated above, the Commission adopted the existing rule to prevent carriers from being forced to make investments in their networks to provide E911 services that cannot be used by the PSAP. To amend the rule and allow the triggering of E911 obligations sometime prior to the actual time at which the PSAP can take advantage of the E911 service would force small and rural carriers to make premature expensive changes to their networks earlier than is currently required. The Bureau’s proposed requirement will cause small wireless carriers to

¹⁵ See Second Public Notice at Appendix A, Section E.

¹⁶ Public Notice at Appendix A, Section C. This supposed “benefit” is no benefit at all to small and rural carriers that do not have the resources to review the documentation that the Commission’s proposed amendment would require PSAPs to provide to carriers. As stated above, in fashioning the existing rule, the Commission properly determined that the public, PSAPs and carriers all benefit from the existing rule. The rule cannot be lawfully changed in the absence of the required determination.

¹⁷ Public Notice at Appendix A, Section E.

unnecessarily direct their limited capital. Depending on the uncertain subsequent actions of the PSAP, this required premature investment may never be used and could be totally stranded. The resulting burden on small carriers is significant and unnecessary. The public interest will best be served by maintaining the existing rule and policy.

At a minimum, however, the Bureau cannot lawfully proceed with its proposed rule and policy change without invoking proper processes including a meaningful and substantive IRFA. Moreover, even if the Bureau wrongfully determined that its proposal meets the requirements of the IRFA, the Bureau cannot unilaterally proceed in the absence of compliance with the appropriate administrative procedures required to change rules and policy established by the Commission.

Accordingly, and for the reasons stated above, RCA urges the Bureau to terminate this proceeding and to continue the application of the existing policy and rule that a wireless carrier is not obligated to provide E911 service until the actual time at which a PSAP can take advantage of the E911 service.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION

By:  _____

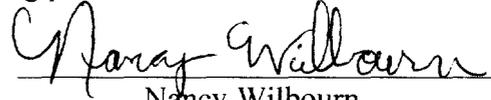
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Comments of the Rural Cellular Association
CC Docket No. 94-102
July 25, 2001

CERTIFICATE OF SERVICE

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Additional Comments of the Rural Cellular Association" was served on this 25th day of July 2001, via hand delivery or by first class, U.S. Mail, postage prepaid to the following parties:


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