

SUMMARY

Nextel Communications, Inc. and Nextel Partners, Inc. (collectively “Nextel”) are petitioning for clarification and partial reconsideration of the Federal Communications Commission (“Commission” or “FCC”) order granting Nextel a temporary conditional waiver of the Enhanced 911 (“E911”) Phase II rules (“*Nextel Waiver Order*”). While Nextel does not challenge the ultimate grant of its request to implement an Assisted Global Positioning System (“A-GPS”) Phase II solution for its iDEN air interface (a proprietary technology of Motorola Inc. (“Motorola”)), certain aspects of the Commission’s decision were arbitrary and capricious, were made without explanation, and were improperly taken without prior public notice and the opportunity for comment by Nextel and other interested parties.

Specifically, although the Commission found that A-GPS is the only feasible E911 Phase II implementation choice available to Nextel and that compliant handsets and infrastructure are available to Nextel only from Motorola, the Commission determined that unavailability of necessary equipment at future benchmark dates would not excuse noncompliance with Nextel’s modified Phase II deployment schedule. In fact, the Commission stated that it would institute enforcement action against Nextel under such circumstances. In effect, without any factual or legal foundation, the Commission has impermissibly prejudged any future waiver request that Nextel may be required to file and substantially modified the E911 Phase II waiver standard applicable to Nextel. This premature enforcement decision ignores applicable FCC precedent, and was made without any explanation whatsoever and in contravention of the notice and comment requirements of the Administrative Procedures Act, and therefore must be rescinded.

In addition, on the same day the *Nextel Waiver Order* was released, the Commission granted “small and mid-sized carriers” (defined as “carriers other than the six major national

wireless carriers”) additional time to file requests for relief from the E911 Phase II implementation rules. Shortly thereafter, the Commission provided additional guidance allowing small and mid-size carriers that already had waiver requests on file to update or supplement their requests. By affording only small and mid-sized wireless carriers additional time to file or update their waiver requests, the Commission inappropriately established two separate classes of carriers for E911 Phase II waiver purposes (the six national carriers, including Nextel, versus all others) and substantially altered the legal rights and obligations of one class of carriers without any explanation, and without public notice and the opportunity for comment by affected parties. As a result of this action, Nextel was arbitrarily deprived of the opportunity to refresh the record on the status of its E-911 implementation program prior to a Commission determination, even though Nextel faces the same technological hurdles as many of the carriers provided additional time to file or supplement their requests (and perhaps even more hurdles given the unique nature of its wireless network).

Because these two aspects of the Commission’s decision in the *Nextel Waiver Order* are unsupported by reasoned decisionmaking and were taken without proper notice and comment, they are arbitrary and capricious and must be clarified and/or reconsidered as set forth herein.

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

In the Matter of)	
)	
Revision of the Commission's)	CC Docket No. 94-102
Rules to Ensure Compatibility)	
with Enhanced 911 Emergency)	
Calling Systems)	
)	

**JOINT PETITION FOR CLARIFICATION
AND PARTIAL RECONSIDERATION OF
NEXTEL COMMUNICATIONS, INC.
AND NEXTEL PARTNERS, INC.**

Nextel Communications, Inc. and Nextel Partners, Inc. (collectively "Nextel"),¹ by its attorneys and pursuant to Section 1.106 of the rules, hereby petition for clarification and partial reconsideration of the Federal Communications Commission ("Commission" or "FCC") order granting Nextel a temporary conditional waiver of the Enhanced 911 ("E911") Phase II rules.² Nextel does not challenge the ultimate grant of its waiver request. However, certain aspects of the Commission's decision were arbitrary and capricious, made without explanation, and improperly taken without prior public notice and the opportunity for comment by Nextel and other affected parties. Accordingly, Nextel respectfully submits that the Commission must clarify and/or reconsider certain actions taken in connection with its grant of the *Nextel Waiver Order*.

¹ Nextel Partners, Inc. is an affiliate of Nextel Communications, Inc. and is constructing and operating iDEN wireless communications systems in numerous rural and suburban markets in the United States under the Nextel brand name.

² In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc., CC Docket No. 94-102, FCC 01-295 (rel. Oct. 12, 2001) ("*Nextel Waiver Order*").

I. INTRODUCTION

Nextel is a Commercial Mobile Radio Service (“CMRS”) provider with approximately eight million subscribers located throughout the United States. Nextel provides cellular mobile telephone, push-to-talk dispatch, data and Internet access services using Motorola Inc.’s (“Motorola”) proprietary iDEN handset and network technology.³ Nextel believes that launching automatic location technology will provide substantial benefits to 911 callers and other customers, and Nextel has taken its E911 Phase II service obligations very seriously. Nextel continues to commit substantial resources to its E911 Phase II implementation and compliance program, and is working daily with Motorola to achieve the E911 Phase II deployment dates in the *Nextel Waiver Order*. As the Commission is aware, however, the only feasible Phase II implementation choice available to Nextel is an Assisted Global Positioning System (“A-GPS”) handset-based solution.⁴ Given the largely proprietary nature of the iDEN technology used in Nextel’s network, the A-GPS handsets and infrastructure Nextel will use to provide Phase II location capability are available only from Motorola.

Despite the Commission’s obvious recognition that Nextel relies entirely on Motorola to provide Phase II compliant equipment, the Commission stated in the *Nextel Waiver Order* that unavailability of equipment would not excuse noncompliance with the schedule approved in the Order, and that it would institute enforcement action against Nextel under such circumstances. In adopting this position, the Commission effectively prejudged any future waiver request by Nextel and substantially modified the E911 Phase II waiver standard applicable to Nextel. In addition, in

³ Motorola is the world’s only manufacturer of iDEN handsets and infrastructure.

⁴ Although commonly referred to as a “handset solution,” A-GPS requires substantial network upgrades, including the development and deployment of new hardware and software throughout the network.

granting Nextel's waiver request but affording small and mid-sized wireless carriers additional time to file or update their Phase II waiver requests, the Commission inexplicably, impermissibly and without prior notice established two separate classes of carriers for E911 Phase II waiver purposes and substantially altered their legal rights. As discussed herein, these actions were arbitrary and capricious, unsupported by reasoned decisionmaking and taken without proper notice and comment. Accordingly, the Commission should clarify and/or reconsider these decisions as set forth herein.

II. BACKGROUND

On November 9, 2000, Nextel filed an E911 Phase II Implementation Report and Request for Waiver outlining its plans to deploy A-GPS technology to provide Phase II service, and requesting additional time to implement this solution throughout its national network.⁵

Specifically, Nextel proposed the following schedule for deployment of A-GPS handsets:

October 1, 2002-	Begin selling A-GPS-capable handsets;
December 31, 2002-	10% of all new handsets sold are A-GPS-capable;
December 1, 2003-	50% of all new handsets sold are A-GPS-capable;
December 1, 2004-	100% of all new handsets sold are A-GPS-capable;
December 31, 2005-	95% of entire iDEN customer base is A-GPS-capable.

As the Commission recognized in the *Nextel Waiver Order*, these deployment dates are based on the schedule set by Motorola for delivery to Nextel of A-GPS capable handsets.⁶

The Commission found Nextel's alternative compliance plan to be justified by the special circumstances Nextel faces in deploying location capability for its iDEN air interface, the lack of

⁵ Nextel Communications, Inc. and Nextel Partners, Inc. Joint Report on Phase II Location Technology Implementation and Request For Waiver, CC Docket No. 94-102 (filed November 9, 2000).

⁶ See *Nextel Waiver Order*, ¶ 11. Nextel did not seek any relief from other provisions of the E911 Phase II rules. Thus, Nextel remains subject to the handset accuracy and reliability requirements in the Commission's rules, as well as to the provisions of the rules concerning network upgrades to deliver Phase II information to public safety answering points ("PSAPs").

viable alternatives as determined by Nextel's trial of location technologies, and the overall benefits to public safety of its proposed solution. Accordingly, the Commission granted Nextel's requested waiver of the Phase II implementation rules.⁷

However, the Commission took a step beyond merely ruling on the merits of the Nextel waiver request. The *Nextel Waiver Order* addresses how the Commission intends to deal with any future waiver request that Nextel might later find it necessary to file:

If Nextel does not have compliant Phase II service on the dates set forth herein, it will be deemed noncompliant and referred to the Commission's Enforcement Bureau for possible action. At that time, an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.⁸

This language telegraphs the Commission's intent automatically to institute enforcement action against Nextel if, for any reason, it is forced to file another waiver request. It effectively denies Nextel the opportunity at a future date to argue that such a waiver is warranted in circumstances where Motorola is unable to timely supply compliant A-GPS handsets and infrastructure in accordance with the schedule approved by the Commission. Just as it believes the Commission has inappropriately prejudged possible future events, Nextel does not intend herein to prejudge the technological developments and delivery dates of its vendor. Rather, Nextel is merely highlighting the fact that the development and integration of location technologies in the proprietary iDEN infrastructure is a complex, time-and-resource-consuming task that may not run according to plans established two years prior to launch *and* prior to the time when actual iDEN A-GPS handset and infrastructure integration had begun. If Motorola has any particular incentive in this A-GPS deployment process, it presumably has an incentive – as a

⁷ See *Nextel Waiver Order*, ¶ 1.

⁸ See *id.*, ¶36.

20% owner of Nextel – to see these deadlines met in a timely manner. Nonetheless, neither Nextel nor Motorola can predict the future with absolute certainty, and the Commission, therefore, should not prejudge it with such certainty.

In addition to prejudging possible future waiver requests, on the same day the Commission released the *Nextel Waiver Order*, it also released a public notice “clarifying” the waiver filing obligations of “small and mid-sized carriers” (defined by the Commission as “carriers other than the six major national wireless carriers”).⁹ Specifically, the Commission granted these carriers until November 30, 2001, to file requests for relief from the E911 Phase II implementation rules. Shortly thereafter, the Wireless Telecommunications Bureau provided additional guidance on E911 Phase II waiver filings by small and mid-size carriers, including allowing carriers that already had waiver requests on file to update or supplement their requests.¹⁰ However, neither the *Nextel Waiver Order* nor the public notices provides any rationale for establishing separate classes of wireless carriers (six “national” carriers versus all others) for E911 Phase II compliance purposes, or for giving small and mid-sized carriers additional time either to file or update their waiver requests while arbitrarily denying Nextel a similar opportunity.¹¹ As discussed below, these two aspects of the Commission’s decision in the *Nextel Waiver Order* are arbitrary and capricious, are unsupported by reasoned decisionmaking, and were taken without proper notice and comment.

⁹ See Commission Establishes Schedule for E911 Phase II Requests by Small and Mid-Sized Wireless Carriers, *Public Notice*, FCC 01-302 (re. Oct. 12, 2001).

¹⁰ Wireless Telecommunications Bureau Provides Guidance on Filings by Small and Mid-Sized Carriers Seeking Relief from Wireless E911 Phase II Automatic location Identification Rules, *Public Notice*, DA 01-2459 (rel. Oct 19, 2001).

¹¹ Nextel recognizes that the waiver request of VoiceStream, a carrier considered by the Commission to be one of the six major national carriers, was previously granted on September 8, 2000.

III. THE COMMISSION IMPROPERLY ESTABLISHED SEPARATE CLASSES OF CARRIERS FOR E911 PHASE II WAIVER PURPOSES AND FAILED TO ARTICULATE ANY RATIONAL BASIS FOR TREATING NEXTEL AND OTHER “NATIONAL CARRIERS” DIFFERENTLY THAN “SMALL AND MEDIUM SIZED” CARRIERS

The Administrative Procedures Act (“APA”) ordinarily requires that rules of general applicability and prospective effect, as well as substantive changes to such rules, be made pursuant to a notice and comment rulemaking proceeding.¹² The notice and comment process serves two basic goals. First, it reintroduces “public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,”¹³ and gives “interested parties a reasonable opportunity to participate in the rulemaking process.”¹⁴ Without such a process, private parties would be bound by agency rules without having the ability to help shape them.¹⁵

By deciding the waiver requests only of certain wireless carriers (including Nextel, whose waiver request had been pending for 11 months) but affording all other carriers nearly two additional months to file or to update previously filed requests for relief from the Phase II rules and forbearing from enforcement action during the pendency of such requests,¹⁶ the Commission established two classes of carriers (the six national carriers versus all other carriers) and

¹² See 5 U.S.C. §§ 553(b), (c). While notice and comment requirements are subject to certain limited exceptions, they represent the cornerstone of the administrative rulemaking process.

¹³ *MCI Telecommunications Corp. v. FCC*, 57 F.3d 1136, 1141 (D.C. Cir. 1995) (vacating the Commission’s order allowing Bell Operating Companies to phase out bundled access offerings for failure to provide adequate notice in a notice of proposed rulemaking)(citing *Nat’l Ass’n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982)).

¹⁴ *Id.* at 1140 (citing *Florida Power & Light Co. v. United States*, 846 F.2d 765, 771 (D.C. Cir. 1988)).

¹⁵ See *Nat’l Family Planning & Reprod. Health Ass’n. v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992).

¹⁶ See *supra* n. 8-9, and accompanying text.

substantially altered their legal obligations, particularly with respect to the consequences of non-compliance. This is precisely the type of agency decision of general applicability with prospective effect that requires notice and comment procedures. However, the Commission did not afford interested parties any input on its unexplained decision to cull out from the herd and brand as approved or conditionally approved the implementation plans of only five of the significant number of wireless carriers that had E911 implementation waivers pending prior to the Commission's October 1, 2001 starting date for Phase II implementation.¹⁷

The Commission failed to articulate any reason whatsoever for its decision to establish two classes of carriers for evaluating and disposing of Phase II waiver requests. Indeed, even though the Commission has considerable leeway in applying its rules, the Commission may not make standardless decisions among similarly situated parties.¹⁸ Because the Commission offered no basis for treating Nextel differently than other wireless carriers – some of which had not even requested waiver of their October 1, 2001 Phase II obligation – and did not adequately explain its

¹⁷ The Commission had required *all* wireless carriers to file Phase II Reports on November 9, 2000 that detailed their individual implementation plans and progress. *See* Request for Extension of October 1, 2000 Reporting Deadline Phase II E911 ALI Technology Selection Report, *Order*, 15 FCC Rcd 20077 (2000). Some carriers filed Reports on November 9, 2000; others filed later; still others have yet to file anything. By October 1, 2001, however, more than 70 carriers had filed requests for waiver of the Phase II rules. *See* FCC Acts on Wireless Carrier and Public Safety Requests Regarding Enhanced Wireless 911 Services, *News Release* (Oct. 5, 2001). The Commission's decision to act on only five of those requests, while giving all others additional time to file or amend (regardless of whether they filed on November 9, 2000), is itself arbitrary – not to mention the Commission's arbitrary pre-judgment of possible future waiver requests from Nextel.

¹⁸ *See Melody Music, Inc. v. FCC*, 345 F. 2d 730, 732-33 (D.C. Cir. 1965) (requiring the Commission to explain its disparate treatment of similarly situated parties).

criteria for singling out “large” carriers for different treatment than “small” and “mid-sized” carriers, its decision cannot stand.¹⁹

One can infer from the Commission’s decision that the size of a particular wireless carrier was one criterion the Commission used to formulate its decision. Size alone, however, does not appear to be the only criteria for separate treatment. For example, according to the Commission’s *Annual Report and Analysis of Competitive Market Conditions*, ALLTEL Corporation (“ALLTEL”), a carrier not singled for an immediate decision, boasted 6,300,000 subscribers by the end of 2000, only 378,000 fewer than Nextel’s 6,678,000 at year-end 2000.²⁰ However, VoiceStream, whose E-911 implementation plan was approved by the Commission in September of 2000, only had 3,879, 000 subscribers by the end of 2000 – 3 million fewer than the “small” or “mid-sized” ALLTEL. Consequently, the Commission’s E-911 waiver decisions could not solely have been based on carrier size, but rather on some heretofore unannounced standard.

Additionally, the Commission’s decision to permit some wireless carriers to file Phase II implementation plans for the first time by November 30, 2001, cannot be reconciled with its decision to require all other carriers to submit deployment plans a year earlier on November 9, 2000, nor can it be reconciled with its decision to subject aspects of the Cingular Wireless and AT&T Wireless waivers to enforcement proceedings for their purported failure to timely prosecute their implementation programs.²¹ Either all wireless carriers have the same obligation

¹⁹ See, e.g., *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (holding that an agency decision must be supported by findings and analysis to justify choices made, and provide a basis for exercise of its discretion).

²⁰ See Implementation of Section 6002(b) of the Omnibus Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Sixth Report*, 16 FCC Rcd 13350, at Appendix C, Table 3 (2001).

²¹ See Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless, LLC, *Order*, CC Docket

to timely file compliance proposals, which is the regime the Commission previously announced; or the Commission is unilaterally and without explanation punishing carriers that in fact had implementation plans and waiver requests pending as of the October 1, 2001 deadline, while at the same time rewarding carriers that ignored their compliance obligations entirely. This is not only counter-intuitive, it encourages whoever the Commission at the moment deems to be “small and mid-sized carriers” to depend upon the Commission liberally to hand out unreasonable and unwarranted relief from mandatory government programs that, by their very nature, apply uniformly to all carriers.

Because the Commission failed to provide any prior notice or explanation of its two-track approach to E911 Phase II waiver requests, it is not possible to evaluate fully the efficacy of the Commission’s decision. However, Nextel plainly was disadvantaged vis-a-vis other carriers by the Commission’s action. For example, Nextel faces the same technological hurdles as many of the carriers provided additional time, and perhaps even more hurdles given the unique nature of its wireless network, but Nextel will not get the same opportunity to refresh the record on the status of its E-911 implementation prior to a Commission determination. Nextel has been prejudiced by the Commission’s rush to judgment regarding enforcement action in connection

No. 94-102, FCC 01-296, at n.10 (rel. Oct. 12, 2001) (“Because the timing of Cingular’s proposal [of August 30, 2001] for its TDMA network did not permit Commission consideration, discussions have been initiated between Cingular and the FCC Enforcement Bureau staff concerning possible consent decrees with the Commission to resolve this compliance issue.”); Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by AT&T Wireless Services, Inc., *Order*, CC Docket No. 94-102, FCC 01-294, at ¶ 26 (rel. Oct. 12, 2001)(“While AT&T has submitted a compliance plan for the TDMA portion of its network [on September 17, 2001], the timing of that submission did not permit Commission consideration. Accordingly, discussions have been initiated between AT&T and FCC Enforcement Bureau staff concerning possible consent decrees with the Commission to resolve this compliance issue.”)

with any future waiver request that Nextel may be required to file.²² Accordingly, the Commission must clarify its decision to grant conditionally Nextel's waiver request, while at the same time affording other carriers additional time to file or update their waiver requests.

IV. THE COMMISSION HAS IMPROPERLY PREDETERMINED THAT IT WILL INSTITUTE ENFORCEMENT ACTION AGAINST NEXTEL IN THE CONTEXT OF ANY POTENTIAL, FUTURE E911 PHASE II WAIVER REQUESTS

Although the Commission has granted Nextel's E911 Phase II waiver request, the Commission also appears to have prejudged any additional relief that may be necessary in the event that A-GPS infrastructure and handsets are unavailable. Specifically, the Commission indicated that it will institute enforcement proceedings against Nextel if it is unable to provide E911 Phase II service in accordance with the implementation timeline established in the *Nextel Waiver Order*, and that the manufacturer's inability to supply necessary equipment will not excuse Nextel's noncompliance.²³ This drastic enforcement decision – which is based on circumstances entirely beyond Nextel's control – stands in stark contrast to the Commission's other findings in granting the waiver, constitutes a substantial revision of the FCC's E911 Phase II waiver policies made without notice or comment and selectively applied to Nextel, and is inconsistent with general FCC waiver precedent and prior FCC action in the E911 proceeding.

Nextel is not alone in its concern regarding the adoption of a draconian enforcement approach that attempts to punish wireless carriers for the potential failings of equipment manufacturers and vendors. As discussed in detail in the separate statement of Commissioner

²² See Section IV, *infra*.

²³ The *Nextel Waiver Order* states “if Nextel does not have compliant Phase II service on the dates set forth herein, it will be deemed noncompliant and referred to the Commission's Enforcement Bureau for possible action. At that time, an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.” *Nextel Waiver Order*, ¶ 36.

Abernathy, telecommunications carriers have no control over the actions of equipment manufacturers and vendors, thus “[w]henver the Commission mandates various technological capabilities by licensees, it runs into the very real limits imposed by manufacturing capabilities and timelines. But it is a mistake to equate manufacturer conduct with carrier conduct and to punish one for the acts and omissions of the other.”²⁴ Nextel cannot “control” the actions of Motorola any more than Motorola can control the actions of its underlying vendors. Moreover, developing and integrating an iDEN A-GPS solution is a complex technical process with the real possibility of unexpected and unplanned hurdles. Such hurdles occur in many product development processes – whether or not they are part of a Commission mandate. Therefore, Commissioner Abernathy is correct in stating that she has

... serious concerns about prejudging any future carrier filings regarding E911. The Commission has an obligation to judge each licensee’s filing on the merits at the time they are filed. I do not believe adjudicatory filings, such as waiver requests, should be prejudged as “suspicious” any more than they should be prejudged as “sympathetic.”²⁵

While Nextel has and will continue to work closely with Motorola to make A-GPS handsets and infrastructure available in accordance with the deployment schedule approved by the Commission, Nextel cannot meet those deadlines if, a year from now, the technology does not yet exist. The Commission has inappropriately prejudged events that may or may not happen in the future and decided to hold Nextel responsible for any failure by its underlying vendor to supply compliant A-GPS handsets and infrastructure in the numbers and the time frames required by the Commission. There certainly is no factual or legal basis on which the Commission can prejudge

²⁴ See *Nextel Waiver Order*, Separate Statement of Commissioner Kathleen Abernathy at 3-4.

²⁵ *Id.*

this outcome today. As discussed more fully below, this aspect of the *Nextel Waiver Order* is arbitrary and capricious, and must be rescinded by the Commission.

A. The Commission’s Decision to Initiate Future Enforcement Action in Circumstances Beyond Nextel’s Control is Inconsistent with Longstanding FCC Policy and the Commission’s Own Findings in Granting the Nextel Waiver.

The Commission’s rules may be waived when there is good cause shown and when “special circumstances warrant a deviation from the general rule, and such a deviation will serve the public interest.”²⁶ In this connection, the FCC’s general practice is to waive its rules temporarily where circumstances beyond the control of licensees make violations of the rules unavoidable.²⁷ In addressing the disposition of any future waiver request by Nextel, however, the Commission stated that “an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.”²⁸ In adopting this position, the Commission turns waiver precedent on its head and ignores its own findings contained in the *Nextel Waiver Order*.

²⁶ See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442, ¶ 43 (2000)(“*Fourth MO&O*”) (citing *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

²⁷ See Wireless Telecommunications Bureau Extends CALEA Section 107(c) Preliminary Determination period for Wireless Carriers Until September 30, 2001; Seeks Comment on Additional Extension Petitions, *Public Notice*, 16 FCC Rcd 5515 (2001)(extending period for wireless carriers seeking extensions of the deadline for complying with the Communications Assistance for Law Enforcement Act (“CALEA”) because “it has become clear that the complexity of the hardware and software wireless carriers need to implement CALEA capability requirements has impeded its availability”); Federal-State Joint Board on Universal Service, *Order*, DA 00-2444, CC Docket No. 96-45 (rel. Nov. 1, 2000)(stating that “applicants should not be penalized when they are unable to implement non-recurring services on time, due to circumstances beyond their control and for which they are not at fault”).

²⁸ *Nextel Waiver Order*, ¶ 36.

The Commission seeks to hold Nextel responsible for the possible unavailability of compliant A-GPS infrastructure and handsets in the quantities and time frames approved in the *Nextel Waiver Order*. Nextel does not control Motorola, and cannot otherwise ultimately require Motorola to produce compliant handsets and infrastructure. Indeed, the availability of compliant equipment is a quintessential example of circumstances that are beyond an FCC licensee's control, and thus typically would be grounds for a temporary waiver of the rules. In this case, however, the FCC has departed from longstanding precedent by seeking to hold Nextel responsible for the potential actions of its supplier.²⁹ Furthermore, the Commission has failed to provide any explanation for this significant departure from past precedent. As a result, this aspect of the *Nextel Waiver Order* cannot be viewed as a product of reasoned decisionmaking and must be reconsidered.

Moreover, in the *Nextel Waiver Order*, the Commission recognized that Nextel faces special circumstances that affect its deployment of E911 Phase II services. The Commission found that the use of the iDEN air interface, a proprietary Motorola technology, limits Nextel's options for location technologies and requires Nextel to rely on Motorola as a sole source provider.³⁰ However, the Commission's decision to commence enforcement proceedings automatically against Nextel in the event of manufacturer failure is wholly inconsistent with Nextel's lack of control over Motorola and the FCC's own findings regarding Nextel's reliance

²⁹ See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Fourth Report and Order*, 15 FCC Rcd 25216, ¶¶ 5-8 (2000)(extending the compliance deadline until June 30, 2002 by which digital wireless service providers must be capable of transmitting 911 calls using TTY devices because suppliers and manufacturers (such as, Lucent Technologies, Ericsson and Motorola) did not have the technology necessary for the transmission of TTY signals over digital wireless systems).

³⁰ *Nextel Waiver Order*, ¶ 19. The Commission further notes that Motorola supports Nextel's proposed deployment schedule as reasonable and achievable. *Id.*, ¶ 20.

on Motorola for compliant equipment. Further, the Commission “entirely failed to consider” that the very same factors that supported grant of Nextel’s waiver request – reliance on Motorola as a sole source of an iDEN/A-GPS location solution and the unavailability of alternative Phase II solutions – would support grant of a further waiver if compliant equipment was not available from Motorola. Such a failure to consider relevant factors is a hallmark of arbitrary and capricious action.³¹

B. The Commission’s Enforcement Decision Represents an Impermissible Revision of the E911 Phase II Waiver Standard and Improperly Prejudges Any Future Waiver Request.

In the E911 Phase II *Fourth Memorandum Opinion and Order*, the Commission has recognized that there may be instances in which “technology-related issues” or “exceptional circumstances” make it impossible for a wireless carrier to deploy Phase II in the required time frames, and individual waivers could be granted in these circumstances.³² The Commission indicated that a request for such a waiver of the Phase II implementation rules should be “specific, focused and limited in scope, and with a clear path to full compliance.”³³ The Commission further stated with respect to the possibility of enforcement action against carriers that fail to comply with the E911 Phase II rules, “in considering the appropriateness of enforcement actions, we will take into account the extent to which carriers have made concrete and timely efforts to comply and to which their failure to do so was the result of factors beyond their control.”³⁴

³¹ *Motor Vehicles Manufacturers Ass’n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 42-43 (1983).

³² See *Fourth MO&O*, ¶ 43.

³³ *Id.*, ¶ 44.

³⁴ *Id.*, ¶ 45.

In contrast, the *Nextel Waiver Order* enunciates an entirely new policy with respect to future E911 Phase II waiver requests by Nextel. The *Nextel Waiver Order* rejects the even-handed waiver policy set forth in the *Fourth Memorandum Opinion and Order* in favor of automatic enforcement action and a presumption against Nextel in the event that Motorola cannot provide A-GPS infrastructure and handsets on a timely basis because “an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.”³⁵ Not only is this new policy inappropriately applied solely to Nextel by the terms of the *Nextel Waiver Order*, it also constitutes a significant shift in the FCC’s E911 waiver standard that was taken without notice and comment.

The Commission properly adopted its E911 Phase II waiver policy in the context of the ongoing E911 rulemaking proceeding.³⁶ Section 553 of the APA requires agencies to follow prescribed notice and comment procedures prior to adopting revisions to substantive rules. Section 553(b) exempts “general statements of policy” from these requirements.³⁷ However, this exception is available only for policy statements which (i) act prospectively (*i.e.*, have no present, binding effect); and (ii) genuinely leave the agency and its decisionmakers free to exercise discretion.³⁸ Neither of these criteria are satisfied in this case.

The Commission’s enforcement statement in the *Nextel Waiver Order* constitutes a present determination that Nextel will be subject to enforcement action if it must file a subsequent

³⁵ *Nextel Waiver Order*, ¶ 36.

³⁶ *See Fourth MO&O*, ¶¶ 42-45.

³⁷ *See* 5 U.S.C. § 553(b).

³⁸ *See Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980)(finding that an agency’s policy did not qualify as a general statement of policy because it vested immediate rights and the agency regarded it as binding).

waiver request, and that unavailability of compliant equipment “will not excuse noncompliance” regardless of the circumstances at the time of the waiver request. Second, given the plain meaning and imperative language in the *Nextel Waiver Order* (e.g., “it will be deemed noncompliant;” unavailability of compliant equipment “will not excuse noncompliance,” etc.), it is clear that the statement “. . . is in purpose [and] likely effect one that narrowly limits administrative discretion . . .” and as such must be treated a “a binding rule of substantive law.”³⁹ Because this substantive revision to the E911 waiver rule was adopted without requisite notice and comment, it should be withdrawn.

C. The Commission’s Decision Inappropriately Treats Nextel in a Manner Substantially Different from VoiceStream, a Similarly Situated Carrier.

The Commission’s decision to automatically institute enforcement proceedings against Nextel in the event it is required to seek a further waiver of the E911 Phase II rules, as well as certain other conditions of its waiver, treat Nextel in a manner that is substantially different than VoiceStream – one of the six major national carriers with which Nextel was grouped and which previously had received a waiver of the Phase II rules from the Commission. Specifically, in waiving the Phase II requirements for VoiceStream, the Commission did not espouse a specific position on enforcement action, but did state that “[t]o the extent VoiceStream cannot comply with any of these conditions, it will be expected to use another ALI methodology that comports with our requirements.”⁴⁰ The Commission also required VoiceStream to report to the Wireless

³⁹ *Guardian Fed. Sav. & Loan Ass’n v. Fed. Sav. & Loan Ins. Co.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

⁴⁰ See *Fourth MO&O*, ¶ 68.

Telecommunications Bureau semiannually on its experience with its ALI solution, including actual deployment and the results of all tests and trials.⁴¹

In contrast, the *Nextel Waiver Order* adopts an automatic enforcement approach with a presumption against future waivers based on the unavailability of compliant equipment. Additionally, the *Nextel Waiver Order* adopts extremely detailed quarterly filing requirements which, in certain instances, seek extremely sensitive business information.⁴² The enforcement decision and related filing requirements imposed on Nextel are substantially different than those of VoiceStream. Because this disparate treatment violates the Commission's obligation to treat similarly situated parties comparably, the Commission should reconsider this aspect of the *Nextel Waiver Order*.⁴³

V. CONCLUSION

Although the Commission conditionally granted Nextel's waiver request, certain aspects of the Commission's decision were arbitrary and capricious, made without explanation and improperly taken without prior public notice and the opportunity for comment by Nextel and other affected parties. Accordingly, Nextel respectfully requests that Commission clarify and/or

⁴¹ *Id.*, ¶ 67.

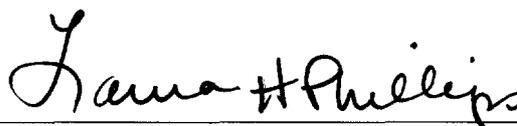
⁴² For example, the Commission anticipates reporting on "important events affecting location-capable handset penetration levels, such as the introduction of new handset models." *See Nextel Waiver Order* at ¶32. If Nextel has plans to release a new A-GPS handset that could significantly impact its numbers of A-GPS activations, Nextel could not publicly state its timing and plans for that new handset release. Such information is extremely competitively sensitive and must be given confidential treatment.

⁴³ *See Melody Music, Inc. v. FCC*, 345 F. 2d 730 (D.C. Cir. 1965) (the Commission has an obligation to assure comparable treatment of similarly situated parties).

reconsider certain actions taken in connection with granting the *Nextel Waiver Order* in a manner not inconsistent with this petition.

Respectfully submitted,

**NEXTEL COMMUNICATIONS, INC.
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CERTIFICATE OF SERVICE

I, Vicki Lynne Lyttle, a legal secretary at Dow, Lohnes & Albertson, PLLC do hereby certify that on this 13th day of November, 2001, copies of the foregoing "Joint Petition for Clarification and Partial Reconsideration of Nextel Communications, Inc. and Nextel Partners, Inc." were served by first-class mail, postage pre-paid, on the following:

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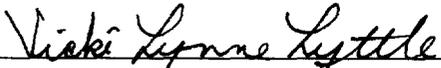
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