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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of

Petition for Waiver of Section 64.402 of the
Commission's Rules

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) WT 01-320
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PETITION FOR WAIVER—EXPEDITED ACTION REQUESTED

Pursuant to Sections 1.3 and 1.925 of the Federal Communications Commission's ("FCC" or "Commission") rules, Verizon Wireless requests that the Commission immediately grant a waiver of Section 64.402 of the Commission's rules in order to allow it to implement a priority access service requested by the federal government.

I. BACKGROUND

On July 13, 2000, the Commission released its Second Report and Order in WT Docket No. 96-86, authorizing Commercial Mobile Services ("CMRS") providers voluntarily to provide priority access service ("PAS").¹ In that order, the Commission

¹ The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Requirements Through the Year 2010; Establishment of Rules and Requirements for Priority Access Service, *Second Report and Order*, WT Docket No. 96-86, FCC 00-242, 15 FCC Rcd 16720 (2000) ("PAS Order").

determined "that it is in the public interest to permit CMRS systems to provide PAS."²

Under the terms of the order and the rules adopted therein, CMRS providers that decide to offer PAS are required to do so in accordance with the policies and procedures set forth in Appendix B to Part 64 of the FCC's rules.³

In response to the tragic events of September 11, 2001, the Office of Manager of the National Communications System ("OMNCS"), working in close concert with the White House, has asked CMRS providers to work with OMNCS and its service integrator, DynCorp, to implement a wireless emergency telephone service on an expedited basis. In a request for proposal released October 10, 2001 ("RFP"), OMNCS and DynCorp indicated that they envision implementing a priority access capability in at least two separate phases.

In the first "Immediate Service" phase, OMNCS and DynCorp seek a priority access capability that would use off-the-shelf capabilities that could provide National Security and Emergency Preparedness ("NSEP") users an increased chance of successful access at call origination to a radio channel for wireless service. OMNCS and DynCorp have specified that Immediate Service PAS must be operational in the Washington, D.C. area within 60 days of the date the RFP was released – by December 10, 2001. Immediate Service PAS would then be implemented in the New York City and Salt Lake City metropolitan areas, with other markets possibly to follow.

² *Id.*, at 16728 (para. 15).

³ See 47 C.F.R. § 64.402 and Part 64, Appendix B.

II. REQUEST FOR WAIVER

On October 19, 2001, Verizon Wireless responded to the RFP with a proposal to provide Immediate Service PAS in the Washington, D.C. market and future additional markets. On October 26, 2001, DynCorp selected Verizon Wireless as an Immediate Service PAS provider for the Washington, D.C., New York City, and Salt Lake City metropolitan areas.

Verizon Wireless' technical solution for the three initial markets is referred to as the "Emergency Services Capability" or "ESC."⁴ Under ESC, within one hour of being notified of an emergency by OMNCS, Verizon Wireless will convert one carrier in each cell site from non-emergency to emergency use only, thereby increasing the chances that NSEP users with programmed handsets will be able to access a radio channel. The remaining network capacity will continue to serve subscribers and roamers.

Verizon Wireless will also test an alternative technical solution (referred to as "Access Channel Persistence" or "ACP") for possible deployment in its Nortel equipment markets. Under ACP, instead of earmarking one carrier solely for emergency use, two classes of users of the network would be created in emergency situations: priority and non-priority. When the solution is activated, the access message from the priority users would be sent with less delay than the access

⁴ ESC is Verizon Wireless' technical solution for markets where Verizon Wireless uses Lucent or Motorola network equipment – the initial three markets all have Lucent equipment. Verizon Wireless will deploy ESC in any other Lucent or Motorola markets where Immediate Service PAS deployment is requested by OMNCS.

messages from non-priority users, thus increasing the chances that calls from priority users would be successfully originated.

Neither of Verizon Wireless' Immediate Service PAS solutions meets all of the requirements of Section 64.402.⁵ This is because the technology that will enable CMRS providers to offer PAS in accordance with the PAS Order is not yet available in network equipment and wireless handsets. For example, the solutions will not be capable of recognizing and differentiating among users assigned different priority levels, will not be available at all times by dialing a feature code, and will not place unsuccessful calls in a queue for the next available channel.⁶

Accordingly, before Verizon Wireless can offer Immediate Service PAS, the FCC must grant a waiver of Section 64.402.⁷ The waiver requested would take effect immediately and remain in effect for so long as Verizon Wireless provides Immediate Service PAS to OMNCS under contract with DynCorp or any other service integrator acting on behalf of OMNCS.

The waiver should extend to Verizon Wireless the same liability protection set forth in paragraphs 22-24 of the PAS Order. The FCC should state that "providing Immediate Service priority access to authorized NSEP users pursuant to contract with the National Communications System or its service integrator, or otherwise approved by

⁵ Indeed, Verizon Wireless' Immediate Service PAS proposal stated "before [Verizon Wireless] can lawfully provide the services set forth in this proposal, a waiver of Section 64.402 of the FCC rules must be obtained."

⁶ See 47 C.F.R. Part 64, Appendix B.

⁷ Phase II of the OMNCS/DynCorp implementation schedule is to implement PAS that complies with the FCC's PAS Order by the end of 2002.

the National Communications System will be *prima facie* lawful under the Communications Act and not unreasonable discrimination or an unreasonable preference.” The same reasons the Commission cited in granting liability protection to PAS providers in the PAS Order are equally applicable to Immediate Service PAS.

Finally, Verizon Wireless requests that the waiver granted authorize Verizon Wireless to provide Immediate Service PAS under any technical solution set forth in a contract with NCS or its service integrator or otherwise approved by NCS. As noted above, Verizon Wireless will test two different technical solutions and may implement different solutions in different markets depending on the equipment type deployed in each market. Accordingly, the waiver should be worded broadly enough to allow Verizon Wireless the flexibility to implement different Immediate Service PAS solutions without seeking separate waivers for each Immediate Service PAS solution and for each market where service is implemented.

III. LEGAL ANALYSIS

Section 1.925 of the Commission’s rules requires that entities requesting a waiver demonstrate (1) that the underlying purpose of the rule would not be served or would be frustrated by application to the instant case; and (2) that a grant of the waiver would be in the public interest. Alternatively, entities may demonstrate that due to unique or unusual factual circumstances, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or that the applicant has no reasonable alternative. The instant waiver request meets each of these criteria.

First, the underlying purpose of Section 64.402 of the Commission’s rules would not be served by applying the rule in this case. In adopting the PAS Order, the

Commission stated that the purpose of that rule was "to help meet the national security and emergency preparedness (NSEP) needs of the Nation." As stated above, priority access in accordance with the detailed protocols established in the PAS Order is not possible at this time. The only way to provide the government a priority access capability in the immediate term is to vary from those protocols. Strict adherence to the FCC's detailed PAS protocols would only serve to deny NSEP users the service that the PAS Order is intended to deliver.

Second, granting the waiver would be in the public interest. As noted above, the Commission has already found that it is in the public interest for CMRS providers to offer PAS service. In the wake of the events of September 11, the government has repeatedly stated that one tool it needs to address future emergency situations is a wireless priority access capability.⁸ The Immediate Service PAS RFP is designed to meet that need by delivering a priority access capability to the government in 60 days. Because the waiver is needed to deliver the Immediate Service capability, granting the waiver is clearly in the public interest.

Third, Verizon Wireless has no reasonable alternative to provide the Immediate Service capability in a manner consistent with the Commission's rules. As discussed above, in order to meet the timetable NCS has requested, Immediate Service priority

⁸ See, e.g., Robert O'Harrow Jr., *Priority Wireless Access Urged for Rescuers During Crises*, Washington Post, October 12, 2001, at E11 ("Emergency workers should have priority access to wireless communications during crises, in part because many authorities could not place wireless calls after the attacks on Sept. 11, the president's new cyberspace security adviser said yesterday. 'It is essential that we work with industry to deploy priority access service for use in crisis situations as soon as possible,' said Richard Clarke, who was appointed to the post earlier this week.").

access can only be provided using off-the-shelf capabilities. These capabilities do not allow for features required under the Commission's rules, such as queuing, multiple priority levels, and always-on access activated by dialing a feature code. As such, there is no way for Verizon Wireless to provide Immediate Service PAS that meets the terms of the RFP and that also complies fully with the FCC's rules.

IV. EXPEDITED TREATMENT

As noted above, the terms of the contract awarded to Verizon Wireless for Immediate Service priority access call for the service to be available in the Washington, D.C. market by December 10, 2001. In order for Verizon Wireless to meet that deadline and be in a position to meet the government's critical emergency telephone needs, the Commission must act expeditiously to grant this waiver request. Indeed, it is Verizon Wireless' hope that the FCC will grant this request early in the 60-day window so that Verizon Wireless can take the steps necessary to implement the Immediate Service capability knowing that it may lawfully provide the service.

The urgency of this situation also warrants a decision by the Commission not to place this request for waiver on Public Notice and solicit public comment. While the Commission seeks comment on many waiver requests, there is no legal requirement that it do so.⁹ Given the government's desire to have Immediate Service PAS in place as soon as possible, proceeding through notice and comment would needlessly delay efforts to prepare for future emergencies.

⁹ 47 C.F.R. § 1.925(c)(i) ("the Commission, *in its discretion*, may give public notice of the filing of a waiver request and seek comment from the public or affected parties.") (Emphasis added)

V. CONCLUSION

The Commission should grant Verizon Wireless' request for a waiver of Section 64.402 and Part 64, Appendix B of the Commission's rules. The waiver is necessary to enable Verizon Wireless to provide Immediate Service priority access to NSEP users and is therefore in the public interest. In granting the waiver, the Commission should extend to Verizon Wireless the same liability protection extended to CMRS providers in the FCC's PAS Order.

Dated: November 2, 2001

Respectfully submitted,

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