

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

In the Matter of)	
)	
Revision of the Commission's)	
Rules to Ensure Compatibility)	CC Docket No. 94-102
with Enhanced 911 Emergency)	
Calling Systems)	
)	
Wireless E911 Phase II Implementation)	
Plan of Nextel Communications, Inc.)	

OPPOSITION OF NENA, APCO AND NASNA

The National Emergency Number Association (“NENA”), the Association of Public-Safety Communications Officials-International, Inc. (“APCO”) and the National Association of State Nine One One Administrators (“NASNA”) (collectively, “Public Safety Organizations”) oppose Nextel’s petition for reconsideration of the Commission’s waiver order in the captioned matter, FCC 01-295, released October 12, 2001. Nextel is dissatisfied with the extent of its relief from the wireless E9-1-1 “Phase II” requirements at Section 20.18 of the Rules.¹

Nextel asserts it was disfavored by comparison with VoiceStream. (Petition, 16-17) Petitioner also complains of improper classification as a large carrier subjected to waiver benchmarks and deadlines not yet imposed on so-called small and mid-size wireless providers. Finally, Nextel believes the FCC has improperly prejudged future enforcement of waiver benchmarks. None of these claims is justified.

¹ Joint Petition for Clarification and Partial Reconsideration of Nextel Communications, Inc. and Nextel Partners, Inc.(“Nextel”), November 13, 2001.

1. Circumstances changed in the year between the VoiceStream and Nextel waiver grants.

In Nextel's view, the Commission unlawfully favored VoiceStream by omitting the burden Nextel claims it faces, "a presumption against future waivers based on the unavailability of compliant equipment." (Petition, 17) Nextel also complains that it must report quarterly, in ostensibly greater detail than VoiceStream's requirement of semi-annual reports.

In September of 2000, the Commission was writing the VoiceStream grant on a relatively clean slate, prior to the agency's 13 months of recent experience with conflicting claims between and among carriers, manufacturers and location service vendors over who is to blame for Phase II implementation delays. If the language of compliance is sterner now, we believe it justified.

VoiceStream's grant remains subject to a petition for reconsideration. By its own admission, that carrier has missed benchmarks for "a variety of reasons, including the general economic and financial difficulties all vendors are experiencing currently."² The Commission is fully capable of investigating this assertion as if made by another of the six large national carriers. The results could be applied in the reconsideration context, or separately. It is premature, we submit, to compare VoiceStream and Nextel until we have FCC responses to comparable behavior.

As to period of reporting, VoiceStream claims to be providing updates "more frequently because of the importance of this effort and the importance of sharing material developments with both industry and the public safety community." (Third Report, 1 and n.3) This statement, coupled with the 24-page length of its most recent update, suggests that VoiceStream is far from escaping the reporting burdens laid on its rivals.

2. *The FCC did not abuse its broad discretion in enforcing rules.*

Nextel contends (Petition, 6-10) that a rulemaking “to establish two classes of carriers” has occurred without proper notice and comment and without adequate explanation for the outcome. Neither of these criticisms is persuasive.

The rules applied here were adopted 15 months ago³ and remain unchanged by the waiver order. The order was not a rogue rulemaking. What has changed are the expectations for enforcement of the existing rules. It is these expectations the Commission felt compelled to address as soon as possible after the October 1st deadline for compliance with the wireless E9-1-1 requirements. So far as we are aware, no wireless carrier had met the deadline. The FCC owed the public and those it regulates an explanation of how it would proceed against this massive shortcoming.

Any administrative agency, of course, has broad discretion in the enforcement of its rules.⁴ Those claiming arbitrary or discriminatory “selective enforcement,” as Nextel asserts here, must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.⁵ There was no such effect or purpose. Nextel

² Third Semi-Annual Report, October 1, 2001, 2.

³ Fourth Memorandum Opinion and Order, FCC 00-326, released September 8, 2000, 15 FCC Rcd 17442, cited in the Public Notice providing waiver filing guidance to small and mid-sized carriers, DA 01-2459, released October 19, 2001.

⁴ *Heckler v. Chaney*, 470 U.S. 821 (1985) (“an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”)

⁵ *United States v. Armstrong*, 517 U.S. 456, 465 (1996). We use “prosecution” in its most neutral sense of proceeding to resolve. Not even Cingular and AT&T, in having their waiver

applied for and was granted a waiver based largely on its own proposals – at least where timely put forward. To judge from the Public Notice addressed to small and mid-size carriers, these carriers are offered no particular favors. Plainly, they will be held to the same waiver standards enunciated 15 months ago and applied in all six of the waiver orders thus far.⁶

Nextel errs, we believe, in referring to “the Commission’s decision to permit some wireless carriers to file Phase II implementation plans for the first time by November 30, 2001.” (Petition, 8) We have found no such permission. The earlier Public Notice (FCC 01-302) consistently speaks of “waiver requests,” not implementation plans. The follow-on notice (DA 01-2459) employs a different term, “Phase II relief,” to the same effect. Nowhere did the FCC purport to extend the November 9, 2000 initial deadline for filing of Phase II implementation reports.

In short, the Commission’s treatment of Nextel in relation to VoiceStream or by comparison with smaller carriers has been reasonably different but not unlawfully discriminatory. Because the FCC enacted no new rules, it was not obliged to put its waiver orders out for public comment. Nextel’s claims on these issues should be dismissed or denied.

requests partly remanded to the Enforcement Bureau, are “charged” with any violation in the more usual sense of the term. No matter what the forum or how it is characterized, the key test of lawfulness is due process. *Cablevision Systems Corporation* (Apparent Liability for Forfeiture), 15 FCC Rcd 24298 (2000), ¶17. *See also*, *Emery Telephone*, 15 FCC Rcd 7181, 7186 (1999).

⁶ DA 01-2459, at 1. Allowing waivers to be filed or augmented up to November 30, 2001 was not unreasonable, in light of the Commission’s manifest purpose to make the five waiver orders themselves part of the guidance to carriers whose requests for relief had yet to be evaluated. Public Notice, FCC 01-302, released October 12, 2001, 1. (“These carriers may face similar circumstances in deploying Phase II capability.”)

3. *The waiver order does not prejudice future enforcement issues.*

Nextel complains (Petition, 14) that the Commission “prejudges” Nextel’s future non-compliance with the terms of its waiver, and that the Commission supposedly foreclosed future consideration of the potential inability of Nextel to obtain the necessary Phase II equipment from its vendors. In fact, the Commission did no more than warn Nextel and similarly situated carriers that it would treat a failure to satisfy waiver conditions in the same manner as a rule violation, and that such violation would be subject to possible enforcement action. The firm language of the waiver order was obviously intended as a warning that the time has come for carriers to comply, and that, absent extraordinary circumstances, further extensions and waiver would not be granted.

The waiver granted to Nextel is expressly conditioned on its meeting certain alternative benchmarks for deployment of Phase II technology. The Commission made clear that these conditions “have the same force and effect as a Commission rule itself.” Waiver order at ¶35. Therefore, as is the case with any potential rule violation, if “Nextel fails to satisfy any condition or Commission rule, it will be subject to *possible* enforcement action, including but not limited to revocation of the relief, a requirement to deploy an alternative ALI technology, letters of admonishment or forfeitures.” *Id.* (emphasis added). The Commission did not state that there *would* be such enforcement action, but rather that enforcement action was “*possible*.” Perhaps the Commission has authority to impose automatic penalties for prospective noncompliance, but that is not what it did in this proceeding, despite Nextel’s claims to the contrary.

Nextel points, however, to Commission’s statement that 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 Enforcement Bureau for possible action.” Waiver order at ¶36. Here

again, however, the Commission was simply restating its standard authority to address noncompliance through enforcement procedures with the *possibility* of sanction. The Commission clearly left the door open that noncompliance would not result in any sanction.

Nextel seems particularly concerned, nevertheless, by the Commission's additional comment that "an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance." *Id.* Yet, that is always the case with Commission rule enforcement. Regulated entities are not excused from rule compliance merely because a piece of equipment necessary for compliance is unavailable from a vendor.⁷ Rather, that is the grounds for a possible waiver (as Nextel and others have been granted) or as a mitigating factor in determining whether a sanction for noncompliance is necessary. It does not however eliminate the noncompliance. That is exactly what the Commission did in this case, stating that Nextel's "'concrete and timely' actions taken with a vendor, manufacturer, or other entity may be considered as possible mitigation factors in such an enforcement context." *Id.*

Nextel also argues incorrectly that the Commission is depriving it of an opportunity to respond to a claim of noncompliance prior to the imposition of a sanction. First, a finding of noncompliance in this instance will be based on Nextel's own Quarterly Reports (supported by affidavit) which will indicate whether it has or has not met the objective benchmarks adopted as conditions to its waiver. Nextel will thus have ample opportunity to demonstrate whether or not it is in compliance. Second, if the Quarterly Reports do not demonstrate compliance, Nextel will

⁷ For example, an owner of a radio transmitting tower is not excused from compliance with the Part 17 tower painting and lighting requirements merely because its vendor could not deliver the necessary parts or services in a timely fashion. That might, however, lead to mitigation of the sanction.

still have an opportunity to address mitigating factors that may affect the imposition of a sanction. The Commission made clear that noncompliance will result in referral to the Enforcement Bureau for *possible* action. The Enforcement Bureau in turn will conduct any necessary investigation and recommend sanctions, if any, based upon relevant Commission rules with appropriate notices and opportunities for Nextel's participation. In particular, Nextel will be free to provide evidence that it took "concrete and timely action with its vendors" and, as the Commission made clear in the Order, such evidence may be considered as possible mitigation factors.

APCO, NENA, and NASNA have repeatedly expressed concerns in all the waiver proceedings that the seemingly endless stream of extensions of time and waiver requests could lead to complacency among some carriers. Rather than an all out effort to comply, some carriers may give priority to economic and business planning concerns, confident that any Phase II implementation requirements are "soft deadlines," and that noncompliance will be without serious consequences. Now, the Commission has wisely made clear that further waivers will not be granted "absent extraordinary circumstances" and that noncompliance will not be excused by a vendor's or manufacturer's failure to deliver. However, contrary to Nextel's claims, the Commission has not heartlessly closed off Nextel's ability to provide a reasonable explanation for its noncompliance. Assuming that Nextel takes "concrete and timely" action with regard to a vendor or manufacturer, those actions will be considered in mitigating any actual sanction.

Conclusion. For the reasons discussed above, the Commission's grant of waiver to Nextel did not unreasonably discriminate against Nextel, or improperly classify the carrier

through an unannounced rulemaking. Neither does the waiver order prejudice future enforcement issues.

Respectfully submitted,

NENA, APCO and NASNA

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