

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Request for Waiver by Cingular Wireless)	FCC 01-296
Request for Waiver by Nextel Communications)	FCC 01-295
Request for Waiver by Verizon Wireless)	FCC 01-299
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To: The Commission

COMMENTS

Southern Illinois RSA Partnership d/b/a First Cellular of Southern Illinois (“First Cellular”), submits these comments in response to the petitions filed by Cingular Wireless, Nextel Communications, and Verizon Wireless (“petitioning carriers”), which request reconsideration of provisions of their *Phase II Waiver Orders*.¹

First Cellular supports the petitioning carriers in urging the Commission to reconsider the what appears to be the creation of a “strict liability” standard for carriers that are unable to meet performance benchmarks, or to clarify that such standard was not intended. First Cellular also opposes the Commission’s determination that it will not accept evidence of vendor’s inability to supply necessary equipment for the carriers to deploy Phase II E911 service as a factor

¹ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless LLC*, CC Docket 94-102, Order, FCC 01-296 (rel. October 12, 2001) (“the *Cingular Waiver Order*”); *by Nextel Communications, Inc.*, FCC 01-295 (“the *Nextel Waiver Order*”); *by Cellco Partnership d/b/a Verizon Wireless*, FCC 01-299 (“the *Verizon Wireless Waiver Order*”) (collectively, “the *Waiver Orders*”).

mitigating the carriers' lack of compliance with deployment schedules. Third, First Cellular urges the Commission to adopt a separate waiver standard for small, rural carriers which lack the economic muscle to influence manufacturers' production schedules.

I. A STRICT LIABILITY STANDARD IS INAPPROPRIATE

Verizon Wireless seeks reconsideration of paragraph 35 of the *Verizon Wireless Waiver Order* wherein the Commission stated that it would deem Verizon Wireless noncompliant if it does not meet performance benchmarks.² Nextel requests reconsideration of paragraph 36 of the *Nextel Waiver Order* wherein the Commission stated, "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."³ Finally, Cingular Wireless LLC requests reconsideration of paragraph 27 of the *Cingular Waiver Order* wherein the Commission made a similar statement.⁴

Each of the petitioning parties has the same objection to the Commission's statements; that the Commission apparently created a "strict liability" standard for implementation of E911 service. If the carriers do not meet the deadline, the Commission has stated its intention to find them automatically in violation of the Commission's rules. First Cellular agrees with the petitioning carriers that such a standard violates due process, the Communications Act and the Commission's rules.

² *Verizon Wireless Petition for Reconsideration*, p. 2.

³ *Joint Petition for Clarification and Partial Reconsideration of Nextel Communications, Inc. and Nextel Partners, Inc.*, p. 4 (emphasis added).

⁴ *Cingular Wireless Petition for Reconsideration*, p. 22.

Carriers must have the ability to rebut a finding of noncompliance and have the statutory right to challenge findings that could adversely affect them. By its statement, the Commission appears to be attempting to remove that opportunity.

II. THE COMMISSION MUST CONSIDER EVIDENCE OF LACK OF EQUIPMENT AVAILABILITY IN ACTING ON FUTURE WAIVER REQUESTS

In each of the *Waiver Orders*, the Commission stated its intention to ignore evidence that the carriers' equipment vendors did not timely supply the carriers with the appropriate equipment to excuse the carriers' failure to deploy E911. The Commission stated, "an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance."⁵

First Cellular agrees with the petitioning carriers that the Commission's statement was not an appropriate approach to Phase II waivers. First, the Commission is announcing that it is making a judgment on waiver requests that have not yet been filed rather than judging the waiver requests, if any indeed are filed, on their individual merits. Second, the Commission is effectively stating that it intends to find carriers in violation of its rules even if what the Commission wants the carriers to do is impossible.

The ability of a licensee to challenge findings adverse to them necessarily includes the ability to present all relevant evidence. A carrier must be able to submit evidence to the Commission that compliance with the rules is impossible, and the Commission must properly consider the evidence prior to making a judgment. In the *Waiver Orders*, the Commission appears to have stated its intention to do neither; the Commission has stated that it will find the carrier in violation of its rules if it misses a deployment deadline, and it has stated that it will not

consider an entire class of evidence that would potentially excuse the noncompliance. Such a stance by a federal regulatory agency would not meet the requirements of due process.

III. SMALL, RURAL CARRIERS DO NOT HAVE THE MARKET POWER OF LARGE CARRIERS AND THUS REQUIRE A DIFFERENT WAIVER STANDARD

In its Petition, Nextel objected to the Commission's apparent creation of two classes of carrier, without notice and opportunity for public comment. However, the creation of two classes of carrier for purposes of regulation of deployment of E911 services is proper. Small and rural carriers do not have the market power to influence manufacturers' equipment production schedules, and often do not have their equipment requirements met until larger carriers' orders are fulfilled. Therefore, it is appropriate to have two classes of carrier for purposes of E911 deployment, based on whether the carrier has a national or only a local service area.

As a small carrier, First Cellular is very concerned with the tenor the Commission has taken with the *Waiver Orders*. Implementation of Phase II E911 is very much a cooperative effort between the manufacturers, the carriers, the public safety entities and the Commission itself, with the Commission's authority reaching only to the carriers. The Commission did not indicate that the nationwide carriers for which it issued individual *Waiver Orders* were in any way dragging their feet on implementation of Phase II E911 service. Yet the Commission felt it appropriate to attempt to limit possible future relief, and threaten the carriers with enforcement action.

While larger carriers have greater clout with manufacturers to supply them with necessary equipment, it is apparent by the slippage of E911 deadlines that their influence can

⁵ *Nextel Waiver Order* at ¶36; *Verizon Wireless Waiver Order* at ¶35; *Cingular Waiver Order* at ¶27.

only extend so far. Smaller carriers have almost no expectation that they would be able to influence a manufacturer's production schedule, and thus are even more at the mercy of the manufacturers. Thus, a Commission policy of strict liability with a limit on the evidence that the Commission will accept to excuse noncompliance creates an impossible standard for small carriers to meet.

Earlier this year, the Commission granted a waiver to all 900 MHz Specialized Mobile Radio licensees that had purchased licenses in the Commission's 900 MHz SMR auction.⁶ The Commission found it in the public interest to extend the five year construction deadline from August 12, 2001 to December 31, 2002, so that licensees could deploy advanced digital systems. The Commission found that the digital voice equipment necessary for the digital systems would "not be commercially available in sufficient quantities in time to meet the five-year construction deadline."⁷ The Commission, in its *Waiver Orders* has not explained why evidence of lack of equipment availability would be relevant in the 900 MHz arena and not for purposes of E911. This is especially puzzling because the Commission could have, and chose not to, require carriers to install analog 900 MHz equipment to meet the construction deadline.

In addition, Section 309(j) of the Communications Act contains a number of provisions that are designed to facilitate and encourage the participation of small and rural carriers in the communications market-place.⁸ The adoption of a policy that arguably would have a more adverse impact on smaller, rural, carriers than it would on larger, national, carriers runs counter to the spirit of Section 309(j) of the Communications Act.

⁶ See, FCI 900, Inc. Expedited Request for 3-Year Extension of 900 MHz Band Construction Requirements, *Memorandum Opinion and Order*, DA 01-1297, Released May 25, 2001.

⁷ *Id.* at ¶10.

⁸ 47 U.S.C. §309(j).

In sum, Southern Illinois RSA Partnership d/b/a First Cellular of Southern Illinois supports the Petitions for Reconsideration of Cingular Wireless, Nextel Communications, and Verizon Wireless to the extent described herein.

Respectfully Submitted,

**SOUTHERN ILLINOIS RSA PARTNERSHIP
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Dated: December 19, 2001

CERTIFICATE OF SERVICE

I, Althea B. Pierce, do hereby certify that on this day, December 19, 2001, that I served a copy of the foregoing Comments by first class United States mail, postage prepaid, to each of the parties listed below:

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