

**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	)	
	)	
Request for Waiver by Cingular	)	
Wireless LLC	)	

**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 the petition of Cingular Wireless LLC (“Cingular”) for reconsideration of the Commission’s waiver order in the captioned matter, FCC 01-296, released October 12, 2001. Cingular was granted relief from the wireless E9-1-1 “Phase II” requirements at Section 20.18 of the Rules as they apply to its GSM/E-OTD location solution and remanded to the Enforcement Bureau regarding its plans for the TDMA network. Cingular criticizes this outcome on several points.<sup>1</sup>

1. *Cingular was not mistreated vis a vis other carriers.*

Cingular alleges (Petition, 17-19) unfairly discriminatory treatment of its waiver request by comparison with two other grantees, Verizon and Nextel. Cingular (Petition, 19-20) also

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<sup>1</sup> Petition for Reconsideration, November 13, 2001.

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.

Cingular asserts (Petition, 18) that the FCC refused to consider evidence that compliance with the earliest of its O-ETD handset benchmarks was “no longer possible.” The statement is true as far as it goes, but incomplete. The Commission told Cingular it “will address any failure to meet [the carrier’s] deadlines through the enforcement process.” It is fair to infer that the Commission disposed of the issue in this fashion because (1) Cingular’s evidence was filed a bare four days in advance of the adoption of the waiver order,<sup>2</sup> and (2) the carrier would be appearing before the Enforcement Bureau, in any event, to consider the TDMA aspects of its waiver.

To be fair, all the large-carrier waiver applicants continued to revise their requests until virtually the last minute. For example, Sprint filed September 20, 2001 a Further Supplemental Phase II Implementation Report (Sprint Waiver Order, FCC 01- 297, note 2) which the FCC was able to consider. Regrettably, the agency had to draw a line at some point. Cingular and AT&T, chiefly with regard to their TDMA proposals, simply fell on the late side of that line.<sup>3</sup>

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<sup>2</sup> The order (¶23) characterizes the evidence as “late-filed.” Cingular rejoins that there was no fixed deadline for waiver decision. This borders on sophistry. All the waiver applicants knew that the agency felt obliged to issue the guidance that these orders would provide as close as possible to the deadline of October 1, 2001, so that carriers would not be kept waiting in a limbo of non-compliance with enforcement an unknown. Commissioner Abernathy described the timing of the decision as “the 13th hour.” (Separate Statement, 3)

<sup>3</sup> Cingular tries another variation on its theme by saying the FCC applied a “different waiver standard” to its application than to those of Verizon and Nextel. (Petition, 19) As we read the order, however, the Commission has not refused to consider arguments of “impossibility” or vendor constraints. It has simply moved the issues to a different forum for lack of time. Cingular’s complaint would become real if the Enforcement Bureau were to flatly decline to consider such defenses.

More notable than the real and imagined disparities in treatment of the five major applicants are the obvious similarities. The bulk of all five orders were written on a common template. All carriers are required to keep the Commission and certain public safety representatives apprised quarterly of their progress in fulfilling waiver benchmarks. No carrier is to be excused automatically for missing a deadline on the ground that a supplier failed to deliver timely a necessary product or service.<sup>4</sup>

Cingular contends (Petition, 20) that the Commission essentially waived the October 1, 2001 deadline to comply with the wireless E9-1-1 rules for small and mid-size carriers while effectively enforcing it for Cingular and five other large carriers. “The failure to justify this disparate treatment,” Cingular asserted, “constitutes reversible error.” *Id.*

Any administrative agency, of course, has broad discretion in the enforcement of its rules.<sup>5</sup> Those claiming arbitrary or discriminatory “selective enforcement,” as Cingular asserts here, must demonstrate that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose.<sup>6</sup> There was no such effect or purpose. Cingular

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<sup>4</sup> Contrary to carrier claims discussed elsewhere in these comments, the Commission’s refusal of an automatic excuse in such circumstances is not a form of “strict liability” or “prejudgment.” It is, instead, a fair and uniform warning that failures will be evaluated through targeted investigations capable of gathering evidence promptly. We have no reason to doubt carriers will be afforded due process.

<sup>5</sup> *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.”)

<sup>6</sup> *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 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).

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.<sup>7</sup>

In short, the Commission's treatment of Cingular in relation to Verizon and Nextel, or by comparison with smaller carriers, has been reasonably different but not unlawfully discriminatory. The agency is entitled to enforce its rules against some and not others, so long as there is no unreasonably discriminatory purpose or effect. Cingular's claims on these issues should be dismissed or denied.

2. *The Commission acted reasonably in deferring decision on Cingular's handset schedule.*

Cingular says it was "clear error for the Commission to require Cingular to do the impossible – deploy location-capable handsets by October 1, 2001." (Petition, 10) The Commission, on the order's adoption date of October 2, 2001, had two choices. It might have withheld the issuance of any decision until it could account for the new handset availability information Cingular supplied four days earlier. Instead, it resolved those parts of the Cingular GSM waiver for which the record was relatively stable and referred the rest to the Enforcement Bureau, which would be dealing with the TDMA aspects of the waiver request anyway. In our view, this was not unreasonable.

Each of the waiver requests had turned into a moving target. On the other four pending applications of major carriers, the FCC faced the same dilemma it confronted with Cingular:

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<sup>7</sup> 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.

whether to issue a decision now, for the guidance this would provide to the applicant and other interested persons, or to delay well past the October 1st deadline. With delay would come mounting uncertainty about whether and how the Commission would enforce its rules.

Cingular is not the only carrier whose waiver proposals were made the basis for Commission orders that have been overtaken by subsequent developments. In fact, only Nextel and AT&T have avoided, for the moment, the combination of delayed switch upgrades and revised handset delivery or testing schedules which service vendors and manufacturers have announced recently to their carrier customers. Nextel escaped because its handset schedule does not begin for 10 months. AT&T differs in not having proposed a GSM/E-OTD timetable in the first place.

Surely there was no way for the FCC on October 2nd to grant Cingular any particular extension of handset deployment because, on September 28th, the carrier could offer no revised schedule. All Cingular could say was that it was “aggressively pursuing revised handset availability dates from its vendors and will notify the Commission once these new dates are obtained.”<sup>8</sup>

For Cingular to suggest that it is “require[d] to comply” (Petition, 10) with the handset deployment schedule in its waiver grant is to elevate form over substance. Cingular is under no such requirement in any practical sense. Instead, the carrier has every opportunity to present to the Enforcement Bureau (and its advisor, the Wireless Telecommunications Bureau) the reasons it has proffered here as to why it should not have to make any location-capable handset available

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Public Notice, FCC 01-302, released October 12, 2001, 1. (“These carriers may face similar circumstances in deploying Phase II capability.”)

<sup>8</sup> Letter of Brian Fontes to the FCC Secretary, September 28, 2001, 1-2.

until September 1, 2002. (Petition, 16) That being so, there is no reason for the Commission to decide the claim here.

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

Cingular complains (Petition, 23) that the Commission “has adopted a strict liability standard” and thus foreclosed future consideration of the potential inability of the carrier to obtain the necessary Phase II equipment from its vendors. In fact, the Commission did no more than warn Cingular 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 partial waiver granted to Cingular 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 ¶26. Therefore, as is the case with any potential rule violation, if “Cingular 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 Cingular’s claims to the contrary.

Cingular points, however, to Commission’s statement that if “Cingular 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 ¶27. Here again, however, the Commission was simply restating its standard authority to address noncompliance through enforcement procedures with the *possibility* of sanction. “Deemed,” as we read it, connotes at worst a “presumption” of noncompliance rather than a conclusion. The Commission clearly left the door open that noncompliance would not result in any sanction. The point is worth clarification in the Commission’s response to the Cingular petition.

Cingular 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.<sup>9</sup> Rather, that is one ground for a possible waiver (as Cingular 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 Cingular’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.*

Cingular 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 Cingular’s representations to the Enforcement Bureau and the carrier’s own Quarterly Reports (supported by affidavit), which will indicate

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<sup>9</sup> 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.

whether it has or has not met the objective benchmarks adopted as conditions to its waiver. Cingular will thus have ample opportunity to demonstrate whether or not it is in compliance. Second, if the representations to the Bureau and the Quarterly Reports do not demonstrate compliance, Cingular will still have an opportunity to address mitigating factors that may affect the imposition of a sanction. The Commission made clear that future 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 Cingular's participation. In particular, Cingular will be free to provide evidence that it took "concrete and timely action with its vendors" and, as the Commission made clear in the waiver 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 Cingular's claims, the Commission has not heartlessly closed off Cingular's ability to provide a reasonable explanation for its noncompliance. Assuming that Cingular takes "concrete and timely" action with regard to a vendor or manufacturer, those actions will be considered in mitigating any actual sanction.

*Conclusion.* Cingular has no basis to claim unreasonable discrimination vis a vis other wireless carriers. The Commission's decision to allow small and mid-size carriers to file or augment waiver requests until November 30, 2001 is within the agency's broad enforcement latitude. The waiver order does not compel Cingular to perform an impossible task, but simply to explain its situation in another forum. The Commission has not imposed "strict liability" on any carrier. Cingular's petition should be denied.

Respectfully submitted,

NENA, APCO and NASNA

By \_\_\_\_\_  
James R. Hobson  
Miller & Van Eaton, P.L.L.C.  
1155 Connecticut Ave. N.W., Suite 1000  
Washington, D.C. 20036 (202) 785-0600  
Counsel for NENA and NASNA

John Ramsey  
Executive Director  
APCO  
351 N. Williamson Blvd.  
Daytona Beach, FL 32114-1112

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