

Before the
Federal Communications Commission
Washington, DC 20554

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

To: The Commission

REPLY COMMENTS OF CINGULAR WIRELESS LLC

Cingular Wireless LLC (“Cingular”) hereby replies to the supporting comments¹ and sole substantive opposition² submitted in response to its Petition for Reconsideration (“Petition”).³ The Petition asked the Commission to reconsider its *Order* (i) refusing to consider Cingular’s enhanced 911 (“E911”) Phase II waiver request for its TDMA networks and related referral to

¹ Cellular Mobile Systems of St. Cloud, LLC, Wireless Communications Venture, and South No. 5 RSA LP Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“St. Cloud Comments”); Cellular Telecommunications & Internet Association Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“CTIA Comments”); Copper Valley Wireless, Inc. Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“Copper Valley Comments”); Nokia Inc. and Motorola, Inc. Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“Vendor Comments”); Rural Cellular Association Comments, CC Docket No. 94-102 (Dec. 19, 2001); Rural Telecommunications Group and the Organization for the Promotion and Advancement of Small Telecommunications Companies Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“OPASTCO Comments”); Southern Illinois RSA Partnership Comments, CC Docket No. 94-102 (Dec. 19, 2001) (“First Cellular Comments”); Sprint Spectrum L.P. Comments, CC Docket No. 94-102 (Dec. 14, 2001) (“Sprint PCS Comments”).

² The only substantive opposition was jointly filed by 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 “Joint Commenters”). NENA, APCO, and NASNA Opposition, CC Docket No. 94-102 (Dec. 19, 2001) (“Joint Opposition”). Tarrant County 9-1-1 District filed a one-sentence opposition that associated the County with the opposition filed by the Joint Commenters. Tarrant County 9-1-1 District Opposition, CC Docket No. 94-102 (Dec. 19, 2001).

³ Cingular Wireless LLC, Petition for Reconsideration, CC Docket No. 94-102 (Nov. 13, 2001) (“Petition”).

the Enforcement Bureau; (ii) refusing to consider facts put forward demonstrating that compliant equipment is not available for GSM networks and referring the question of Cingular's compliance to the Enforcement Bureau; and (iii) imposing strict liability on a carrier missing an E911 Phase II benchmark.⁴ There is no disagreement that deeming carriers strictly liable for noncompliance with E911 Phase II benchmarks regardless of the availability of compliant equipment is improper. Although filing a pleading denominated an opposition, even the Joint Commenters agree that the Commission should clarify that it never intended to preclude relief from the Phase II rules where compliance is beyond a carrier's control. The Joint Commenters also acknowledge that Cingular was treated differently than virtually every other CMRS carrier. Moreover, no party challenged Cingular's observation that the Commission failed to apply a uniform waiver standard.⁵ Reconsideration is thus appropriate.

I. THE COMMISSION MUST RECONSIDER ITS DECISION TO IMPOSE STRICT LIABILITY FOR E911 PHASE II COMPLIANCE

In the *Order*, the Commission stated that Cingular “*will be deemed noncompliant*” if it is unable to comply with the Phase II rules or conditions established by the *Order*.⁶ The Commission further determined that if Cingular is deemed noncompliant, “an assertion that a vendor, manufacturer, or other entity was unable to supply compliant products will not excuse

⁴ *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, *Order*, 16 FCC Rcd 18305 (Oct. 12, 2001); see *Public Notice*, “Cingular, Nextel, and Verizon File Petitions for Reconsideration of Commission Orders on Wireless E911 Phase II Waiver Requests,” CC Docket No. 94-102, DA 01-2722 (rel. Nov. 20, 2001). Like Cingular, Verizon and Nextel also challenged the Commission's adoption of a strict liability standard.

⁵ Copper Valley and First Cellular acknowledge the application of different waiver standards, but claim that small carriers are entitled to a waiver standard that differs from the one applied to large carriers. Copper Valley Comments at 4-6; First Cellular at 4-5. The Commission, however, never proffered any rationale for differential treatment. Moreover, the commenters still urge the Commission to grant the Petition.

⁶ *Order* at ¶ 27 (emphasis added).

noncompliance.”⁷ Cingular demonstrated it would be legal error to establish such a strict liability standard for E911 Phase II compliance and urged the Commission to reconsider its decision.⁸

All commenters either support Cingular’s Petition or maintain that the Commission never intended to establish a strict liability standard for noncompliance. Copper Valley and First Cellular demonstrate that “such a standard violates due process, the Communications Act and the Commission’s rules.”⁹ First Cellular correctly observes that:

[c]arriers must have an opportunity to rebut a finding of noncompliance and have the statutory right to challenge findings that could adversely affect them. By [imposing strict liability], the Commission appears to be attempting to remove that opportunity.

* * *

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*.¹⁰

Similarly, CTIA characterizes the adoption of a strict liability standard as “drastic” and notes that the standard “violates Commission rules that afford carriers the opportunity to rebut a finding of noncompliance” prior to an FCC determination of liability.¹¹ CTIA agrees with Cingular that the strict liability standard is particularly troubling here because the *Order* imposes “conditions that cannot be satisfied. . . .”¹²

⁷ *Id.*

⁸ Petition at 22-24.

⁹ First Cellular Comments at 2; Copper Valley Comments at 2.

¹⁰ First Cellular Comments at 3; *accord* Copper Valley Comments at 3-4.

¹¹ CTIA Comments at 2, 3.

¹² *Id.* at 4 (agreeing with Cingular that “‘granting a waiver with conditions that cannot be satisfied goes too far’ and that the Commission should rescind its referral to the Enforcement Bureau”).

St. Cloud and OPASTCO note that the *Order* “effectively prejudged any future waiver requests based upon handset availability, setting a harsh precedent for the remainder of the wireless industry.”¹³ Both commenters therefore support elimination of the strict liability standard, with St. Cloud noting that the new standard

could automatically subject many small carriers to time-consuming and expensive Enforcement Bureau proceedings, notwithstanding the fact that noncompliance may be the result of circumstances beyond their control, a factor traditionally justifying a waiver without the need for an enforcement proceeding.¹⁴

Handset vendors Nokia and Motorola note that the *Order* appears to state that, “upon failure to satisfy an implementation benchmark, the carrier will be judged *per se* guilty of violating the Commission’s rules; the only remaining question is what penalty should be imposed.”¹⁵ They oppose the adoption of such a standard because “[a] carrier cannot be deemed guilty of violating the Commission’s requirements without first having a meaningful opportunity to present evidence to the contrary.”¹⁶ In particular:

a determination that a carrier is “noncompliant” – and therefore warrants enforcement action – should only be made after the carrier has had a meaningful opportunity to seek a waiver or the Commission’s rules or otherwise demonstrate compliance. . . . E911 cannot be implemented more quickly than the underlying technology can be developed, and the Commission should provide sufficient elasticity in its procedures to accommodate technological realities. The Commission must base E911 implementation dates – and any potential enforcement proceedings – upon reasonable and, most importantly, realistically achievable technology goals.¹⁷

¹³ St. Cloud Comments at 3; OPASTCO Comments at 2.

¹⁴ St. Cloud Comments at 2; *see* OPASTCO Comments at 2-3.

¹⁵ Vendor Comments at 4.

¹⁶ *Id.* at 4.

¹⁷ *Id.* at 2.

Rather than oppose the imposition of the strict liability standard, Sprint PCS and the Joint Commenters urge the Commission to clarify that such a standard was not imposed by the *Order*.¹⁸ Sprint notes that the Commission lacks the authority to impose such a standard and that, in any event, the Commission could not have intended to adopt such a standard because strict liability “would represent a new waiver standard and a radical change in Commission precedent.”¹⁹

Cingular is in agreement with this statement of the law, and recognizes one possible reading of the *Order* that may indicate that the FCC did not intend to adopt a strict liability standard. Specifically, the *Order* imposed quarterly reporting requirements that require Cingular to notify the Commission if it will be unable to satisfy an E911 benchmark.²⁰ The *Order* also indicates that relief from these benchmarks may be obtained in extraordinary circumstances.²¹ Presumably, the unavailability of compliant equipment would constitute such a circumstance. The *Order* later states that an assertion that compliant equipment is unavailable will not excuse noncompliance if made after a deadline lapses.²² Thus, the *Order* could be read as simply precluding defenses raised for the first time *after* a deadline has lapsed.²³ Under this reading, evidence that compliance is beyond a carrier’s control would justify relief from the relevant

¹⁸ Sprint PCS Comments at 3-4; Joint Opposition at 7.

¹⁹ Sprint PCS Comments at 3-4 (noting that the Commission must follow precedent unless it provides a rational explanation for departing from precedent, which was not provided in the *Order*).

²⁰ *Order* at ¶ 22.

²¹ *Id.* at ¶¶ 22, 26.

²² *Id.* at ¶ 27.

²³ *See Id.* at ¶¶ 26-27.

Phase II requirement if raised prior to a deadline in the context of a waiver request, quarterly report, or supplemental filing. The Commission must clarify if this interpretation is correct.

The Joint Commenters appear to support this interpretation, but also request clarification.²⁴ According to the Joint Commenters, “[t]he Commission has not imposed ‘strict liability’ on any carrier”²⁵ and evidence that compliance is not possible due to factors beyond a carrier’s control may be used as a basis for a waiver which presumably would be filed prior to the relevant deadline.²⁶ The Joint Commenters assert, however, that if a carrier were deemed noncompliant because the Commission is unable to act on a waiver request, any negative consequences of the automatic liability finding would be cured if no penalty was imposed.²⁷ This is incorrect. The mere determination that a carrier violated the rules can be used against a carrier in a variety of contexts (*e.g.*, license renewal). Thus, a decision by the Enforcement Bureau to forgo the imposition of a penalty for noncompliance does not eliminate the possible adverse consequences associated with a noncompliance finding and does not cure the associated legal problems with establishing liability without proper notice and an opportunity to be heard.

Accordingly, on reconsideration the Commission should either eliminate the strict liability standard or clarify that such a standard was never adopted.

II. THE COMMISSION MUST APPLY A UNIFORM STANDARD FOR EVALUATING E911 PHASE II WAIVER REQUESTS

The Joint Commenters take “artistic license” with Cingular’s argument that the FCC applied a discriminatory waiver standard and morphs Cingular’s position into a “selective

²⁴ Joint Opposition at 6-7.

²⁵ *Id.* at 9. According to the Joint Commenters, “at worst,” the *Order* establishes a “‘presumption’ of noncompliance rather than a conclusion.” *Id.* at 7.

²⁶ *Id.* at 7.

²⁷ *Id.* at 6-8.

enforcement” argument.²⁸ The Joint Commenters then proceed to destroy this straw man. The Joint Commenters’ reliance on selective enforcement is no accident because the tactic subjects the Commission to far less scrutiny. The actual legal position taken by Cingular is ignored because it would subject the FCC to the requirement that it engage in reasoned decision-making.

In fact, the Joint Commenters

- take no issue with the fact that there was no FCC deadline for acting upon waiver requests;²⁹
- recognize that the Commission waived the October 1, 2001 implementation deadline for every small and mid-sized carrier without considering *any* evidence submitted by these carriers;³⁰
- acknowledge that the Commission refused to waive the October 1, 2001 deadline for Cingular based on equipment unavailability, because the evidence was submitted too late (September 28, 2001) for consideration;³¹ and
- observe that the Commission was able to consider evidence submitted by Sprint on September 20, 2001, but did not consider evidence submitted by Cingular on September 28, 2001.³²

The Joint Commenters correctly conclude that Cingular was treated differently than Verizon, Nextel, and all smaller carriers.³³

The Joint Commenters contend, however, that this treatment was not unlawful because it was merely selective enforcement and for conduct to violate this standard there must be evidence

²⁸ *Id.* at 3 (alleging that Cingular’s Petition claimed “arbitrary or discriminatory ‘selective enforcement’”). In actuality, the phrase “selective enforcement” is never used in Cingular’s filing.

²⁹ According to the Joint Commenters, “all the waiver applicants knew that the agency felt obligated to issue the guidance that these Orders would provide as close as possible to the deadline of October 1, 2001.” *Id.* at 2 n.2. No evidence is cited to support this claim and the Joint Commenters later claim that it was reasonable to allow “waivers to be filed or augmented up to November 30, 2001.” *Id.* at 4 n.7.

³⁰ *Id.* at 1-2, 4 n.7, 9

³¹ *Id.* at 2, 4-6.

³² *Id.* at 2.

³³ *Id.* at 4.

of discriminatory intent. Even if this were Cingular's argument, the fact that Cingular was discriminated against at least establishes an appearance problem regarding the integrity of the decision-making process.³⁴

Cingular actually demonstrated that the Commission's action constituted a failure to apply a uniform waiver standard. Cingular contended that it was clear error for the FCC (i) to refuse to give its waiver a "hard look;" (ii) to fail to consider evidence required by its announced waiver standard; and (iii) to impose different waiver standards to similarly-situated applicants.³⁵ The Joint Commenters do not respond to these arguments.

The failure to consider Cingular's evidence of equipment unavailability also was unreasonably discriminatory because it resulted in the adoption of requirements that were impossible for Cingular to satisfy.³⁶ As Cingular noted in its Petition, "'impossible requirements are perforce unreasonable' and [] the 'law does not compel the doing of impossibilities.'"³⁷ Finally, the discrimination was unreasonable because the Commission failed to explain the basis

³⁴ See 2 Davis & Pierce, *Administrative Law Treatise* 67 (3d ed. 1994) ("Due process requires a neutral, or unbiased, adjudicatory decisionmaker. Scholars and judges consistently characterize provision of a neutral decisionmaker as one of the three or four core requirements of a system of fair adjudicatory decisionmaking."); *Greater Boston TV v. FCC*, 44 F.2d 841, 850 (1970) *cert. denied*, 403 U.S. 923; *Starr v. FAA*, 589 F.2d 307, 315 (7th Cir. 1978).

³⁵ Petition at 17-22.

³⁶ The Joint Commenters place great emphasis on the date associated with the evidence provided by Cingular on September 28, 2001. They claim that it was reasonable to ignore this evidence because it was submitted in close proximity to the October 1, 2001 implementation deadline. No attempt is made, however to justify the Commission's failure to consider the voluminous record in the docket that compliance with the Phase II E911 requirements was impossible. The September 28, 2001 evidence was merely Cingular's most recent evidence of impossibility. Cingular had repeatedly informed the Commission that compliance appeared impossible and, at a minimum, would be dependent upon the availability of equipment from vendors. See Petition at 4, 12-13.

³⁷ *Id.* at 12 (citations omitted).

CERTIFICATE OF SERVICE

I, Paula Lewis, do hereby certify that on this 4th day of January, 2002, a copy of the foregoing **Reply Comments of Cingular Wireless LLC** was served by U.S. Mail, first-class postage prepaid on the following:

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