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

In the Matter of	)	
	)	
Revision of the Commission's Rules	)	CC Docket 94-102
To Ensure Compatibility with	)	
Enhanced 911 Emergency Calling Systems	)	
	)	
Petition of City of Richardson, Texas	)	

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Comments of the Rural Cellular Association

The Rural Cellular Association ("RCA"),[1] by its attorneys, hereby responds to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") on December 12, 2001, requesting comment on petitions for reconsideration filed by Cingular Wireless, LLC ("Cingular") and Sprint PCS in the above-captioned proceeding.[2] RCA supports the Petitioners in urging reversal of the Richardson Order.[3]

The petitions seek reconsideration of the Commission's decision to amend its rule

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[1] RCA is an association representing the interests of small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide Commercial Mobile Radio Service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing rural wireless service providers.

[2] *Wireless Telecommunications Bureau Seeks Comment on Petitions for Reconsideration Regarding Public Safety Answering Point Requests for Phase II Enhanced 911*, DA 01-2885 (rel. Dec. 12, 2001) ("Public Notice").

[3] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petition of the City of Richardson, Texas: Order*, CC Docket No. 94-102, FCC 01-293 (rel. Oct. 17, 2001) ("Richardson Order").

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defining a valid Public Safety Answering Point ("PSAP") request that triggers a wireless carrier's obligation to provide enhanced 911 ("E911") service to that PSAP. As demonstrated in Cingular's petition and by RCA's comments in this proceeding, the Commission's amended rule contradicts the Commission's established and rational policy that a wireless carrier should not be obligated to provide E911 service "until the actual time at which the PSAP can take advantage of the E911 service."[4] Further, in amending its rule, the Commission adopted substantive rule changes without the requisite notice and comment procedures. Contrary to the Commission's assertion that any failure to follow proper procedures was merely a "technical defect" constituting "harmless error," substantive modification of lawfully-promulgated regulations without due process is a violation of the Administrative Procedure Act ("APA"). Accordingly, the Commission should reverse its decision.

I. The Amended Rule is Contrary Rational Policy

Former Section 20.18(j) provided that, before a carrier is obligated to provide E911 services, the PSAP must be "capable of receiving and utilizing the data elements associated with the service . . . ."[5] As has been demonstrated by RCA, Cingular and other commenters in this proceeding,[6] this unambiguous language reflected the well-reasoned decision that a wireless carrier is not obligated to provide E911 service "until the actual time at which a PSAP can take

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[4] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems: Second Memorandum Opinion and Order*, 14 FCC Rcd 20850 at para. 69 (1999) ("Second MO&O").

[5] 47 C.F.R. § 20.18(j).

[6] *See, e.g.,* Reply Comments of RCA filed May 3, 2001 at 3; Reply Comments of RCA filed July 25, 2001 at 3; Comments of Western Wireless filed April 23 at 1-2.

advantage of the E911 service."[7] As recognized by the Commission, any other interpretation would trigger an expensive and time-consuming process which potentially, and unnecessarily, strands investment. In its Second Memorandum Opinion and Order, the Commission explained:

> . . . carriers are not required to make unnecessary expenditures in response to a PSAP that is not ready to use the E911 information. Carriers should not be forced to make investments in their networks to provide E911 services that cannot be used by the PSAP. Apart from the significant costs involved . . . the public, the PSAP and the carrier benefit from a requirement that is not triggered until the actual time at which the PSAP can take advantage of the E911 service.[8]

The amended rule flies in the face of this well-reasoned policy. Premature carrier expenditures triggered by PSAP equipment or service orders, regardless of the contractual provisions intended to guarantee delivery to the PSAP, do not obviate the fact that wireless carrier investment may still be stranded. This is borne out by experience. As reported by some RCA members who have installed all of the necessary components for Phase I E911 services, the delivery of the Phase I information has been delayed for substantial periods of time due to problems involving coordination between the PSAP and the LEC. Accordingly, the Commission's amended rule does not guarantee that the PSAP will be ready in six months and certainly does not comport with the rational policy that a wireless carrier should not be obligated to provide E911 service until the actual time at which a PSAP can take advantage of the E911 service.

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[7] Second MO&O at para. 69.

[8] Second MO&O at para. 69 (emphasis supplied).

II. The Commission Violated the APA By Adopting Substantive Rule Changes Without the Requisite Notice and Comment Procedures

Section 553 of the APA requires that the "agency" give formal notice of proposed rule making before it adopts any rule.[9] This requirement to adhere to a formal notice and comment proceeding includes amendments to existing rules.[10] However, in amending Section 20.18(j), no such formal notice was given by the Commission.

On July 10, 2001, the Wireless Telecommunications Bureau ("Bureau") released a Public Notice in this proceeding in which it sought further comment on a petition filed by the City of Richardson, Texas ("Richardson") in which Richardson requested clarification and/or a declaratory ruling concerning the process by which a PSAP makes a valid request for Phase II E911 service from a wireless carrier.[11] In its Second Public Notice, the Bureau announced its purpose in seeking additional comment was to determine "whether the rule should be amended to clarify its meaning and/or adopt some criteria between the two extremes . . . ."[12] Without any

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[9] 5 U.S.C. § 553(b) & (c).

[10] Reply Comments of RCA filed July 25, 2001 at 4 (citing *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (Supreme Court holding that compliance with the notice and comment rulemaking in APA procedures is "required" when an agency "adopts a new position inconsistent with . . . existing regulations"); *National Wildlife Federation v. Clark,* 577 F.Supp. 825, 828 (D.C. Dist. 1984) (citing Section 551(5) of the APA as defining rulemaking as the "'agency process for formulating, amending, or repealing a rule'" and noting that Section 553 sets forth minimal requirements of notice and comment for such rulemaking)).

[11] *Wireless Telecommunications Bureau Seeks Further Comment on the Commission's Rules Concerning Public Safety Answering Point Requests for Phase II Enhanced 911: Public Notice*, CC Docket No. 94-102; DA 01-1623 (rel. July 10, 2001) ("Second Public Notice").

[12] *Id.* at 2 (emphasis supplied).

formal notice of proposed rulemaking, the Commission issued its Richardson Order and amended the rule.

In the Richardson Order, the Commission states that the APA's requirement was satisfied in that "the interpretation proposed is first advanced in a bureau-level public notice and then published by the agency, with a request for comments, in the proposed rules section of the *Federal Register*."[13] Yet no precedent is cited to support its conclusion.[14] The Commission further asserts that "[a]ssuming *arguendo*, that the Bureau (rather than the Commission's) issuance of the *Second Public Notice* constitutes a technical defect in the Commission's compliance with the APA's notice and comment requirements, such error was harmless."[15] In support of this argument, the Commission cites case law holding that an agency's failure to provide notice and comment is harmless when it had "no bearing on the procedure used or substance of the decision reached."[16]

The agency's failure to provide appropriate notice and comment, however, had the effect of the adoption of a substantive rule based upon a record which could not, by definition, be complete. The amended rule modifies the unambiguous meaning of Section 20.18(j): that a wireless carrier is not obligated to provide E911 service until the actual time at which a PSAP

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[13] Richardson Order at para. 23.

[14] *See* Cingular's Petition for Reconsideration at 11 & n.39 ("there is no legal precedent for the conclusion that the publication of a Bureau notice in the Federal Register converts the Bureau document into a document required to be issued by the Commission itself").

[15] Richardson Order at para. 25.

[16] *Id. citing Sagebrush Rebellion v. Hodel*, 790 F.2d 760, 765 (1986).

can take advantage of the E911 service and instead requires wireless carriers to provide E911 service upon the PSAP's belief that they will be ready to receive information within six months. No formal notice of proposed rulemaking as to this substantive rule change was issued by the Commission prior to its amending the rule. Accordingly, adequate notice was not provided to the public, as required by the APA. As demonstrated by Cingular, courts have declared that these failures constitute violations of the APA.[17] Thus, the Commission is wrong in its assumption that failure to abide by the APA's procedures was merely a "technical defect" because lack of proper notice of a substantial rule change indeed harms the public interest.

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[17] *See* Cingular's Petition for Reconsideration at 10.

III. Conclusion

In its Richardson Order, the Commission has substantively altered a rule implementing a rational policy without the proper notice and comment procedures. Although the Commission contends that such procedural deficiencies are harmless, substantive modification of lawfully-promulgated regulations without due process is a violation of the APA and disserves the public interest. Accordingly, the Commission should reverse its decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Naomi Adams, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Comments of the Rural Cellular Association" in CC Docket No. 94-102 was served on this 18th day of January 2002, via hand delivery or first class, U.S. Mail, postage prepaid to the following parties:

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