

Before the  
**Federal Communications Commission**  
Washington, D.C. 20554



In the Matter of )  
)  
Revision of the Commission's Rules to Ensure )  
Compatibility with Enhanced 911 Emergency )  
Calling Systems )  
)  
Request for Waiver by Verizon Wireless )

CC Docket No. 94-102

RECEIVED & INSPECTED  
MAR 14 2002  
CC-MAILROOM

To: The Commission

**VERIZON WIRELESS PETITION FOR RECONSIDERATION**

**VERIZON WIRELESS**

John T. Scott, III  
Vice President and Deputy General  
Counsel — Regulatory Law  
1300 I Street, N.W. Suite 400W  
Washington, DC 20005  
(202) 589-3760

November 13, 2001

No. of Copies rec'd 0  
List ABCDE

## SUMMARY

The Commission must reconsider its apparent "strict liability" determination in paragraph 35 of the *Order* that Verizon Wireless will be deemed noncompliant if it does not meet performance benchmarks. Section 503 of the Act obligates the Commission to afford Verizon Wireless the opportunity to rebut a finding of noncompliance. The Commission has apparently determined that such a finding is not rebuttable, contrary to its statutory obligations and Verizon Wireless' due process interests. Even assuming that any such opportunity still exists, it is rendered meaningless by the Commission's determination that the unavailability of compliant products or services from third parties is an insufficient basis for excusing noncompliance.

The Commission must also provide meaningful safety valve opportunities when imposing rules or conditions based on its predictive judgment, whether via procedures for waiver or the opportunity to rebut a finding of noncompliance. The Commission must monitor its regulatory programs and adjust its approach as more information becomes available. Where its predictions do not meet expectations, availability of waiver procedures is essential. The Phase II deadlines throughout this proceeding have been premised on vendors' projections of Phase II-compliant products. As the Commission acknowledged, Verizon Wireless' proposed deployment timetable in its waiver request also was necessarily premised on vendors' representations; these findings may not be disregarded if the underlying factual basis of the conditions does not materialize as hoped. The Commission's duty to revisit the conditions of the *Order* is enhanced by virtue of its decision to monitor compliance on an ongoing basis via quarterly reporting.

The record also supports modification of the interim EFLT condition of paragraph 44. Verizon Wireless emphasized in its waiver request that EFLT was untested, but the Commission turned the preliminary description of the potential accuracy of the technology into a binding requirement. The mandated accuracy requirement is not supported in the record and should be eliminated. In addition, Verizon Wireless seeks a revision of the EFLT deployment date for Nortel switches to August 1, 2002. Verizon Wireless advised that deployment in markets served by Lucent switches would precede deployment for Nortel-served markets because of the later switch upgrade dates applicable to the latter. This modification is supported in the record and ensures that the conditions in the *Order* are internally consistent.

Finally, the Commission must obtain OMB approval pursuant to the Paperwork Reduction Act prior to imposing the substantial quarterly reporting obligations on Verizon Wireless. The Commission's apparent determination that the reporting obligations are not an "information collection" applicable to ten or more entities is contrary to the terms of the PRA and implementing OMB rules. Moreover, the E-911 rules and, thus, the *Order*, apply to all of Verizon Wireless' cellular and broadband PCS licensee affiliates, and the Commission has traditionally interpreted the PRA in terms of its impact on affected licensees. Finally, the Commission has already imposed these requirements on most nationwide carriers, and has no basis not to impose such requirements on other carriers seeking similar relief in the future. The quarterly reporting requirements are, accordingly, invalid until the Commission obtains the requisite OMB approval.

TABLE OF CONTENTS

SUMMARY..... i

TABLE OF CONTENTS..... ii

I. THE COMMISSION MUST AFFORD VERIZON WIRELESS A MEANINGFUL OPPORTUNITY TO CHALLENGE A FINDING OF NONCOMPLIANCE..... 2

    A. The Commission’s Stated Enforcement Policy Imposes An Apparent “Strict Liability” Standard on Verizon Wireless for Failure to Comply with Conditions in the *Order*. ..... 2

    B. The Commission is Statutorily Obligated to Afford Carriers the Opportunity to Rebut a Finding of Noncompliance. .... 5

    C. The Commission Must Provide Meaningful “Safety Valve” Opportunities when Imposing Rules or Conditions Based on its Predictive Judgment. .... 7

II. THE RECORD SUPPORTS MODIFICATION OF THE INTERIM EFLT CONDITION. .... 11

III. THE REPORTING REQUIREMENTS HAVE NOT BEEN APPROVED PURSUANT TO THE PAPERWORK REDUCTION ACT..... 13

CONCLUSION..... 16

Before the  
**Federal Communications Commission**  
Washington, D.C. 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 )  
 )  
Request for Waiver by Verizon Wireless )  
  
To: The Commission

**VERIZON WIRELESS PETITION FOR RECONSIDERATION**

Pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, Verizon Wireless<sup>1</sup> hereby petitions the Commission to reconsider three discrete aspects of its *Order* in the above-captioned proceeding granting, with some modifications, Verizon Wireless' request for waiver of the enhanced 911 ("E-911") Phase II requirements.<sup>2</sup>

Verizon Wireless appreciates the Commission's grant of a waiver to enable deployment of Phase II E-911 service and its recognition of the many steps that must be taken by carriers, vendors and PSAPs to achieve Phase II E-911. The company remains fully committed to working cooperatively with the public safety community to meet the new deployment deadlines

---

<sup>1</sup> This filing is submitted on behalf of Cellco Partnership, TRS No. 803807, and all licensee entities in which Cellco Partnership holds a controlling interest, all of which are listed in letters to the Bureau dated February 1 and April 4, 2001, supplementing its November 9, 2000, Phase II E911 Report.

<sup>2</sup> See *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order*, CC Docket No. 94-102, FCC 01-299 (rel. Oct. 12, 2001) ("*Order*").

for its network-assisted handset solution. Consistent with this commitment, Verizon Wireless is continuing FOA testing in Dallas, Texas of the AGPS/AFLT solution, has initiated the provision of Phase II service in St. Clair County, Illinois and Lake County, Indiana, via an interim network solution, and is actively working to meet the *Order's* deadlines. It files this petition to raise three specific issues of concern.

First, Verizon Wireless seeks reconsideration of the Commission's apparent "strict liability" determination in paragraph 35 of the *Order* that Verizon Wireless will be deemed noncompliant if it does not meet performance benchmarks. Second, Verizon Wireless requests modification of the conditions imposed in paragraph 44 that could be strictly read as applying to its voluntary commitment to deploy an interim EFLT solution, including its projected accuracy and the deployment schedule for Nortel switches. Third, the Commission must obtain approval from the Office of Management and Budget pursuant to the Paperwork Reduction Act for the new reporting requirements the *Order* imposes before those requirements are valid.

**I. THE COMMISSION MUST AFFORD VERIZON WIRELESS A MEANINGFUL OPPORTUNITY TO CHALLENGE A FINDING OF NONCOMPLIANCE.**

**A. The Commission's Stated Enforcement Policy Imposes An Apparent "Strict Liability" Standard on Verizon Wireless for Failure to Comply with Conditions in the *Order*.**

The record in this proceeding shows that wireless carriers have only a limited impact and control on vendors' ability to provide Phase II-compliant equipment and on the ability of LECs and other responsible parties to provide their part of the Phase II solution. As Commissioner Abernathy correctly noted, the Commission to date has not attempted to subject manufacturers

and vendors to E-911 obligations.<sup>3</sup> Moreover, the economic uncertainties facing manufacturers are well known, and the record in the proceeding is replete with examples of vendors' all-too-optimistic projections.

Despite "best efforts" to implement the infrastructure upgrades required for E-911, these are uncertainties beyond Verizon Wireless' control. The Commission appears, however, to have subjected Verizon Wireless to a "strict liability" standard by announcing in the *Order* that Verizon Wireless will be deemed noncompliant should it fail to meet its performance benchmarks -- even if reasons beyond its control prevent it from meeting those dates. Such action clearly exceeds the Commission's authority under the Communications Act and is inconsistent with its own rules and regulations.

In the *Order*, the Commission established benchmarks for Verizon Wireless' deployment of ALI-capable handsets, largely consistent with the dates requested in the waiver request.<sup>4</sup> In its Waiver Request, Verizon Wireless expressly stated that its proposed timetable was based on information provided by its handset and equipment vendors and "may be affected by unforeseen events such as shortages in available products or problems that occur in testing or deployment."<sup>5</sup> Perhaps in recognition of these uncertainties, the Commission appears to preserve Verizon Wireless' ability to seek further waiver of the conditions set forth in the *Order*:

To the extent that Verizon fails to satisfy any condition or Commission rule, it will be subject to possible enforcement action, including but not limited to

---

<sup>3</sup> See Separate Statement of Commissioner Abernathy, at 3-4.

<sup>4</sup> Compare *Order* ¶¶ 36-45 and Verizon Wireless Updated Phase II E911 Report and Request for Limited Waiver, filed July 25, 2001 ("Waiver Request") at 19-30.

<sup>5</sup> Waiver Request at 18; see also *id.* at 19-23 (discussing handset and network vendors' limited and disparate capabilities); Kathryn A. Zachem, *Ex Parte* Presentation on Behalf of Verizon Wireless in CC Docket No. 94-102, filed Sept. 27, 2001, at 2.

revocation of the relief, a requirement to deploy an alternative ALI technology, letters of admonishment or forfeitures. We will not entertain requests for additional relief that seek changes in the requirements, schedules, and benchmarks imposed herein *absent extraordinary circumstances* . . . .<sup>6</sup>

Having recognized that future extensions or waivers may need to be considered, as settled law provides,<sup>7</sup> the Commission then reverses course and flatly declares in paragraph 35 of the *Order* that Verizon Wireless “will be deemed noncompliant” if it does not have compliant Phase II service available in accordance with the *Order*:

If Verizon does not have compliant Phase II service available on the dates set forth herein, *it will be deemed noncompliant* and referred to the Commission’s Enforcement Bureau for possible action. *At that time, an assertion that a vendor, manufacturer or other entity was unable to supply compliant products will not excuse noncompliance.* However, a carrier’s “concrete and timely” actions taken with a vendor, manufacturer, or other entity<sup>8</sup> may be considered as possible *mitigation factors* in such an enforcement context.<sup>8</sup>

This statement appears to establish a *per se* finding of future liability, which, it would appear, could apply regardless of whether a further waiver or extension of the deadlines is obtained.<sup>9</sup>

---

<sup>6</sup> *Order* ¶ 34 (emphasis added).

<sup>7</sup> See *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fourth Memorandum Opinion and Order* 15 FCC Rcd. 17442, ¶¶ 39, 45 (2000) (citing 47 C.F.R. § 1.3, *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990), and *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)). The Commission has applied this standard to requests for further waiver of deadlines established in prior orders granting waiver of the deadline. See *Coon Valley Telephone Company*, 13 FCC Rcd. 17490, ¶ 6 (1998); *Radcliffe Telephone Company, Inc.*, 13 FCC Rcd. 16835 (1998); *Pierce Telephone Company, Inc.*, 13 FCC Rcd. 7241 (1998); see also *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997) (noting “Commission’s rules allow it ‘at any time’ to waive requirements for good cause”). If, however, the phrase “revocation of relief” in the *Order* means that enforcement penalties may be imposed retroactively – that is, forfeiture amounts are calculated based on acts or omissions preceding the new deadlines established in the *Order*, even as far back as the date of the *Order* – then Verizon Wireless would challenge the Commission’s authority to impose such a penalty.

<sup>8</sup> *Order* ¶ 35 (emphasis added).

<sup>9</sup> See *id.* ¶ 35 n.78.

The matter would be referred to the Enforcement Bureau for “possible action,” but arguments demonstrating the unavailability of compliant equipment will not excuse noncompliance and will only be considered as possible mitigation factors in the enforcement context.

**B. The Commission is Statutorily Obligated to Afford Carriers the Opportunity to Rebut a Finding of Noncompliance.**

A finding of “noncompliance” can carry with it monetary penalties and other sanctions. A carrier must therefore be afforded a meaningful opportunity to rebut such a finding, consistent with traditional notions of due process and in accordance with the statutory protections of Section 503 of the Act, as well as the Commission’s rules implementing that provision.

Carriers have the statutory right to challenge findings that could adversely affect them, and the Commission appears to have improperly eliminated that opportunity here. In particular, Section 503(b)(4) of the Act requires, in relevant part: “[N]o forfeiture penalty shall be imposed under this subsection against any person unless and until . . . the Commission issues a notice of *apparent* liability, in writing, with respect to such person; [and] *such person is granted an opportunity to show*, in writing, within such reasonable period of time as the Commission prescribes by rule or regulation, *why no such forfeiture penalty should be imposed.*”<sup>10</sup> Section 503 addresses more than just forfeiture *amounts*; it also provides the opportunity for a carrier to show why the carrier is not liable in the first instance – hence the statutory term “*apparent liability.*”<sup>11</sup>

---

<sup>10</sup> 47 U.S.C. § 503(b)(4) (emphasis added). The Commission’s rules implementing Section 503 reflect these requirements. See 47 C.F.R. § 1.80(f)(3).

<sup>11</sup> See, e.g., *Notice of Apparent Liability for Forfeiture of Western PCS BTA 1 Corp.*, 14 FCC Rcd. 21571, ¶ 1 (1999) (evidence in the record not sufficient to support a finding of rule violation); *Mercury PCS II, LLC*, 13 FCC Rcd. 23755 (1998) (rescinding forfeiture liability on (continued on next page)

Section 503 is grounded in fundamental principles of due process requiring that licensees have notice of a potential penalty and meaningful opportunity to challenge the Commission's decision.<sup>12</sup> As the Commission has stated:

[I]t should be stressed that a notice of apparent liability is not a finding of liability. The purpose of the notice of apparent liability is to inform the licensee of the apparent violations and to grant him an opportunity to show why he should not be held liable. No liability can attach unless and until the licensee is given the notice and opportunity to respond. The legislative history of sections 503 and 504 of the Communications Act reveals that the present statutory scheme was the direct outgrowth of Congress' concern that licensees might be found liable without being accorded "due process."<sup>13</sup>

The Commission's determination in the *Order* that Verizon Wireless will be deemed noncompliant without notice and opportunity to respond flatly contravenes this law.

It is unclear from the *Order* whether, despite the apparent *per se* finding of liability, the Commission does intend to allow Verizon Wireless (and other carriers) to challenge the noncompliance finding.<sup>14</sup> While the Enforcement Bureau is given discretion whether to initiate action, it appears that the initial finding of noncompliance would be un rebuttable. But even in the event that the noncompliance finding may be challenged, the Commission has determined that, when the Enforcement Bureau decides what *additional* sanction, if any, to impose beyond the finding of noncompliance, the unavailability of compliant products or necessary services

---

basis that FCC failed to provide notice of prohibited conduct); *Waterman Bdcasting Corp.*, 11 FCC Rcd. 14547 (1996), rescinded by letter dated Apr. 15, 1997 (not possible to determine whether violation had occurred, as explained in *NPR Phoenix*, 13 FCC Rcd. 14070, ¶ 5 (1998)).

<sup>12</sup> See *Amoco Prod. Co. v. Fry*, 118 F.3d 812, 819 (D.C. Cir. 1997) ("Notice and a meaningful opportunity to challenge the agency's decision are the essential elements of due process.")

<sup>13</sup> *Liability of Altavista Broadcasting Corp.*, 2 FCC 2d 445, ¶ 7 (1966) (citing S. Rep. 1857, 86th Congress, 2d session, at 8-10).

from vendors or other carriers will serve only as a mitigating factor, not a basis for excusing noncompliance. In essence, the Commission has eliminated impossibility as a viable defense -- regardless of Verizon Wireless' good faith efforts. Any such prejudgment is particularly improper where, as here, carriers' compliance is significantly affected by the acts or omissions of third parties.<sup>15</sup> As discussed below, the Commission must reconsider this aspect of the *Order* to ensure that enforcement of the E-911 rules is consistent with the agency's statutory mandate and its own rules.

**C. The Commission Must Provide Meaningful "Safety Valve" Opportunities when Imposing Rules or Conditions Based on its Predictive Judgment.**

In imposing requirements such as the Phase II rules and the conditions of the *Order*, the Commission must necessarily exercise its predictive judgment. The Commission's authority to adopt rules on this basis, provided that the underlying record supports the rules, is well established. When doing so, however, the Commission must also afford carriers meaningful

---

<sup>14</sup> If such a reading was, in fact, the Commission's intent, clarification rather than reconsideration may be appropriate here.

<sup>15</sup> A situation in which a carrier may be liable under Section 503, such as where it fails to exercise good faith, diligent efforts to comply, must be distinguished from a situation of technical infeasibility, in which even a carrier's best efforts to comply cannot achieve compliance. See *Midwest Radio-Television, Inc.*, 45 F.C.C. 1137, 1141 (1964) (policy underlying "willful" noncompliance definition to address licensees' "lack of concern or indifference" or "laxity" and where "violations *could*, and indeed should, have been easily avoided" (emphasis added)) and H.R. Rep. No. 97-765, at 50-51 (1982) (explaining Congress' intent to incorporate *Midwest Radio-Television* standard into "willful" definition for Sections 312 and 503 of Act); cf. *Edison Electric Inst. v. EPA*, 996 F.2d 326, 336 (D.C. Cir. 1993) (given statute's "technology-forcing" nature, it was "more reasonable to adopt an *ex ante* view and ask whether, if sufficient resources were devoted to the problem, it was possible" to achieve compliance).

“safety valve” procedures – whether via procedures for the outright waiver of rules or conditions, or via the opportunity to rebut a finding of noncompliance.<sup>16</sup>

The Commission’s approach in this proceeding, until now, has reflected this approach. Throughout the proceeding, the underlying factual basis for the Phase II deadlines has been vendor-provided projections regarding the availability of compliant products. As noted *supra*, the Commission expressly determined in the *Fourth MO&O* that third-party vendors’ inability to timely provide compliant products could be a basis for waiver of the rules.<sup>17</sup> This determination is consistent with Commission precedent, as the agency has traditionally granted waivers or modified its rules where regulatees are dependent on the availability of equipment from third-party vendors for compliance with Commission-imposed rules<sup>18</sup> -- even for requirements expressly imposed in the Communications Act.<sup>19</sup>

---

<sup>16</sup> It is insufficient even if, under paragraph 35 of the *Order*, a forfeiture dollar amount may be mitigated to zero. A finding of noncompliance in itself, if left standing, may have substantive implications for cellular and PCS licensees. See 47 C.F.R. §§ 22.940(a), 24.16(b) (“substantial compliance” a prerequisite for obtaining renewal expectancy).

<sup>17</sup> The Commission’s reliance on the *Fourth MO&O* as a basis for the enforcement approach stated paragraph 35 is therefore in error. See *Order* ¶ 35 (citing *Fourth MO&O*, 15 FCC Rcd. at 17458).

<sup>18</sup> See, e.g., *Roosevelt County Rural Telephone Cooperative, Inc.*, 13 FCC Rcd. 22, ¶¶ 29-36 (1997); *Cuba City Telephone Exchange Company et al.*, 12 FCC Rcd. 21794, ¶¶ 16-25 (1997); *C, C & S Telco, Inc. et al.*, 6 FCC Rcd. 349, ¶¶ 6, 12 (1991); *Policies and Rules Concerning Operator Service Providers*, 5 FCC Rcd. 4630, ¶ 22 (1990); see also *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992 - Compatibility Between Cable Systems and Consumer Electronics Equipment*, 9 FCC Rcd. 1981, ¶¶ 76-77 (1994) (adjusting compliance deadlines for certain cable box devices based on unavailability of products from manufacturers); see also *EarthWatch Inc.*, 15 FCC Rcd. 18725, ¶¶ 6-8 (Int’l Bur. 2000) (granting third extension of construction deadline due to unforeseen technical problem with component of satellite).

<sup>19</sup> See *Telephone Number Portability, Petitions for Extension of the Deployment Schedule for Long-Term Database Methods for Local Number Portability, Phase II*, 13 FCC Rcd. 9564, (continued on next page)

More fundamentally, in imposing regulatory obligations and deadlines in the exercise of its predictive judgment, the Commission must have a record basis for such requirements;<sup>20</sup> and, if its predictions prove inaccurate, the Commission must revisit those requirements.<sup>21</sup> “The Commission has an ongoing obligation to monitor its regulatory programs and make adjustments in light of actual experience” and a “duty to finetune its regulatory approach as more information becomes available . . . .”<sup>22</sup> In instances where the Commission “pursue[s] plans and policies bottomed on informed prediction,” the availability of waiver procedures is particularly important.<sup>23</sup> Where predictions do not materialize, the availability of waiver procedures is essential to ensuring the legitimacy of the underlying rules.<sup>24</sup>

---

9568 ¶ 18, 9570 ¶ 25 (1998) (inability of LNP database provider to provide stable platform for wireline LNP “warrants a deviation from the general rule”).

<sup>20</sup> See *AT&T v. FCC*, 832 F.2d 1285, 1291 (D.C. Cir. 1987) (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984)); *ASG Industries Inc. v. CPSC*, 593 F.2d 1323, 1335 (D.C. Cir. 1979); *National Ass'n of Indep. Television Producers and Distributors v. FCC*, 502 F.2d 249, 254 (2d Cir. 1974) (APA “does not authorize the use of an effective date that is arbitrary or unreasonable”).

<sup>21</sup> *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (“should the Commission's predictions about the effectiveness of international coordination prove erroneous, the Commission will need to reconsider its allocation in accordance with its continuing obligation to practice reasoned decisionmaking”).

<sup>22</sup> *Telocator Network of America v. FCC*, 691 F.2d 525, 550 n.191 (D.C. Cir. 1982); see *Bechtel*, 957 F.2d at 881 (“The Commission's necessarily wide latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether they work - that is, whether they actually produce the benefits the Commission originally predicted they would.); *P&R Temmer v. FCC*, 743 F.2d 918, 929 (D.C. Cir. 1984) (“Where any administrative rule, although considered generally to be in the public interest, is not in the public interest as applied to particular facts, an agency should waive application of the rule”).

<sup>23</sup> See *WAIT Radio v. FCC*, 418 F.2d at 1157 (Commission's “discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances”); *Telocator* at 550 n.191; see also *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972) (“it is well established that an agency's authority to proceed in a complex area . . . by

(continued on next page)

The factual record basis for the various E-911 Phase II deadlines established by the Commission throughout this proceeding was vendors' predictions of the availability of commercially available E-911 Phase II solutions.<sup>25</sup> Most recently, the Commission determined in the *Fourth MO&O* that waivers "should not generally be warranted" on the basis of its determination that "ALI technologies *are already, or will soon be*, available that provide a reasonable prospect for carriers to comply with the E911 Phase II requirements."<sup>26</sup> Verizon Wireless demonstrated in its Waiver Petition, however, that Commission deadlines continued to outpace vendors' capabilities. As the Commission acknowledged, Verizon Wireless "advise[d] that the specific, aggressive implementation deadlines it has proposed are based on vendor negotiations, and that it expects to meet those deadlines, *barring unforeseen delays in product availability and delivery*," and that efforts of other parties – including "technology vendors, network equipment and handset vendors, [and] local exchange carriers" – are necessary for the successful deployment of Phase II service.<sup>27</sup> There remains the possibility that, in certain instances, vendors may again be unable to accommodate carriers' deployment deadlines. These findings, in light of the Commission's underlying ongoing obligation to monitor and "finetune"

---

means of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances" citing *Permian Basin Area Rate Cases*, 390 U.S. 747, 784-86 (1968)).

<sup>24</sup> See *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (citing dissenting opinion in *KCST-TV, Inc. v. FCC*, 699 F.2d 1185, 1200 (D.C. Cir. 1983)); *WAIT Radio*, 418 F.2d at 1158 ("provision for waiver may have a pivotal importance in sustaining the system of administration by general rule").

<sup>25</sup> *Report and Order*, 11 FCC Rcd. 18676, 18711 ¶ 68 (1996), *aff'd in relevant part on reconsideration, Memorandum Opinion and Order*, 12 FCC Rcd. 22665, 22723-24, ¶¶ 120-122 (1997); *Third Report and Order*, 14 FCC Rcd. 17388, ¶¶ 37, 45, 53 (1999); *Fourth MO&O*, 15 FCC Rcd. at 17449-17453 ¶¶ 17-30.

<sup>26</sup> *Fourth MO&O*, 15 FCC Rcd. at 17457-58 ¶ 44 (emphasis added).

its regulatory approach, further underscore the unlawfulness of the flat imposition of liability in the *Order*.

Finally, the Commission imposed detailed quarterly reporting obligations on Verizon Wireless in part so that it would be apprised of whether the factual bases for the deadlines of the *Order* (i.e., vendor representations of product availability) remain valid.<sup>28</sup> The Commission cannot, by fiat, be absolved of its duty to revisit the conditions of the *Order* if these underlying factual bases do not materialize as hoped. Indeed, the Commission's duty to revisit the conditions of the *Order* is, if anything, enhanced by virtue of its decision to monitor Verizon Wireless' compliance on an ongoing basis before the deadlines established in the *Order* come to pass.

For these reasons, Verizon Wireless requests that the Commission reconsider the determination of *per se* liability set forth in paragraph 35 of the *Order*.

## **II. THE RECORD SUPPORTS MODIFICATION OF THE INTERIM EFLT CONDITION.**

Verizon Wireless also requests modification of the conditions in paragraph 44 that could be strictly read as applying to its voluntary commitment to deploy an interim EFLT solution, including its projected accuracy and the deployment schedule for Nortel switches. In the *Order*, the Commission directed that "on or before April 1, 2002, Verizon must deploy the EFLT Phase II solution, with an accuracy on average of within 250 to 350 meters, without the assistance of a

---

<sup>27</sup> *Order* ¶¶ 3, 19 (emphasis added).

<sup>28</sup> The quarterly reports are intended as "the principal vehicle for providing the Commission with notice of anticipated problems . . . ." *Id.* ¶ 32.

modified handset, in all markets served by Lucent and Nortel switches.”<sup>29</sup> The record in this proceeding does not support this condition. In its Waiver Request, Verizon Wireless emphasized that EFLT was an untested technology and that it would be deployed only if it proves successful.<sup>30</sup> The language in paragraph 44 of the *Order*, however, turns Verizon Wireless’ preliminary description of this unproven technology into a binding requirement. The potential average accuracy ranges were very preliminary and should not have been used to establish any accuracy requirement. This mandate is particularly unwarranted given that EFLT was clearly identified as a step that would provide “better than Phase I” service, but would be only an interim solution *in addition to* the handset solution. Verizon Wireless noted in its Waiver Request that “[i]nitial testing shows the potential to locate callers within 250-350 meters on average.”<sup>31</sup> However, testing continues, and it is not clear at this time what the average accuracy range of the final EFLT product will be.<sup>32</sup>

Verizon Wireless thus seeks reconsideration of the *Order* to eliminate the accuracy reference. While the ALI accuracy provided via EFLT may improve over time as a result of actual field experience, the Commission should not maintain specific accuracy requirement where there is no evidence to support such a mandate.

---

<sup>29</sup> *Id.* ¶ 44 (emphasis added).

<sup>30</sup> Waiver Request at 6.

<sup>31</sup> Waiver Request at 28 (emphasis added). Verizon Wireless expressly placed the Commission on notice that further testing of EFLT was forthcoming and that results initial testing may prove overly optimistic. Consideration of these facts is clearly in the public interest to ensure that the Commission has an adequate record basis and is thus the product of reasoned decisionmaking. *See* 47 C.F.R. § 1.106(c)(2).

<sup>32</sup> *See supra* Section I, regarding impropriety of strict liability requirement when compliance not feasible due to unavailable or unproven technology.

Secondly, Verizon Wireless seeks modification of this condition to account for differences between the upgrade dates for the Lucent and Nortel switches. In its Waiver Request, Verizon Wireless advised:

Assuming successful completion of all tests . . . [it] would target deployment of EFLT in all markets where it uses Lucent switches within five months, *i.e.*, April 1, 2002, followed closely by those markets where it uses Nortel switches. This period is needed to account for the necessary switch upgrades plus field testing.

Absent delays from vendors, Verizon Wireless remains committed to deploying EFLT in its Lucent switches by April 1, 2002.<sup>33</sup> The Commission, however, imposed an April 1, 2002 deadline for EFLT for markets served by both Lucent *and* Nortel switches. As the Commission has acknowledged and accounted for elsewhere in the *Order*, the upgrades for Nortel switches are feasible only at a later date – August 1, 2002, based on vendor representations. Verizon Wireless requests that the Commission modify the EFLT condition applicable to Nortel switches to reflect the *August 1, 2002* date for switch upgrades. This modification is fully warranted by the record and ensures that the conditions in the *Order* are internally consistent.

### **III. THE REPORTING REQUIREMENTS HAVE NOT BEEN APPROVED PURSUANT TO THE PAPERWORK REDUCTION ACT.**

The *Order* imposes very substantial reporting obligations every three months, beginning February 1, 2001, and continuing for four full years. The reporting must identify, among other things, the status of all PSAP requests, and the progress Verizon Wireless has made to deploy network upgrades and market GPS handsets. The *Order* summarily concludes that Office of Management and Budget (“OMB”) approval of the quarterly reporting requirements is not

---

<sup>33</sup> See *Order* ¶ 24.

required under the Paperwork Reduction Act (“PRA”) on the basis that the *Order* “does not contain an information collection applicable to ten or more entities.”<sup>34</sup>

Verizon Wireless disagrees with the Commission’s determination that the PRA does not apply. First, a “person” under the PRA expressly includes a partnership or corporation.<sup>35</sup> OMB regulations, in turn, define “ten or more persons” as the “persons to whom a collection of information is addressed by [an] agency within any 12-month period, and to any independent entities to which the initial addressee may reasonably be expected to transmit the collection of information during that period, including...*separately incorporated subsidiaries or affiliates.*”<sup>36</sup> Second, the Phase II E-911 rules, by their terms, apply on a licensee-specific basis, and the conditions of the *Order* therefore necessarily apply to all of Verizon Wireless’ cellular and broadband PCS licensee affiliates.<sup>37</sup> In fact, after Verizon Wireless had filed its Phase II E-911 update in November 2000, the Bureau requested that the company make a separate filing listing all of the individual licensee affiliates, on the ground that *each licensee affiliate* was subject to the Phase II rules.<sup>38</sup> That Bureau determination is inconsistent with the Commission’s rationale for not seeking OMB approval. Third, the Commission has traditionally interpreted its PRA obligations for Title III radio services in terms of the impact of its requirements on affected

---

<sup>34</sup> *Id.* ¶ 46; *see also* 44 U.S.C. § 3502(3)(A)(i).

<sup>35</sup> 44 U.S.C. § 3502(10).

<sup>36</sup> 5 C.F.R. § 1320.3(c)(4) (emphasis added).

<sup>37</sup> 47 C.F.R. § 20.18(a).

<sup>38</sup> *Letter from John T. Scott, of Verizon Wireless, to Wendy Austrie, of the Wireless Telecommunications Bureau, in CC Docket No. 94-102, dated Feb. 1, 2001 (filed Feb. 8, 2001) (responding to Bureau request to provide list of all licensees covered by Phase II update).*

licensees.<sup>39</sup> Again, the *Order* is inconsistent with that past practice. Fourth, the Commission clearly intends to apply reporting requirements to all CMRS providers subject to Phase II requirements. It imposed virtually identical quarterly reporting requirements on the carriers which to date have received waiver requests (save VoiceStream), and would have no basis not to impose “me too” reporting obligations as a condition for granting “me too” waivers in the future.<sup>40</sup> The Commission cannot escape the OMB approval requirements of the PRA simply by breaking paperwork requirements down, carrier by carrier.

For these reasons, the Commission must obtain OMB approval for the quarterly reporting requirements. Unless and until it does so, the reporting requirements are invalid.<sup>41</sup>

---

<sup>39</sup> See, e.g., *AirCell, Inc., Order*, 14 FCC Rcd 806, ¶ 30 (1998); *Creation of Low Power Radio Service, Notice of Proposed Rulemaking*, 14 FCC Rcd 2471, ¶ 113 (1999); *Amendment of Part 80 of the Rules Concerning the Use of Narrow-Band Direct-Printing (NB-DP) Frequencies in the Maritime Services, Notice of Proposed Rulemaking*, 4 FCC Rcd 8072, ¶ 14 (1989).

<sup>40</sup> See *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235 (D.C. Cir. 1985), *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) (Commission could not arrive at different outcomes in the cases of similarly-situated licensees); see also *Mountain Solutions, Ltd., Inc. v. FCC*, 197 F.3d 512 (D.C. Cir. 1999) (discussing *Green Country* precedent).

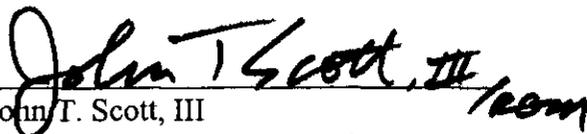
<sup>41</sup> See 44 U.S.C. § 3512; *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25 (D.C. Cir. 1995), *cert. denied sub nom., Northeast Cellular Tel. Co. v. FCC*, 119 S.Ct. 47 (1998).

**CONCLUSION**

For the foregoing reasons, Verizon Wireless respectfully requests reconsideration of the *Order* on the three discrete matters raised herein.

Respectfully submitted,

**VERIZON WIRELESS**

  
John T. Scott, III  
Vice President and Deputy General  
Counsel - Regulatory Law  
1300 I Street, N.W. Suite 400W  
Washington, DC 20005  
(202) 589-3760

Dated: November 13, 2001

CERTIFICATE OF SERVICE

I, LaVon E. Stevens, do hereby certify that a true and correct copy of the foregoing  
"Verizon Wireless Petition for Reconsideration" was served by mail this 13th day of November,  
2001 to:

Hon. Michael Powell  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-B201  
Washington, D.C. 20554

Hon. Kathleen Q. Abernathy  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-A204  
Washington, D.C. 20554

Hon. Michael J. Copps  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
8-A302  
Washington, D.C. 20554

Hon. Kevin J. Martin  
Commissioner  
Federal Communications Commission  
445 12th Street, S.W.  
Room 8-C302  
Washington, D.C. 20554

Thomas J. Sugrue, Esq.  
Chief  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Room 3-C252  
445 12th Street, S.W.  
Washington, D.C. 20554

Kris A. Monteith, Esq.  
Chief  
Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Room 3-C124  
445 12th Street, S.W.  
Washington, D.C. 20554

Thomas Navin, Esq.  
Deputy Chief  
Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
Room 5-C142  
445 12th Street, S.W.  
Washington, D.C. 20554

Jane Phillips  
Policy Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

John T. Scott, III, Esq.  
Verizon Wireless  
1300 I Street, N.W.  
Suite 400 West  
Washington, D.C. 2005

Robert M. Gruss, Esq.  
Shook, Hardy & Bacon, LLP  
600 14th St., N.W.  
Suite 800  
Washington, D.C. 20005  
Attorney for Association of Public-Safety Communications  
Official-International, Inc.

James R. Hobson, Esq.  
Miller & Van Eaton, P.L.L.C.  
1155 Connecticut Ave., N.W.  
Suite 1000  
Washington, D.C. 20036  
Attorney for National Emergency Number Association