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

In the Matter of	)	
	)	
VOICESTREAM WIRELESS CORPORATION	)	
	)	WT Docket No. 01-333
Petition for Waiver of Section 64.402 of the Commission's Rules	)	

Memorandum Opinion and Order

Adopted: March 15, 2002 **Released: April 3, 2002**

By the Commission: Commissioner Copps approving in part, dissenting in part, and issuing a statement; Commissioner Martin issuing a statement.

I. INTRODUCTION

1. We have before us a petition for waiver (Petition) of our Part 64 Rules regarding the provision of wireless priority access service (PAS)[1] filed on November 28, 2001 by VoiceStream Wireless Corporation (VoiceStream)[2] and supported by the National Communications System (NCS).[3] Specifically, VoiceStream seeks a waiver of Section 64.402 of our Rules, 47 C.F.R. § 64.402, in order to be able to provide a wireless emergency service to the NCS. In this *Memorandum Opinion and Order*, we act upon VoiceStream's request by granting a temporary waiver of the provision in Appendix B included in our Part 64 Rules that authorized users activate the feature on a per call basis by dialing a feature code. Specifically, we grant a VoiceStream a waiver until notification by VoiceStream or NCS that the per call invocation feature can be commercially deployed on a global system for mobile communications (GSM) system, upon expiration or termination of the contract between VoiceStream and NCS, DynCorp or any other service integrator acting on behalf of NCS, to provide a wireless priority access capability; or by December 31, 2002, whichever is earliest.

II. BACKGROUND

2. *Wireless PAS Rules*. In July 2000, the Commission responded to a request from NCS and amended its Part 64 Rules to permit commercial mobile radio service (CMRS) providers to voluntarily

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[1] *See* The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Through the Year 2010, *Second Report and Order*, WT Docket No. 96-86, 15 FCC Rcd 16720, 16722 ¶ 5 (2000) (*PAS R&O*).

[2] Petition for Partial Waiver of Section 64.402 of the Commission's Rules filed by VoiceStream Wireless Corporation (filed Nov. 28, 2001) (Petition).

[3] National Communications System, Brenton C. Greene, Deputy Manager, Statement in Support of Petition for Waiver (filed Dec. 6, 2001) (NCS Statement). The NCS is an organization created by Executive Order to administer and manage the telecommunications assets of 23 federal government organizations in serving the national security and emergency preparedness (NSEP) needs of the federal, state and local governments. *See* Executive Order 12,472, Assignment of National Security and Emergency Preparedness Telecommunications Functions, 49 Fed. Reg. 13471 (1984). We will refer to the role or duties of NCS rather than that of the Executive Office of the President (EOP) since NCS will be the agency acting on behalf of the EOP.

offer PAS to national security and emergency preparedness (NSEP) personnel[4] In the *PAS R&O*, the Commission noted that federal, state and local government public safety organizations are increasingly using CMRS systems.[5] Additionally, several commenters stated that it has become commonplace in natural disasters and other emergencies for commercial wireless providers to donate both handsets and airtime to public safety personnel for their use during the emergency.[6] Further, these commenters contend that their efforts to utilize wireless spectrum are oftentimes thwarted because the systems are often congested with other user traffic.[7] To promulgate optimum use of CMRS frequencies, where the CMRS operator elects to provide a priority access service, to government agencies and non-government NSEP personnel, the Commission offered the PAS Rules.[8]

3. Under these PAS Rules, authorized NSEP users in emergencies could gain access to the next available wireless channel to originate a call; however, the priority calls would not preempt calls in progress.[9] In adopting the PAS Rules applicable to CMRS providers, the Commission noted that carriers who elected to offer PAS would be required to adhere to uniform operating protocols concerning the number of priority levels and the priority level for particular NSEP users.[10] In this regard, our PAS Rules provide for five levels of priority as requested by NCS. As envisioned by our Part 64 Rules, PAS would be triggered on a per call basis by dialing a feature code and would be available to authorized NSEP users at all times.[11] The Commission did not require CMRS providers to offer PAS or to adhere to particular technical standards in implementing PAS.[12]

4. Our PAS Rules also provide that the Executive Office of the President (EOP), acting through NCS, will administer PAS. The NCS will receive, process and evaluate requests for priority actions from authorizing agents.[13] Further the NCS assigns priorities or denies requests for priority and conveys its determinations to the service provider and the authorizing agent. Any revisions to, or revocations of, priority assignments are made by the NCS. Similarly, the NCS is responsible for issuing new or revised regulations or procedures regarding the operation, administration and use of PAS and for providing training on PAS to the affected entities and individuals. The NCS must maintain a database for PAS related information and disclose the content of this database only to the extent required by law. Additionally, the NCS serves as the final arbiter of authority for the assignment of priorities and the adjudicator of any disputes that arise during the exercise of the President's war emergency powers under

[4] *PAS R&O*, 15 FCC Rcd at 16721 ¶ 3. The Rules became effective on October 9, 2000, 60 days after publication in the Federal Register. *See* 65 Fed. Reg. 48393 (Aug. 8, 2000).

[5] *PAS R&O*, 15 FCC Rcd at 16725 ¶ 10.

[6] *Id.*

[7] *Id.* at ¶ 11-12.

[8] *Id.* at ¶ 15.

[9] *PAS R&O*, 15 FCC Rcd at 16721 ¶ 3.

[10] *Id.* at 16722 ¶ 4.

[11] *See* 47 C.F.R. Part 64, Appendix B.

[12] *PAS R&O*, 15 FCC Rcd at 16722 ¶ 4, 16729 ¶ 17.

[13] An authorizing agent is a Federal or State entity that authenticates, evaluates and makes recommendations to NCS regarding the assignment of PAS levels. *See* 47 C.F.R. Part 64, Appendix B, § 2d.1.

Section 706 of the Communications Act.[14] The role of the FCC is limited to one of regulatory oversight for implementation and enforcement of PAS Rules and adjudication of disputes that arise regarding priority level when the President's war emergency powers under Section 706 of the Communications Act have not been invoked.[15]

5. Our Part 64 Rule provides for detailed treatment of PAS in Appendix B. The CMRS service provider that voluntarily elects to offer PAS must provide PAS levels 1, 2, 3, 4 or 5 only upon receipt of an authorization from the NCS and remove PAS for specific users at the direction of the NCS. Likewise, the CMRS service provider who voluntarily elects to offer PAS shall ensure that PAS system priorities supersede any other NSEP priority that may be provided. The PAS provider must also participate in reconciliation and revalidation of PAS information at the request of the NCS. The PAS provider must designate a point of contact to coordinate with the NCS for administration of PAS. Where technically and economically feasible, the PAS provider must provide roaming service users the same grade of PAS provided to local service users. Additionally, the PAS provider must insure that at all times a reasonable amount of CMRS spectrum is made available for public use. Further, the PAS provider must notify the NCS and the service user if PAS is to be discontinued as a service. The PAS provider may disclose the content of the NSEP PAS database only to those having a need-to-know or who will not use the information for economic advantage. Lastly, compliance by the PAS provider with regulations and procedures supplemental to and consistent with the appendix in Part 64 of our Rules and issued by the NCS is required.

6. The Commission has also addressed the issue of potential liability under Section 202(a) of the Communications Act for CMRS providers offering PAS.[16] Section 202(a) prohibits common carriers from making any unjust or unreasonable discrimination in charges, practices, classifications, facilities or services, from giving an undue or unreasonable preference or advantage, or from subjecting any person, class of persons or locality to any undue or unreasonable prejudice or disadvantage.[17] In the *PAS R&O*, some commenters noted that CMRS providers might be reluctant to offer PAS without protection from liability for violation of Section 202(a).[18] In this connection, the Commission determined that providing PAS to authorized users in accordance with our Part 64 Rules would be *prima facie* lawful under the Communications Act and would not constitute unreasonable discrimination or an unreasonable preference under Section 202(a).

7. *Post-September 11th*. NCS asserts that, as a direct result of the experiences and aftermath of the tragic events of September 11, 2001, there is a critical, immediate need for implementation of wireless PAS.[19] Wireless technology played an important role in available communications for emergency workers in New York and Washington, D.C.[20] Wireless PAS was not in place on September 11th, but the

[14] 47 U.S.C. § 706. For example, if the President's war emergency powers afforded in Section 706 are invoked, the NCS would resolve claims by NSEP users disputing the level of priority assigned to them.

[15] *Id.* For example, if the President's war emergency powers are not invoked, the FCC would resolve claims by NSEP users disputing the level of priority assigned to them.

[16] *PAS R&O*, 15 FCC Rcd at 16730-31 ¶¶ 22-24.

[17] 47 U.S.C. § 202(a).

[18] *PAS R&O*, 15 FCC Rcd at 16730 ¶ 22.

[19] See NCS Statement at 2.

[20] *See, e.g.*, Wireless Emergency Response Team (WERT) Report, *Final Report*, (Oct. 2001) at http://www.nric.org/meetings/docs/wert_final_report.pdf].

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NCS has since undertaken efforts to implement wireless PAS on an expedited basis. In particular, NCS has elected to procure a government contract with a wireless carrier to satisfy immediate needs for wireless PAS in three cities, Washington, D.C., New York City, New York (New York City) and Salt Lake City, Utah (Salt Lake City).[21] VoiceStream and other wireless carriers have participated in that procurement process. VoiceStream responded to the NCS's solicitation with a proposal to provide its wireless emergency service in the Washington, D.C., New York City, New York and Salt Lake City, Utah markets and future additional markets. On November 28, 2001 VoiceStream submitted its Petition and requested expedited action in order to be able to offer its proposed wireless emergency service to NCS.[22]

8. VoiceStream describes a Part 64 compliant PAS system that it plans to implement called Enhanced Multi-Level Precedence and Preemption (eMLPP). VoiceStream's eMLPP, through its Subscriber Identity Module/Universal Subscriber Identity Module, will store the maximum authorized precedence level for each user.[23] Feature code dialing, where the user enters a numerical code, will be employed to identify the user and the appropriate priority level. Alternatively, the eMLPP handsets will use software to provide a menu whereby the user selects the precedence level at which its call is to be handled. The available precedence levels will be programmed into the handsets upon subscriber activation, and the selection will be communicated to the network. There will be five different levels of precedence available for the subscriber; in addition, there will be two other levels reserved for network internal use. The eMLPP capability also provides queuing of the priority call for the next available resource when radio or network resources are not available. Additionally, access to eMLPP will begin upon account activation. However, neither the handsets required for eMLPP nor the feature code dialing is commercially available at this time.

9. VoiceStream plans to offer a slightly modified eMLPP in Washington, D.C., New York City and additional cities as deemed necessary for the safety and security of the United States. VoiceStream's current proposal for immediate wireless emergency service to NCS possesses all requirements of the Commission's *PAS Order* except the requirement[24] that each NSEP subscriber invoke or activate the priority access service on a per call basis.[25] Because the current proposed system is unable to employ the per-call-invocation feature, VoiceStream's interim proposed system would automatically invoke the highest authorized precedence level stored in the user's Subscriber Identity Module/Universal Subscriber Identity Module,[26] contrary to the requirement in Appendix B of Part 64 of our Rules. In support of its waiver request, VoiceStream states that the eMLPP capable handsets that would support the per-call-invocation feature are not commercially available at this time.[27] VoiceStream reports that it can provide commercially available handsets with eMLPP capability for GSM operators in the United States by

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[21] Verizon Wireless also filed a Part 64 waiver request on November 2, 2001 and received NCS support. However, Verizon Wireless subsequently withdrew its waiver request on December 13, 2001.

[22] *See* Petition.

[23] *Id.* at 4.

[24] *See* 47 C.F.R. Part 64, Appendix B, ¶ 2c.

[25] Petition at 4 n.5.

[26] *Id.* at 4.

[27] *Id.*

December 31, 2002.[28] VoiceStream also reports that it is exploring other mechanisms for providing the per call invocation feature that do not require specific eMLPP capable handsets.[29] In conjunction with a waiver of the per-call-invocation feature, VoiceStream asks that this waiver remain in effect until feature code dialing or software, compatible with GSM handsets, that would communicate the priority level selection to the network is available. As stated earlier, VoiceStream anticipates that feature code dialing or software, that reads, relays and confirms priority selections, will be available by December 31, 2002.[30] VoiceStream also argues that the waiver should extend to VoiceStream the same liability protection set forth in paragraphs 22-24 of the *PAS R&O*.[31]

10. On December 6, 2001, the NCS filed a statement in support of VoiceStream's Petition.[32] In its supporting statement, the NCS notes that on September 11, 2001, wireless PAS was unavailable to NSEP users, and cell phones that were distributed by the carriers often had to contend with congestion on the wireless networks.[33] Further, NCS asks that protection from service provider liability be afforded and supports VoiceStream's argument that its proposal is *prima facie* lawful and not unreasonable discrimination or an unreasonable preference under Section 202(a) of the Communications Act.[34]

11. On December 11, 2001, the Wireless Telecommunications Bureau (Bureau) sought comment on VoiceStream's Petition.[35] Two comments supporting VoiceStream's waiver request were filed in response to the *Public Notice*,[36] and VoiceStream submitted reply comments.[37]

III. DISCUSSION

12. Section 1.925 of the Commission's Rules provides that a waiver of the Commission's Rules may be granted if it is shown that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest or the applicant has no reasonable alternative.[38]

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[28] Ex Parte Letter from Robert Calaff, Corporate Counsel-Government & Regulatory Affairs to Magalie Roman Salas, Office of the Secretary, Federal Communications Commission (dated Jan. 18, 2002) (Ex Parte Letter).

[29] Petition at 4.

[30] Ex Parte Letter.

[31] Petition at 4-5.

[32] *See* NCS Statement.

[33] *Id.* at 2.

[34] *Id.* at 3-4.

[35] Wireless Telecommunications Bureau Seeks Comment on a Petition for Waiver of the Commission's Part 64 Priority Access Service Rules, WT Docket No. 01-333, DA 01-2883 (rel. Dec. 11, 2001) (*Public Notice*).

[36] Comments of the Cellular Telecommunications & Internet Association (CTIA Comments); Comments of General Dynamics Decision Systems (GDDS Comments).

[37] Reply Comments of VoiceStream Wireless Corporation (VoiceStream Reply Comments) and Erratum to Reply Comments of VoiceStream Wireless Corporation (VoiceStream Reply II).

[38] 47 C.F.R. § 1.925

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13. In the situation presented in VoiceStream's waiver Petition, we find that a waiver of the requirement that each NSEP subscriber invoke or activate PAS on a per call basis would be consistent with the underlying purposes of the Commission's PAS Rules and would be in the public interest. Therefore, we will grant VoiceStream's Petition for waiver. This waiver will expire upon notification by VoiceStream or NCS that the per call invocation feature can be commercially deployed on a GSM system, upon expiration or termination of the contract between VoiceStream and NCS, DynCorp or any other service integrator acting on behalf of NCS, to provide a wireless priority access capability, or by December 31, 2002, whichever is earliest.

14. The purpose of our PAS Rules is to comply with our statutory mandate "to make available . . . a rapid, efficient Nation-wide . . . communication service . . . for the purpose of national defense, [and] for the purpose of promoting safety of life and property. . . ."[39] The PAS Rules enable CMRS providers to offer PAS to federal, state and local public safety personnel to help meet the Nation's NSEP needs.[40] The uniform protocols of PAS, which were proposed by NCS, are designed to ensure the compatibility of a peacetime PAS system with a wartime PAS system, allow federal and out-of-region NSEP personnel to avail themselves of PAS, and enable the PAS system to be far more effective than it would be if different carriers used different protocols.[41]

15. VoiceStream asserts that its Petition should be granted because neither feature code dialing nor the handset software that will allow it to deploy a fully compliant, GSM-based, Part 64 system is commercially available. Both commenters support VoiceStream's request.[42] GDDS states that granting this Petition would create a powerful security capability for commercial GSM systems that the government could use for national security matters.[43] CTIA suggests that in light of the non-availability of PAS compliant handsets, the requested waiver should be granted.[44] In that connection, VoiceStream maintains that in order to provide the government with a priority access capability in the immediate term, it must be allowed to depart from the uniform protocols.[45] VoiceStream argues that grant of its Petition will allow it to provide the government with a wireless priority access capability using off-the-shelf equipment in the near-term.[46] The NCS supports grant of the Petition to permit VoiceStream to immediately provide a wireless priority access service to NSEP. Until the development of GSM-based, commercially available handsets that allow VoiceStream to fully comply with the PAS Rules, the NCS supports the system proposed by VoiceStream to provide it with immediate use of wireless spectrum in the markets mentioned above, and potentially other metropolitan areas.[47]

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[39] *PAS R&O*, 15 FCC Rcd at 16721 ¶ 1 n.1 *citing* 47 U.S.C. § 151.

[40] *Id.* at 16721 ¶ 3.

[41] *Id.* at 16722 ¶ 4.

[42] CTIA Comments; GDDS Comments.

[43] GDDS Comments at 1.

[44] CTIA Comments at 1-2.

[45] Petition at 6.

[46] *Id.*

[47] NCS Statement at 3.

16. In its statement of support, NCS acknowledges its role, outlined in the PAS Rules, to provide the administrative framework and guidelines for the implementation and operation of PAS systems, including but not limited to the development of wireless priority processes and procedures, designating authorizing agents, and assigning priorities upon the request of the service user.[48] In light of NCS's responsibility to coordinate the planning for and provision of NSEP communications for the federal government, we continue to give great deference to the NCS with regards to its needs in this respect.[49] The NCS has indicated that it has an immediate need for wireless priority access in emergency situations in the wake of the experiences of September 11, 2001. We do not doubt the NCS imperative because we recognize that the important role of such communications in emergency situations is even greater post-September 11th. In addition, the NCS has identified three metropolitan areas in the nation in which such immediate access is paramount. We further recognize that the use of this means of PAS by NCS and VoiceStream will be limited in terms of duration.

17. We believe that several factors act in concert to make strict application of the per call invocation requirement of our Part 64 Rules unduly burdensome and contrary to the public interest in this situation. We find that the unprecedented, terrorist events of September 11, 2001, the subsequent request by NCS seeking proposals for immediate priority access service and the commercial unavailability of any means by which a GSM system can comply with the per call invocation requirement makes strict application of that requirement unduly burdensome and contrary to the public interest. We agree with CTIA that ensuring NCS access immediately to a wireless priority access service, even if limited in its capability, is in the public interest.[50] Further, the access that VoiceStream can provide in an emergency situation will likely alleviate some of the wireless network congestion that NSEP personnel experienced in the aftermath of the September attacks. We believe that having a communications capability as described by VoiceStream serves the public interest for the near term. Consequently, we believe that we should grant VoiceStream's Petition.

18. In the *PAS R&O*, the Commission noted the importance of limiting the effect on the general wireless user.[51] In that connection, we note, however, that this grant does not include waiver of the PAS Rule requiring the CMRS provider to ensure that at all times a reasonable amount of CMRS spectrum is made available for public use.[52] Further, we decline to grant a permanent waiver of our PAS Rules. As noted by the petitioner, the preferred technical solution allowing PAS to be offered in full compliance with our Rules is expected to be in place by December 31, 2002.[53] In addition to providing for immediate availability of some form of PAS, we seek to promote and facilitate implementation of uniform PAS systems as described in our Rules and as originally conceived by NCS. Consequently, while we will grant VoiceStream's request to voluntarily operate its wireless emergency system, the waiver will be effective only until notification by VoiceStream or NCS that the per call invocation feature can be commercially deployed on a GSM system; upon expiration or termination of the contract between VoiceStream and NCS, DynCorp or any other service integrator acting on behalf of NCS, to provide a wireless priority access capability; or by December 31, 2002, whichever is earliest. As with all network

[48] *Id.*

[49] *See also* CTIA Comments at 2, 4 (noting that NCS is the expert agency with respect to the federal government requirements for priority access).

[50] CTIA Comments at 3.

[51] *PAS R&O*, 15 FCC Rcd at 167xx, ¶ 32.

[52] 47 C.F.R. § 64.402, Appendix B.

[53] NCS Statement.

modifications and policies, we believe that carriers and consumers are best served by complete disclosure of all relevant terms and conditions of service.

19. Finally, we address VoiceStream's request for the same liability protection for its modified priority access service as the Commission set forth in the *PAS R&O*.[54] CTIA supports VoiceStream's request.[55] Section 202(a) of the Communications Act prohibits common carriers from making any unjust or unreasonable discrimination in charges, practices, classifications, facilities or services, from giving an undue or unreasonable preference or advantage, or from subjecting any person, class of persons or locality to any undue or unreasonable prejudice or disadvantage.[56] The Commission held in the *PAS R&O* that providing priority access to authorized NSEP users in accordance with our PAS Rules would be *prima facie* lawful under the Communications Act and not unreasonable discrimination or an unreasonable preference.[57] As we noted in the *PAS R&O*, Section 202 does not prevent carriers from treating users differently; it bars only unjust or unreasonable discrimination.[58] Therefore, liability protection extends to all carriers that do not unjustly or unreasonably treat users differently. Differentiation among users is lawful so long as there is a valid reason for the differentiation.[59] We stress that this liability protection extends only to Section 202(a) and not to any other rule or law. This *Memorandum Opinion and Order* is not evidence of compliance with any other obligation and should not be seen as indicating any general protection from liability under any other legal theory.

20. In the case of PAS, in emergency situations, non-NSEP customers simply are not "similarly situated" with NSEP personnel. NSEP personnel are attempting to save and protect lives and property, restore order, and restore critical services. The ability of NSEP personnel to communicate without delays during emergencies is essential. Similarly, within the NSEP community, the levels of priority set by the PAS Rules will delineate different types of customers which the carrier may appropriately treat differently in this regard. For example, NCS's proposed priority levels provide for federal defense personnel to receive priority over utility managers. In a national emergency the ability of federal personnel to access the wireless channels is imperative. A CMRS provider therefore does not violate the Communications Act by offering federal users the ability to achieve that access. In this case, VoiceStream may treat NSEP personnel differently from their other customers because there is a valid reason for doing so. Accordingly, VoiceStream, and similarly situated carriers, are entitled to the same liability protection set forth in paragraphs 22-24 of the *PAS R&O* for purposes of providing immediate, short-term priority access to NSEP personnel.

IV. CONCLUSION

21. We, therefore, conclude that grant of the VoiceStream Petition is in the public interest and grant VoiceStream a limited and temporary waiver of the per call invocation requirement until notification by VoiceStream or NCS that the per call invocation feature can be commercially deployed on a GSM system, upon expiration or termination of the contract between VoiceStream and NCS, DynCorp

[54] Petition at 4-5.

[55] CTIA Comments at 3-4.

[56] 47 U.S.C. § 202(a).

[57] *PAS R&O*, 15 FCC Rcd at 16730-31 ¶ 23.

[58] *Id.*; Investigation of Special Access Tariffs of Local Exchange Carriers, Tentative Decision, CC Dkt. No. 85-166, 8 FCC Rcd 1059, 1079 ¶ 135 (1993); MTS and WATS Market Structure, *Third Report and Order*, CC Dkt. No. 78-72, 93 FCC2d 241, 271 ¶ 97 (1983).

[59] *See PAS R&O*, 15 FCC Rcd at 16730-31 ¶ 23.

or any other service integrator acting on behalf of NCS, to provide a wireless priority access capability; or by December 31, 2002, whichever is earliest. We also recognize that other CMRS providers may be interested in providing a type of priority access other than that currently provided for under our Part 64 Rules.

V. ORDERING CLAUSE

22. Accordingly, pursuant to Sections 1 and 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, IT IS ORDERED that the Petition for Waiver of Section 64.402 of the Commission's Rules filed by VoiceStream Wireless Corporation on November 28, 2001 IS GRANTED to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

STATEMENT OF COMMISSIONER
MICHAEL J. COPPS
Approving in Part and Dissenting in Part

RE: VoiceStream Wireless Corporation – Petition for Waiver of Section 64.402 of the Commission's Rules.

The very first line of the Communications Act explains the Commission's public safety responsibility. It states that the Commission was created:

> "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, *for the purpose of the national defense, [and] for the purpose of promoting safety of life and property through the use of wire and radio communication . . .*"[60]

We therefore have the responsibility to make our communications system an effective tool in times of national emergency. The attacks that occurred on September 11 highlighted both the immediacy of the need for such preparation, and the utility of effective communications networks. I believe that our government and our communications industries acted admirably, and even heroically, during and after the attack. They allowed us to fight the fear of terror with the power of communications, and they should be commended.

Establishing a well-conceived priority access service ("PAS") promotes public safety. I therefore support the Commission's granting of a temporary waiver to VoiceStream of portions of our previously established PAS rules. This waiver will allow the National Communications System ("NCS") and VoiceStream to put a working PAS in place while a fully compliant system is constructed.

Protecting the public safety, however, extends beyond establishing priority use of our networks for high government officials and public safety personnel. We also have the responsibility to protect all our citizens' use of the wireless network. In emergencies the wireless calls of regular Americans are critical. People from all walks of life provide information about attacks or disasters to the government and must be able to call 911 or other emergency responders to protect their families and fellow citizens before government officials arrive. Furthermore, we should never discount the importance of keeping the channels of communication open to all of our citizens insofar as it is possible to do so. All of us should understand the implications of a PAS. We should know whether our carrier's PAS will reduce our ability to complete calls in an emergency. The Commission therefore should have required VoiceStream to disclose to its customers the effect the PAS will have on the ability of those Americans *not* on a PAS list to make calls during an emergency. This waiver does not do so. Therefore, I dissent to this portion of the item.

A Temporary Waiver Will Protect Public Safety

Sometimes meeting our responsibility to make our networks effective tools for promoting the national defense and public safety requires extraordinary actions. One such action is the creation of wireless PAS. The NCS requested in 1995 that the Commission implement wireless PAS. NCS explained that persons involved in national defense and public safety must be sure that they can make wireless telephone calls without fear that congestion of the network would make completing such calls

[60] 47 U.S.C. § 151 (italics added).

difficult. The Commission initiated a rulemaking and released a Report and Order in 2000 creating rules for a wireless PAS system.[61]

I believe that the Commission has a special responsibility to protect public safety, and I support the creation of wireless PAS. A well-functioning PAS can make the wireless system a powerful tool in the hands of senior government officials and emergency responders. The ubiquity and ease-of-use of the wireless system is a great asset, and we should put it to work for the American people in emergencies. In such emergencies, above-average use of the system overloads the network, rendering it less useful for everyone. For these situations, the government could assign a portion of its spectrum for an emergency network that does not piggyback on the public network. If it does not, we must try to devise a system where critical government users can depend on the public network for near-certain call completion. If we cannot do this we will not be able to rely on the public wireless network for this task.

As described in today's Order, the VoiceStream PAS promises to make their network available to government users at all times. For this reason, I commend VoiceStream for being the first carrier to implement a PAS. I believe that it is important that VoiceStream meet our full PAS rules as soon as possible. Because of the special circumstances created by the attacks of September 11th, however, I support a temporary waiver of our rules to ensure that a system can be put in place as soon as possible, while a completely compliant solution is in the works. I also support a more universal examination of PAS by the Commission to begin as soon as possible, in light of the new public safety environment.

We Should Have Provided All the Facts to the American People

It is legitimate to create a PAS that recognizes that some communications between high government officials and emergency responders must get through even if it means reducing the ability of the rest of us to complete calls. However, as we move ahead with such a system, we must ensure that all Americans fully understand the implications of the new system.

I would therefore require any carrier that implements a PAS to inform its customers of the creation of the system and the impact on its customers' ability to complete calls in an emergency. With this information our citizens can decide which carrier they are most comfortable with, and how much to rely on their wireless phone in an emergency. Our reliance on market forces to regulate carrier behavior in the largely unregulated wireless marketplace depends on consumers' ability to make informed decisions about their carrier. We must not "hide the ball" when it comes to PAS. Consumer anger will be overwhelming if the first time consumers learn that a PAS has reduced their chance of completing a call is in the aftermath of an emergency. Our citizens deserve to be fully informed ahead of time.

In other areas we do not require carriers to disclose every action that has an impact on their service. But PAS is obviously a special circumstance. First, we are dealing with critical public safety situations here, and with potentially life-threatening national emergencies where people will depend on their wireless phone as a lifeline. When dealing with PAS we address far, far more important circumstances than we do when we decide not to require the disclosure of other everyday carrier decisions that affect service. Second, I believe that there is no way that even a diligent consumer can understand the implications of PAS on their service without carrier disclosure. Without a requirement to disclose the impact of PAS, carriers have the perverse incentive to avoid determining the exact implications of PAS, to downplay the impact of PAS, or to hide the existence of PAS from consumers. This does not promote public safety.

[61] *The Development of Operational, Technical and Spectrum Requirements for Meeting Federal, State and Local Public Safety Agency Communication Through the Year 2010, Second Report and Order*, 15 FCC Rcd 16720 (2000) ("*PAS 2d. R&O*").

Finally, some argue that PAS will have little, if any, impact on consumers' use of their systems, and that informing consumers will only scare them into avoiding carriers with a PAS. They argue that consumers already have little chance of completing a call in an emergency, and that PAS will reduce this chance by only a small amount. If that is the case, then disclosing the impact of PAS to consumers should not dissuade consumers from signing up with a carrier. If PAS is not a threat, then why not inform customers? If, on the other hand, PAS turns out to seriously undermine customer use of the network in an emergency, and this causes customers to avoid particular carriers, why would we want to protect carriers from this appropriate market response? Carriers faced with customers who are informed about PAS will have an incentive to design a PAS that achieves maximum utility for both the government and consumers – the efficient outcome.

Furthermore, it is important to note that today's Order leaves unresolved the question of how much service degradation can be caused by PAS before our rules are violated. While a carrier may claim to keep consumer impact to an additional 1 or 2 percent reduction in call completion, our Order does not indicate whether a carrier would violate our rules if this reduction turns out to be 10 or 20 percent. Such a clarification is much needed. In the *PAS R&O* we noted the importance of a PAS resulting in "only a minimal effect on the general wireless user."[62] Today's Order reiterates that our rule that "[s]ervice providers who offer any form of priority access service shall . . . [i]nsure that at all times a reasonable amount of CMRS spectrum is made available for public use."[63] I believe that this rule means that if a carrier effectively denies its customers access to wireless service that it has violated our PAS rules and is no longer protected from liability under Section 202(a). An upcoming PAS review by the Commission should clarify how our existing rules operate.

Conclusion

Protecting the public safety is a primary responsibility of the Commission. I believe that establishing a well-conceived PAS promotes the public safety, so I agree with our decision to grant a temporary waiver of our rules so that a PAS can be put in place while a fully compliant system is constructed.

I also believe, however, that protecting the public safety extends to giving all Americans the information we need to protect ourselves. The Commission should have required VoiceStream to disclose to its customers the fact that it is instituting a PAS and to disclose the effect of the PAS on consumers' ability to make calls during an emergency. It is this lack of basic disclosure that forces my dissent to this portion of the waiver.

[62] *PAS 2d. R&O* at ¶ 32.

[63] 47 C.F.R. § 64.402, Appendix B.

SEPARATE STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: *In the Matter of Voicestream Wireless Corporation Petition for Waiver of Section 64.402 of the Commission's Rules,* WT Docket No. 01-333

We cannot underestimate the importance of public safety and national security operations. Emergency response service providers at the federal, state and local levels require instant, reliable, unfettered mobile voice access in times of crises. Priority Access Service will be critical in helping to meet the country's communications needs related to national security and emergency preparedness. It will further the Commission's statutory mandate to "make available ... a rapid, efficient Nationwide ... communication service ... for the purpose of national defense, [and] for the purpose of promoting safety of life and property[.]"[64] PAS also demonstrates how technological advances are allowing increasingly efficient use of spectrum. During crisis situations, a higher valued use of the spectrum prevails, without having to dedicate those frequencies for emergency services all of the time.

Although I approve this item, one aspect of the PAS rules does give me pause. Activation of PAS may cause a decrease in the availability of service for "non-priority" customers during times when they may need or want their service the most. While the PAS rules do not require carriers to notify their customers when they have entered into such agreements, this Order emphasizes that carriers and consumers are best served by complete disclosure of all relevant terms and conditions. I also encourage PAS carriers to inform their customers when they have entered into such arrangements. It is good business practice to provide such notification to customers. Indeed, responsible carriers typically inform their customers of such changes to their service, and clearly indicate the limitations of any service they offer.

Moreover, while this Order exempts carriers from the prohibition against unjustly or unreasonably providing preferences to any particular class of persons, it does nothing with respect to the prohibition against unjust or unreasonable practices. Thus, customers will still have recourse under the section of the Communications Act prohibiting unjust or unreasonable practices. Customers may also have private contractual remedies, as well as state remedies. Accordingly, I feel comfortable supporting this limited waiver of the PAS rules.

[64] 47 U.S.C. § 151.