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

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

COMMENTS OF THE CELLULAR TELECOMMUNICATIONS & INTERNET ASSOCIATION

The Cellular Telecommunications & Internet Association ("CTIA")[1] hereby submits the following comments in support of the Petition for Reconsideration filed by ALLTEL Communications, Inc.[2] and the Joint Petition for Reconsideration filed by Dobson Cellular Systems, Inc. and American Cellular Corporation[3] (collectively "Petitions" or "Petitioners") of the Commission's July 26, 2002, *Order to Stay*[4] in the above-referenced proceeding.

CTIA opposes a "strict liability" enforcement standard that would penalize wireless carriers for failure to comply with the Commission's E911 deployment rules for

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[1] CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers all Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

[2] *See* ALLTEL Communications, Inc. Petition for Reconsideration (filed Aug. 26, 2002) (hereinafter "ALLTEL Petition").

[3] *See* Dobson Cellular Systems, Inc. and American Cellular Corporation Joint Petition for Reconsideration (filed Aug. 26, 2002) (hereinafter "Joint Petition").

[4] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, Order to Stay*, CC Docket No. 94-102, FCC 02-210 (rel. July 26, 2002) (hereinafter "*Order to Stay*").

reasons beyond their control. As detailed in the Petitions, many small wireless carriers are having difficulty complying with certain E911 Phase II implementation deadlines due to vendor or other supplier inability to supply compliant products, and through no fault of their own. In these situations, a strict liability standard violates both the strictures of the Communications Act of 1934, as amended (the "Act"), as well as past Commission precedent. Accordingly, CTIA urges the Commission to modify the enforcement provisions of the *Order to Stay*.

I. CMRS Carriers Face A Number of E911 Phase II Implementation Barriers That Are Completely Beyond Their Control

As CTIA has noted in previous filings with the Commission, CMRS carriers currently face a number of E911 Phase II deployment barriers that are completely beyond a carrier's control.[5] As further detailed below, these barriers include vendor failure to provide compliant products in a timely manner and LEC intransigence in providing necessary upgrades to a Public Safety Answering Point ("PSAP") when a valid Phase II implementation request is made.

Both ALLTEL and Dobson/ACC note in their respective Petitions that a number of carriers, and in particular small carriers, face serious vendor problems in obtaining

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[5] *See* Letter from Michael Altschul, Senior Vice President and General Counsel, CTIA to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sept. 12, 2002) (detailing LEC and vendor readiness problems that threaten wireless carriers' ability to comply with E911 Phase II implementation deadlines); Letter from Christopher R. Day, Staff Counsel, CTIA to Marlene H. Dortsch, Secretary, Federal Communications Commission (filed Sept. 17, 2002) (attaching a PowerPoint presentation detailing LEC delays and excessive charges that impair E911 Phase II implementation by wireless carriers).

sufficient Phase II handsets ands other compliant equipment.[6] In fact, the Commission expressly recognized these provisioning delays in the *Order to Stay*, where it noted that "[n]ationwide carriers' deployment schedules have created downstream delays for Tier II and Tier III carriers."[7] Unfortunately, under the Commission's apparent strict liability enforcement policy, Tier II and Tier III carriers can be held liable for vendor provisioning delays, even though the Commission has expressly acknowledged that such delays may be unavoidable for small carriers.

Furthermore, CTIA notes that Phase II implementation delays are also occurring due to LEC refusal to make certain services required for Phase II functionality available to wireless carriers. For example, at least one LEC is denying service to CMRS carriers while it awaits resolution of its attempt to require wireless carriers to execute a "E911 Phase II Interface Agreement" under which a wireless carrier would be charged $0.63 cents for every Automatic Location Identification ("ALI") database dip,[8] even thought the Commission expressly allocated ALI database costs to PSAPs in the *King County* decision.[9] In addition, another LEC has refused to provide necessary Phase II services in

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[6] *See* Joint Petition at 2-3 ("Small and mid-sized carriers in particular lack the market power to affect manufacturers' and vendors' commitments to deliver compliant equipment and software."); Dobson Petition at 1-3.

[7] *Order to Stay* at ¶ 11.

[8] *See* Letter from Luisa L. Lancetti, Vice President, Regulatory Affairs, Sprint PCS to Magalie R. Salas, Secretary, Federal Communications Commission (filed Aug. 13, 2002) (attaching a copy of BellSouth's proposed "Wireless E-911 Phase II Interface Agreement for Wireless Service Providers" that attempt to levy a $0.63 charge "per update of Wireless location information in the BellSouth ALI database using the E2 Connectivity interface").

[9] *See* Letter from Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau to Marlys R. Davis, E911 Program Manager, King County, Washington (dated May 7, 2001) (stating that PSAPs "must bear the costs of maintaining and/or upgrading the E911

the absence of a tariff covering such services, but has also made no effort to actually issue such a tariff.[10]

These vendor delays and LEC refusals to provide necessary Phase II implementation services have placed a number of Tier II and Tier III carriers in a position where Phase II implementation is impossible due to no fault of their own. In this situation, CTIA strongly agrees with the Petitioners that strict liability enforcement actions are manifestly unfair.

II. The Strict Liability Enforcement Standard Violates the Plain Language of the Communications Act and Ignores a Long Line of Commission Precedent

A. The Strict Liability Standard Ignores Section 504 of the Act

In addition to the basic issue of fairness, CTIA also believes that fundamental principles of due process, as well as the Communications Act itself, mandate that the Commission provide notice and opportunity to challenge any Commission finding of noncompliance. Specifically, Section 504(b)(4) of the Act states that: "[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;

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components and functionalities beyond the input to the 911 Selective Router, including the 911 Selective Router itself, the trunks between the 911 Selective Router and the PSAP, the Automatic Location Identification (ALI) database, and the PSAP customer premises equipment (CPE)"), *aff'd on recon., Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order on Reconsideration*, CC Docket No. 94-102, FCC 02-146, at ¶ 1 (rel July 24, 2002).

[10] *See* Letter from John T. Scott, III, Vice President and Deputy General Counsel, Verizon Wireless to Marlene H. Dortch, Secretary, Federal Communications Commission, at 6 (filed Aug. 19, 2002) (noting that both Qwest and SBC are conditioning Phase II upgrades on the approval of state wholesale tariffs for such services).

[and] such person is granted an opportunity to show, in writing . . . why no such forfeiture penalty should be imposed."[11]

The plain language and statutory command of Section 504(b)(4) cannot be countenanced with the strict liability language contained in the *Order to Stay*, which states that "an assertion that a vendor, manufacturer, or other entity was unable to supply compliant products will not excuse noncompliance," and that such factors may *only* be considered as "possible mitigation factors in such an enforcement context."[12] In fact, the statute clearly states that carriers must be granted an opportunity to show why a forfeiture should not be imposed, and does not impose any limitation on a carrier's right to rebut a Commission finding of apparent liability.[13] Accordingly, on the basis of the statutory language alone, CTIA urges the Commission to modify the strict liability language in the *Order to Stay*.

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[11] 47 U.S.C § 504(b)(4).

[12] *Order to Stay* at ¶ 37.

[13] *See* 47 U.S.C. § 504(b)(4); *see also Liability of Altavista Broadcasting Corp., Licenses of Station WKDE, Altavista, Va., For Forfeiture, Memorandum Opinion and Order*, 2 F.C.C. 2d 445, at ¶ 7 (1966).

> The purpose of the notice of apparent liability is to inform the licensee of the apparent violation 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.'

Id.

B. Commission Precedent and Basic Principles of Administrative Law Require That Carriers Be Allowed an Opportunity to Address a Possible Enforcement Action or Forfeiture

In addition to the statutory mandate of due process contained in Section 503 of the Act, CTIA also agrees with the Petitioners that Commission precedent and basic principles of administrative law require the Commission to provide "meaningful 'safety valve' procedures" in cases where a carrier cannot comply with Commission rules.[14] In a number of past cases, the Commission has waived its rules or suspended enforcement actions where the unavailability of necessary equipment made compliance with a rule or mandate impossible.[15] In the instant case, Tier II and Tier III carriers should, at a very minimum, have the opportunity to explain any noncompliance with the E911 Phase II mandates, and allow the Commission to re-examine its enforcement position if compliance is impossible due to outside forces.

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[14] Joint Petition at 6.

[15] *See, e.g. Verizon Wireless's Petition for Partial Forbearance from the Commercial Radio Services Number Portability Obligation, Memorandum Opinion and Order*, WT Docket No. 01-184, CC Docket No. 95-116, FCC 02-215, at ¶ 25 (rel. July 26, 2002) (granting a one-year extension of LNP implementation deadline due to record evidence showing that "delays in the delivery of switch software by some vendors have compressed the LNP implementation schedule"); *Earth Watch, Inc., Order and Authorization*, 15 FRCC Rcd 18725, 187272 (2000) ("Generally, we grant [construction] milestone extensions only for circumstances beyond the control of the license. For example, we have found in the past that unanticipated technical problems can justify a milestone extension.").

CONCLUSION

For the foregoing reasons, CTIA respectfully requests that the Commission grant the Petitions for Reconsideration of the *Order to Stay*.

Respectfully submitted,

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Dated: October 16, 2002