

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

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In the Matter of)
)
)
Revision of the Commission's)
Rules to Ensure Compatibility)
with Enhanced 911 Emergency)
Calling Systems)
)

CC Docket No. 94-102

JOINT COMMENTS OF NEXTEL COMMUNICATIONS, INC.
AND NEXTEL PARTNERS, INC.

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SUMMARY

Pursuant to the September **16,2002** Public Notice of the Federal Communications Commission (“Commission” or “FCC”), Nextel Communications, Inc. and Nextel Partners, Inc. (collectively, “Nextel”) submit these comments in response to the reconsideration petitions filed by ALLTEL Communications, Inc., Dobson Cellular Systems Inc., and American Cellular Corporation (collectively, “Petitioning Carriers”). The Petitioning Carriers seek reconsideration of the Commission’s decision to improperly impose a strict liability standard if certain Phase II Enhanced **911** (“E911”) implementation benchmarks cannot be achieved.

The Commission’s decision to discipline wireless carriers if they do not achieve the FCC’s Phase II implementation benchmarks, even if failure to achieve those benchmarks results from the actions of third parties (*e.g.* vendors, local exchange carriers (“LECs”) or public safety answering points (“PSAPs”)) over which the carriers have no control, violates the Communications Act and the Administrative Procedures Act (“APA”). Under the Communications Act, as amended, the Commission is authorized to penalize a carrier that does not comply with a FCC order only if the carrier’s action is willful. The Commission has recognized that an action is *not* willful if it “involved unavoidable circumstances.” Because the success of Phase II deployment is, to a large extent, beyond the control of wireless carriers, the Commission has improperly prejudged a carrier’s potential inability to comply by imposing a strict liability standard for actions that are not willful. Additionally, the Commission’s imposition of strict liability violates Section 553 of the APA by imposing a new standard without proper notice and comment procedures or establishing a record. For these reasons, the Commission must reconsider its decision.

A strict liability standard for Phase II compliance is not only unlawful, but also disserves the public interest by impeding the one avenue through which Phase II E911 will be most rapidly deployed: cooperation. Successful resolution of the many factors currently slowing Phase II deployment requires close coordination among the wireless carrier, third party vendors, the LEC and the PSAP. Public safety officials recently proffered such a cooperative approach as a means for facilitating more rapid Phase II deployment. Nextel applauds these public safety organizations for acknowledging that any number of factors can affect a particular PSAP's deployment and agrees that all stakeholders must cooperate in good faith to resolve the numerous hurdles now facing Phase II deployment. The Commission's strict liability standard is wholly at odds with this reality and would not promote Phase II implementation.

Finally, the Commission's unsupported decision to divide CMRS carriers into classes for Phase II compliance violates the APA because the Commission offered no notice or opportunity for comment and failed to establish a record upon which to base its decision. Its failure to comply with these APA requirements and to adequately explain its decision to single out "large" carriers for different treatment than "small" and "mid-sized carriers is arbitrary and capricious and does not withstand legal scrutiny.

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Pursuant to the September 16, 2002 Public Notice of the Federal Communications Commission (“Commission” or “FCC”),¹ Nextel Communications, Inc. and Nextel Partners, Inc. (collectively, “Nextel”) submit these comments in support of the reconsideration petitions filed by ALLTEL Communications, Inc., Dobson Cellular Systems Inc., and American Cellular Corporation (collectively, “Petitioning Carriers”).² The Petitioning Carriers assert that the Commission’s July 26, 2002, Order to **Stay** improperly imposes a strict liability standard on the Petitioning Carriers if certain Phase II implementation benchmarks cannot be achieved and, therefore, request Commission reconsideration of that decision.³

I. INTRODUCTION

On July 26, 2002 the Commission released an *Order to Stay* that, with certain conditions, stayed wireless enhanced 911 (“E911”) Phase II deployment deadlines for certain commercial

¹ Public Notice, Wireless Telecommunications Bureau Seeks Comment On Petitions For Reconsideration Regarding Order To Stay E911 Phase II Rules For Small Carriers, DA 02-2285 (Sept. 16, 2002).

² *ALLTEL Communications, Inc. Petition for Reconsideration*, CC Docket No. 94-102 (Aug. 26, 2002); *Dobson Cellular Systems Inc. and American Cellular Corporation Joint Petition For Reconsideration*, CC Docket No. 94-102 (Aug. 26, 2002) (hereinafter, collectively “*Reconsideration Petitions*”).

³ See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Order to Stay* (July 26, 2002) (hereinafter “*Order to Stay*”).

mobile radio service (“CMRS”) carriers! The Commission based its decision, in part, on the inability of vendors to provide timely delivery of Phase II compliant location technology to these CMRS carriers, defined by the Commission as small and mid-sized wireless carriers. The Commission noted that this relief was similar to waivers that previously had been granted to nationwide wireless carriers that also had experienced Phase II technology delays.’ In the *Order to Stay*, the Commission created new classifications for imposing its Phase II obligations on nationwide, mid-sized and small carriers, and classified them as Tier I, Tier II and Tier III carriers respectively.⁶

In establishing benchmark deadlines for the Tier II and Tier III carriers, the Commission stated that they would be deemed noncompliant and subject to possible enforcement action for failure to satisfy any condition or Commission rule, including the Phase II benchmark implementation dates, set forth in the *Order to Stay*.⁷ A carrier deemed noncompliant would be referred to the Commission’s Enforcement Bureau regardless of whether noncompliance resulted from a third party’s inability to supply compliant products—a factor over which the carrier may have no control.⁸ The Commission, however, indicated that this circumstance might be recognized as a possible mitigation factor in an enforcement proceeding.⁹

⁴ *Id.*

⁵ *Id.* at ¶¶7, 8.

⁶ *Id.* at ¶¶19-24 (discussing the creation of a three-tiered approach to Phase II implementation).

⁷ *Id.* at ¶36.

⁸ *Id.* at ¶37.

⁹ *Id.*

The Petitioning Carriers assert that this language imposes a strict liability standard that prejudices the facts and circumstances that may exist at the time benchmark deadlines arrive.” As a result, non-nationwide wireless carriers that miss Phase II benchmarks because of handset and/or network equipment manufacturer or other vendor delays, even though outside the carrier’s control, would not be afforded a meaningful opportunity to demonstrate why noncompliance should be excused before being referred to the Enforcement Bureau.

Accordingly, the Petitioning Carriers request the Commission to reconsider the strict liability standard that has been created for small and mid-sized wireless carriers’ Phase II deployment efforts. Herein, Nextel supports the Petitioning Carriers’ request.

II. BACKGROUND

On October 12,2001, the Commission granted Nextel’s request for a waiver of certain Phase II E911 requirements, allowing the phased deployment of an assisted Global Positioning Satellite (“A-GPS”) technology to provide Phase II E911 service.” The Commission indicated, however, that it would institute enforcement action against Nextel **if** it failed **to** meet the dates set forth in *Nextel’s Waiver Order*,¹² similar to the noncompliance conditions it recently imposed upon the Tier II and Tier III carriers.

¹⁰ See *Reconsideration Petitions*. See, e.g., *AUTEL Communications, Inc. Petition for Reconsideration*, CC Docket No. 94-102 at pp. 4-5 ; *Dobson Cellular Systems Inc. and American Cellular Corporation Joint Petition For Reconsideration*, CC Docket No. 94-102 at pp. 2-4.

¹¹ See *Nextel Waiver Order*, CC Docket No. 94-102 (October 12,2001) (hereinafter “*Nextel Waiver Order*”). Specifically, the Commission approved the following schedule for Nextel:

October 1, 2002:	Begin selling and activating A-GPS-capable handsets;
December 31,2002:	At least 10%of all new handsets activated are A-GPS-capable;
December 1,2003:	At least 50%of all new handsets activated are A-GPS-capable;
December 1, 2004:	100% of all new handsets activated are A-GPS-capable;
December 31,2005:	95% of all subscriber handsets in service are A-GPS-capable.

Id. at ¶37.

¹² *Id.* at ¶36.

On November 13, 2001, Nextel and its affiliate Nextel Partners, Inc. filed a *Joint Petition for Clarification and Partial Reconsideration* asserting that in the *Nextel Waiver Order* the Commission improperly predetermined that it would institute enforcement action against Nextel in the context of any potential, future E911 Phase II waiver requests. As written, the Commission's language indicated an intention to institute automatic enforcement action against Nextel if, for any reason, it missed a compliance date and filed an additional waiver request. Similar to the Petitioning Carriers' arguments, Nextel claimed that this language effectively denies it the opportunity at a future date to argue that a waiver is warranted under circumstances that may be outside of Nextel's control or are the result of changed circumstances. Nextel reiterates herein that the Commission's apparent intention to prejudge future compliance issues and/or waiver requests is not legally permissible and is not in the public interest. Additionally, the Commission's decision to divide CMRS carriers into different classes with differing deadlines was made without any notice or opportunity for comment in violation of the Administrative Procedures Act ("APA").

111. DISCUSSION

A. THE COMMISSION DOES NOT HAVE AUTHORITY TO IMPOSE A STRICT LIABILITY STANDARD

The Communications Act, as amended (the "Act"), authorizes the Commission to discipline a carrier that does not comply with a FCC order only if the carrier's action is **willful**.¹⁴ Willful is defined by the Act as "the conscious and deliberate commission or omission of [an] act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the

¹³ *Joint Petition for Clarification and Partial Reconsideration of Nextel Communications, Inc. and Nextel Partners, Inc.* CC Docket No. 94-102 (filed November 13, 2001) (hereinafter, "*Nextel Petition for Reconsideration*").

¹⁴ See 47 U.S.C. § 503(b)(1)(B). See also, 47 U.S.C. § 503(b)(1)(C) and *(D) Stratus Communications, Inc. v. FCC*, 530 F.2d 1001, 1007 n.10 ("forfeiture applies only to willful and repeated violations").

Commission.”¹⁵ “Mere ‘violations of Commission policy’” are not necessarily willful or repeated violations of the Act.¹⁶ The Commission has recognized that an action is not willful if it “involved unavoidable circumstances.”¹⁷ Furthermore, the Supreme Court has defined willful to be “voluntary” or “intentional.””

Although the Commission’s Phase II E911 rules apply only to CMRS carriers, a number of parties are essential to successful and timely deployment of Phase II service. Wireless carriers depend on third parties (e.g., E911 vendors, local exchange carriers (“LECs”), third party system administrators and location database administrators, and handset and infrastructure vendors) to provide Phase II network infrastructure, handset and database capabilities, and to successfully integrate these varying networks and location information components. Specifically, LECs must upgrade their infrastructure, including any automatic location identification (“ALI”) databases they control, and coordinate their trunking and other connectivity between the PSAP and third party vendors to facilitate the delivery of a caller’s Phase II location information.¹⁹ Likewise, a

¹⁵ 47 U.S.C. § 312(f)(1). When Congress included the definition of “willful” in the Act, it made clear that the definition applied to Section 503. *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, 4387-88, ¶ 5 (1991) (citing H.R. REP. NO. 97-765, 97th Cong. 2d Sess. 51 (1982)).

¹⁶ *New Jersey Coalition for Fair Broadcasting v. FCC*, 580 F.2d 617, 619 n.3 (1978) (quoting *Agreements Between Broadcast Licensees and the Public*, Report and Order, 57 FCC 2d 42, 52, ¶ 32 (1975) (“*Agreements Between Licensees and the Public*”)).

¹⁷ *Southern California Broadcasting Co.*, 6 FCC Rcd 4387, ¶ 4 (citing *Vernon Broadcasting, Inc.*, 1986 FCC Lexis 3189 (1986)). In *Vernon Broadcasting*, the Commission found that although the licensee had violated the rules concerning fencing around a radio tower, the violation was not willful because the licensee had inspected the fence line but the fence line had been vandalized. *Vernon Broadcasting* at ¶ 3. The licensee in *Vernon Broadcasting* could not control the acts of vandalism done by third parties, much like Phase II carriers cannot control the actions of third parties that are integral in their compliance with the rules.

¹⁸ *Kawaauhau v. Geiger*, 523 U.S. 57, 61 n.3 (1998) (quoting BLACK’S LAW DICTIONARY 1434 (5th ed. 1979)).

¹⁹ Other issues with LECs also can impact deployment of Phase II service. PSAPs obtain ALI database services from LECs and, consequently, PSAPs cannot request and receive Phase II location data without ALI database functionality. During the week of July 15, 2002 Nextel was informed that BellSouth would not upgrade for Phase II E911 service until Nextel agreed to pay BellSouth \$.63 per each rebid updating the ALI database that occurs during a 911 call. BellSouth’s attempt to leverage the Commission’s wireless E911 Phase II requirement to assess wireless carriers for these ALI database activities is inconsistent with the Commission’s decision in *King County* and, therefore, unacceptable to Nextel. See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Order on Reconsideration* (July 24, 2002) (reaffirming the

PSAP must upgrade to equipment capable of receiving and utilizing Phase II location information, which must be synchronized with LEC facilities, third party vendor's facilities and the wireless carrier's network. Third party vendors, which often manage the ALI database for the LEC and manage the wireless national ALI ("WNALI") database, also must coordinate the interconnectivity of their infrastructure and equipment with the wireless carrier, LEC and PSAP to enable successful end-to-end connectivity and delivery of Phase II information to a PSAP.

Further complicating the end-to-end connectivity described above is the reality that each Phase II deployment may be different than the one before it. Thus, ensuring that each of these parties has the necessary equipment and infrastructure in place and that the connectivity between those varying pieces is properly synchronized and stabilized can make coordinating the various components a lengthy and complex process. In many cases, a CMRS carrier's best efforts cannot control the activities, operations and capabilities of these other parties. Thus, under these circumstances, a carrier's missed deadline is neither a voluntary nor "conscious and deliberate." On the contrary, carriers are making deliberate and conscious efforts to comply with the Phase II requirements, but have been held up *involuntarily* by various setbacks that often include the activities of various third parties. Thus, automatically penalizing CMRS carriers, whether Tier I, Tier II or Tier III, for delays caused by the actions or inactions of other parties violates Section 503(b)(1)(B) of the Act.

Moreover, the Commission's strict liability standard violates the APA. Having not addressed this standard previously in a full notice and comment proceeding, the Commission

Wireless Telecommunications Bureau decision "identifying the 911 Selective Router as the demarcation point for allocating Enhanced 911 implementation costs between wireless carriers and PSAPs"). BellSouth subsequently informed the Commission it had reduced the wireless carrier charge to \$.11 per call and that it would test with carriers in certain South Carolina markets if wireless carriers would sign an agreement accepting this ALI database "service" from BellSouth. See letter from Kathleen B. Levitz to Marlene H. Dortch, CC Docket No. 94-102, (September 18, 2002). Because BellSouth's position contravenes *King County*, Nextel has been unable to move forward in BellSouth markets to date.

violated Section 553 of the APA by imposing a new standard in a proceeding on a waiver request? Section 553 requires agencies to follow prescribed notice and comment procedures prior to adopting revisions to substantive rules.²¹ Although Section 553(b) exempts “general statements of policy” and “interpretive rules” from these requirements,²² this exception applies only to actions that are (i) prospective (*i.e.*, have no present, binding effect); and (ii) leave the agency and its decision-makers free to exercise discretion.²³ Neither criteria is satisfied in this case.

In the E911 Phase II *Fourth Memorandum Opinion and Order*, the Commission stated “in considering the appropriateness of enforcement actions, we will take into account the extent to which carriers have made concrete and timely efforts to comply and to which their failure to do so was the result of factors beyond their control.”²⁴ Now the Commission is subjecting carriers immediately to enforcement action if a subsequent waiver request is necessary, regardless of the circumstances at the time of the waiver request.

With respect to Phase II E911 deployment, the 553(b) exception for “general statements of policy” would only be applicable if the Commission left itself discretion to provide relief, in

²⁰ In deciding to adopt strict liability standards in other proceedings, the Commission has done so through a complete notice and comment rulemaking. Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers, *Second Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC 1508 (1998) (adopting a “strict liability standard, in which a carrier would be liable for slamming if it was responsible for an unauthorized change, regardless of whether the unauthorized carrier did so intentionally”).

²¹ 5 U.S.C. § 553(b).

²² 5 U.S.C. § 553(b)(A)

²³ See *Am. Bus. Ass’n v. United States*, 627 F.2d 525, 529 (D.C. Cir. 1980) (finding that an agency’s policy did not qualify as a general statement of policy because it vested immediate rights and the agency regarded it as binding). See also *National Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987) (“[A]n interpretative rule does not have the force of law and is not binding on anyone.”) (emphasis added). The Commission’s decision not to consider the unavailability of compliant equipment is binding on the Commission and thus is not merely an interpretative rule, but rather a substantive rule.

²⁴ 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, 17458 ¶45 (2000) (hereinafter, “*Fourth MO&O*”).

appropriate circumstances, for carriers' inability to fulfill any part of their Phase II deadlines. Because the Commission does not appear to have retained such discretion in this case, its Orders on Tier I, Tier II and Tier III carriers' compliance plans violate the notice and comment requirements of the APA. First, the Commission's enforcement statement in the *Order to Stay* and the *Nextel Waiver Order* constitutes a present determination that CMRS carriers will be subject to enforcement action if they file future waiver requests. Second, given the plain meaning and imperative language used by the Commission in the *Order to Stay* (e.g., "it *will* be deemed noncompliant" (emphasis added); the unavailability of compliant equipment "*will nor* excuse noncompliance" (emphasis added))?" its statements "[are] in purpose [and] likely effect one[s] that narrowly limit administrative discretion" and, as such, must be treated as "a binding rule of substantive law" rather than as **discretionary**.²⁶

Because the language adopted by the Commission has a present, binding effect that severely curtails its discretion to make future decisions, the imposition of strict liability is not a general statement of policy that is exempt under Section 553 of the APA. This substantive revision of Phase II implementation rules was adopted without requisite notice and comment procedures. As a result, the Commission should reconsider its decisions, or clarify that it did not impose a strict liability standard on wireless carriers.

B. A STRICT LIABILITY POLICY WOULD VIOLATE THE FCC'S WAIVER PRECEDENT ESTABLISHED IN THIS PROCEEDING

In the E911 Phase II *Fourth Memorandum Opinion and Order*, the Commission recognized that there might be instances in which "technology-related issues" or "exceptional circumstances" make it impossible for a wireless carrier to deploy Phase II in the required time

²⁵ *Order to Stay* at ¶ 37.

²⁶ *Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Ins. Co.*, 589 F.2d 658, 666-67 (D.C. Cir. 1978).

frames and that individual waivers could be granted in these **circumstances**.²⁷ Furthermore, the Commission stated that it “expects wireless carriers to work aggressively with technology vendors and equipment suppliers to implement Phase II” and continued that, with respect to the possibility of enforcement action against carriers that fail to comply with the **E911** Phase II rules, “in considering the appropriateness of enforcement actions, *we will take into account the extent to which carriers have made concrete and timely efforts to comply and to which their failure to do so was the result of factors beyond their control* (emphasis added).”

The Commission, therefore, has recognized in this proceeding that a wireless carrier’s ability to deploy Phase II technology and establish end-to-end connectivity with requesting PSAPs is largely dependent upon the actions of third parties.²⁹ Although Tier I carriers are making progress in deploying Phase II technologies (e.g. selling Phase II-capable handsets), significant deployment efforts lie ahead, many of which are largely dependent on the activities, efforts, readiness, funding and technological capabilities of third parties as described above. The Commission, therefore, should clarify that its Tier I, Tier II and Tier III Waiver Orders do not alter its conclusion in the *Fourth Memorandum Opinion and Order* that it would “take into account the extent to which carriers have made concrete and timely efforts to comply and to which their failure to do so was the result of factors beyond their control.”³⁰ Having previously recognized the complexities of Phase II deployment and the extent to which success (or failure) is

²⁷ See *Fourth MO&O* at 17457, ¶43.

²⁸ *Id.* at 17458, ¶ 45.

²⁹ The Commission, in fact, has recognized from the beginning of the implementation of E911 that circumstances outside the carrier’s control can affect the implementation timetable. Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 18676, 18710, 18718, ¶¶ 66, 83-84 (recognizing “that technology-related issues may prevent some wireless carriers from implementing Phase I within the timetable adopted in this Order”).

³⁰ See *Fourth MO&O* at 17442, 145.

outside of the carrier's control, Nextel does not believe that the Commission desired to impose a strict liability standard in this circumstance.

C. ALL PARTIES MUST **WORK COOPERATIVELY TO FACILITATE RAPID DEPLOYMENT OF PHASE II E911**

A strict liability standard that sends carriers immediately to enforcement impedes the one avenue by which Phase II E911 will be most rapidly deployed cooperation. Only by working together can CMRS carriers, PSAPs, LECs and other critical parties successfully deploy Phase II services.

When the FCC released waiver orders on October 12, 2001 for five of the nationwide wireless carriers, belatedly deemed "Tier I" in the *Order to Stay*, Phase II equipment that would meet FCC accuracy requirements was still, in large part, in developmental stages. At that time, a lengthy rulemaking process already had occurred and public safety organizations were pressuring wireless carriers to speed their deployment of Phase II technologies. Under these circumstances, the FCC focused its attention on wireless carriers, the only Phase II entities over which it then exercised jurisdiction, and adopted aggressive Phase II implementation benchmarks. As a result, wireless carriers face stringent benchmarks through 2005 and continue to dedicate significant time, effort and resources to achieve these deadlines.

Although significant hurdles remain before Phase II can be widely deployed, Tier I carriers have made noteworthy progress in implementing Phase II location technologies since October 2001. For example, Nextel's A-GPS technology, which was still under development when the *Nextel Waiver Order* was released, now has been installed, tested and developed in its integrated digital enhanced network ("iDEN"). Carriers, including Nextel, have introduced new handset models that are capable of calculating a caller's location information, and some PSAPs have Phase II capabilities deployed in their service areas.

The factors currently affecting Phase II deployment in various PSAP areas are significantly different from those previously confronting the Commission. While the Commission was focused solely on wireless carriers' receipt and installation of Phase II technology and equipment as recently as twelve months ago, many carriers now have upgraded their networks and have commenced Phase II deployments. In the process of integrating various networks to transmit Phase II information from the wireless carrier's network to the PSAP's computer screen, a number of technical complexities have arisen resulting in new issues that must be addressed and resolved. As Dr. Dale N. Hatfield stated in his report on wireless E911 services that was released on October 16, 2002, "...deployment of wireless E911 services in the United States is an extremely complex matter."³¹ "There is," he continued, "complexity in every

Successful resolution of these complexities requires close coordination among the wireless carrier, third party vendors, the LEC and the PSAP. As discussed above in Section IIIA, LECs and PSAPs must upgrade their equipment to be able to transmit, receive and use a caller's location information, transmitted and displayed as latitude and longitude. Once all parties' equipment has been upgraded, end-to-end integration testing must be performed to ensure that all of the various networking components are synchronized, stable and successfully transmitting the location information through the wireless carrier's network, the LEC network, and the third-party database provider's network to a PSAP.

³¹ "A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services," Prepared for the Federal Communications Commission by Dale N. Hatfield, at page 18. See also Public Notice, "Wireless Telecommunications Bureau Seeks Comment on Report on Technical and Operational Wireless E911 Issues," WT Docket No. 02-46, DA 02-2666, released October 16, 2002.

³² *Id.*

End-to-end connectivity is a complex, tedious process requiring rigorous testing and coordination of equipment and timers throughout at least three networks (i.e., the wireless network, the third party vendor database and the LEC network). Because there ~~are~~ equipment, technology and timer variations among individual LECs, PSAPs and wireless carriers, potential end-to-end connectivity issues often cannot be predicted and are only uncovered after deployment with a specific PSAP has been initiated. Moreover, these connectivity issues can only be resolved on an *ad hoc* basis using “customized solutions” from PSAP-to-PSAP and LEC-to-LEC. Resolving end-to-end connectivity issues on an *ad hoc* basis requires far more time and testing than was predicted or anticipated when the Commission adopted its Phase II rules. Rather than initiating enforcement proceedings, without regard for the complexities described herein, the Commission should encourage a cooperative effort among the relevant parties to facilitate rapid and successful deployment of Phase II E911.

To this end, a cooperative approach was recently proffered by the National Emergency Number Association (“NENA”), the Association of Public-Safety Communications Officials International, Inc. (“APCO”) and the National Association of State Nine One One Administrators (“NASNA”), when they informed the Commission that “in the end, as we have said previously, [Phase II] implementation will depend more on common-sense accommodations reached in good faith among the parties...”.³³ “In the final analysis,” they continued, “no rule can overcome the inherent uncertainties in the implementation process. It is a feature of the real world, testified to by many early Phase II implementers, that the definition of readiness evolves and varies

³³ Letter from John R. Melcher, Thera Bradshaw and Evelyn Bailey to Marlene H. Dortch, CC Docket No. 94-102, (September 20, 2002).

according to the peculiarities of individual serving arrangements, configurations and geographies. Not until the work starts will all the variables be identified.”³⁴

Nextel applauds these public safety organizations for acknowledging that any number of factors can affect PSAP deployment and agrees that all stakeholders must cooperate in good faith to resolve the numerous hurdles now facing Phase II deployment. Only by working together and channeling E911 resources to their most productive use can E911 stakeholders achieve deployment as rapidly and efficiently as possible. Nextel urges the Commission to heed the public safety organization leaders’ recommendations and to reconsider its imposition of a strict liability standard, replacing it with an opportunity for parties to engage in good faith efforts that foster a cooperative environment and expedite widespread Phase II deployment.

D. THE COMMISSION ARBITRARILY CREATED SEPARATE CLASSES FOR “NATIONAL” CARRIERS AND “SMALL AND MID-SIZED” CARRIERS

Nextel reiterates herein that the Commission’s unsupported decision to divide CMRS carriers into classes for Phase II compliance violates the APA.³⁵ When the Commission approved or conditionally approved only five wireless carriers’ Phase II implementation plans in October 2001,³⁶ but afforded all other carriers nearly two additional months to file or update previously filed Phase II waiver requests and forbore from enforcement action during the pendency of such requests, the Commission—without prior notice and comment—established at least two classes of carriers (the six national carriers versus all other carriers) and substantially altered carriers’ legal obligations. Nextel was disadvantaged vis-à-vis other carriers by the Commission’s action. For example, Nextel faced the same technological hurdles as many of the carriers that were provided

³⁴ *Id.*

³⁵ See *Nextel Petition for Reconsideration* at pp. 15-16.

³⁶ The sixth nationwide carrier, VoiceStream (now T-Mobile), was granted a limited waiver in September 2000. See *Fourth MO&O* at 17442, ¶60.

additional time and, arguably, even more hurdles given the unique nature of its iDEN wireless network.

As noted above, the **APA** requires that rules of general applicability and prospective effect, as well as substantive changes to rules, be made pursuant to a notice and comment rulemaking proceeding.³⁷ In the *Order to Stay*, the Commission exacerbated its **APA** failures by adopting new carrier classifications — without any record support — that establish very different deadlines for Phase II implementations. Compounding this legal infirmity is the fact that some now-classified Tier I carriers could be penalized under the Commission’s strict liability standard at a time when other Tier II and Tier III carriers, continuing to operate without a Phase II solution, are not subject to such enforcement threat.³⁸ Because the Commission offered no notice or opportunity for comment on its decision to divide the CMRS marketplace into classes, failed to establish a record on which to make such a decision, and still has not adequately explained its criteria for singling out “large” carriers for different treatment than “small” and “mid-sized” carriers, its decision is arbitrary and capricious and does not withstand legal scrutiny.³⁹

³⁷ See 5 U.S.C. §§ 553(b), (c).

³⁸ In fact, Nextel Partners, Inc. (“NPI”), which would qualify as a small carrier under the Commission’s new classifications, is being held to standards not applied to other small carriers simply because NPI complied with earlier Phase II **E911** requirements, including choosing a technology by November 9, 2000. See Public Notice, “Wireless Telecommunications Bureau Provides Guidance on Carrier Reports on Implementation of Wireless **E911** Phase II Automatic Location Identification,” DA 00-2099, released September 14, 2000. NPI and Nextel, both providing services using Motorola’s iDEN technology, are now being held to a more rigorous deployment schedule than, for example, SouthernLINC which uses the same iDEN technology.

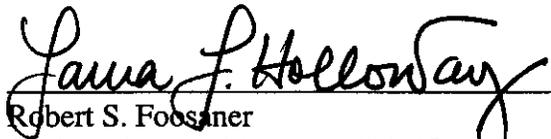
³⁹ See, e.g., *Burlington Truck Lines v. United States*, 371 U.S. 156, 167 (1962) (holding that an agency decision must be supported by findings and analysis to justify choices made, and provide a basis for exercise of its discretion).

IV. CONCLUSION

For the reasons stated herein, the Commission should reconsider its decision to prejudge carriers' potential inability to timely fulfill their Phase II E911 deployment deadlines and to impose a strict liability standard.

Respectfully submitted,

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October 16, 2002

CERTIFICATE OF SERVICE

I, Rochelle Pearson, at Nextel Communications, Inc. do hereby certify that on this 16th day of October, 2002 copies of the foregoing "Comments of Nextel Communications, Inc. and Nextel Partners, Inc." were filed electronically **through** ECFS and served by first-class mail, postage pre-paid, on the following:

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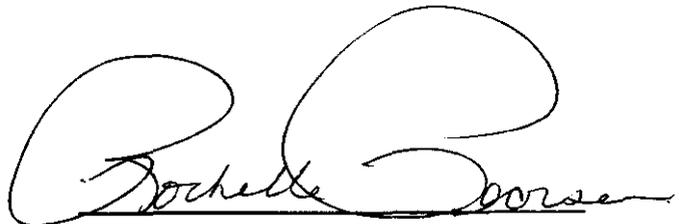
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