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July 11, 2003

Ms. Marlene H. Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Ex Parte Letter
CC Docket No. 02-377**

Dear Ms. Dortch:

The Rural Telecommunications Group (“RTG”) and Tier III Coalition for Wireless E911 (“the Coalition”), by their attorneys, hereby respond to the June 27, 2003 *ex parte* filing submitted by NENA, APCO and NASNA (“the Associations”) concerning the petition for partial and temporary forbearance filed by the Coalition on November 20, 2002 (“Petition”) in connection with the Federal Communications Commission’s (“FCC” or “Commission”) Phase II enhanced 911 (“E911”) accuracy requirements set forth in Section 20.18(h) of the Commission’s rules.

Preliminarily, RTG and the Coalition note that the Associations have mischaracterized the relief requested by the Petition. The Associations state that “[t]he Coalition asks the Commission to forbear from enforcement of the wireless E9-1-1 Phase II caller location accuracy requirements, as applied to Tier III wireless carriers, until an unspecified time after December 31, 2005.” Rather than requesting unlimited relief as suggested by the Associations, the Petition “seeks forbearance only for a limited period, up to and including December 31, 2005.” Petition at p. 1.

The Associations argue that the recent decision by the United States Court of Appeals for the District of Columbia Circuit in *Cellular Telecommunications & Internet Association and Cellco Partnership d/b/a Verizon Wireless v. Federal Communications Commission and United States of America*, 2003 U.S. App. LEXIS 11317 (decided June 6, 2003) should govern disposition of the Petition. While this case is certainly relevant to interpreting one of the relevant statutory provisions related to forbearance, it does not support denial of the Petition.

The D.C. Circuit’s decision focuses on the meaning of “necessary” when conducting a statutory forbearance analysis of whether a particular regulation is necessary for the protection of consumers. The D.C. Circuit’s decision clearly indicated that context must inform the Commission’s decision as to what is “necessary” in a particular case. *Id.* at 25, 29. In that case,

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the Commission refused to grant a request for permanent forbearance from wireless local number portability requirements for all wireless carriers, both large and small. Here, the Coalition has requested *temporary* forbearance from only a single aspect of the E-911 deployment schedule, the caller location accuracy requirements, for a limited class of the smallest wireless carriers (that have already made a good faith effort to comply with the regulation by meeting proposed safe harbor criteria) based upon the unique characteristics of the markets in which they operate. The contexts of the two forbearance requests could not be more dissimilar. In fact, the context of the present forbearance request is far more similar to the temporary forbearance relief sought and granted in the wireless number portability proceeding but is even more limited in that it would apply only to a single aspect of E911 deployment by a limited class of wireless carriers.¹ See *CTIA's Petition for Forbearance From Commercial Mobile Radio Services Number Portability Obligations*, Memorandum Opinion and Order, 14 F.C.C.R. 3092, 1999 WL 58618 (1999). Both the D.C. Circuit's recent opinion and the Commission's own forbearance decisions support the limited forbearance relief sought in the present case.

The Associations argue that individual waivers are preferable to forbearance as a means of addressing situations where enforcement of the Phase II rules would not serve the public interest. RTG and the Coalition respectfully disagree. The need to file individualized waiver requests imposes even greater costs on the small rural carriers who are the subject of the forbearance request. These carriers are already burdened with the costs of complying with E911, local number portability and other unfunded government mandates. The requested forbearance, which is already limited both in time and scope, to those carriers for whom the public interest would be served by its grant, is a far more efficient means of granting the requested relief, and better serves the public interest than a requirement that small rural carriers incur the expense of preparing, and the FCC incur the expense of reviewing and resolving, a large number of waiver requests.

In addition, all rural carriers would be seeking waivers based upon essentially identical facts and limitations in their inability to economically achieve the accuracy requirements. As a result, the FCC would need to establish some basis upon which to evaluate waiver requests. Presumably, the Commission would look to see whether a carrier had made a good faith effort to comply. Where the carrier has made such efforts, a waiver would presumably be granted. In essence, the Commission would need to establish a *de facto* safe harbor; which is precisely what the Coalition Petition seeks to do. However, unlike the forbearance approach in which a rural carrier would be deemed in compliance with the rules after it has reached that level of

¹ To the extent the Associations believe the D.C. Circuit's decision supports rejection of the Petition, such belief is perhaps due to their misunderstanding that the Coalition has requested permanent forbearance. In the wireless number portability proceeding at issue in the court's decision, not only had the Commission granted temporary forbearance from its wireless number portability requirements when faced with that request, the FCC decision affirmed by the court, which denied a request for permanent forbearance, also *extended* by one year the deadline for compliance with those requirements, effectively granting further temporary forbearance. See *Verizon Wireless's Petition for Partial Forbearance from the Commercial Mobile Radio Services Number Portability Obligation*, Memorandum Opinion and Order, 17 F.C.C.R. 14,972, 2002 WL 1733284 (2002).

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deployment, under the suggested waiver approach, a carrier would be *in violation* of the FCC rules unless and until the waiver is formally granted. That *violation* is significant from the standpoint of the rural carrier's existing financing covenants and, perhaps more relevant to this issue, would directly impact on the carrier's ability to obtain the requisite financing to deploy the E911 Phase II technology in the first place. While the Associations believe the waiver approach to be preferable, there is clearly no real benefit gained by forcing the FCC to dedicate substantial resources to deal with scores of individual waiver requests. Grant of the forbearance would free scarce Commission resources and only require FCC evaluation of an individual waiver for carriers that did not fall within the confines of the forbearance.

Finally, the Associations suggest that the financial and technical obstacles facing some small rural carriers can be resolved through sharing a location determination system with other carriers. As RTG's counsel testified at the FCC's April 29, 2002 Wireless E911 Coordination Initiative, such a solution is unavailable in many rural areas, where there are no other carriers to share infrastructure with.

If you have any questions regarding this filing, please communicate directly with the undersigned.

Sincerely,

Caressa D. Bennet, Counsel for the
Rural Telecommunications Group

Michael Kurtis
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Counsel for the Tier III Coalition
for Wireless E911

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Cobb
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Mr. Bryan Tramont
Ms. Jennifer Manner
Mr. Paul Margie
Mr. Sam Feder
Mr. Barry Ohlson

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