

November 6, 2003

**VIA ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554

**Re: *Ex Parte* Presentation in CC Docket No. 94-102, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, and IB Docket No. 99-67, Amendment of Parts 2 and 25 to Implement the Global Mobile Personal Communications by Satellite (GMPCS) Memorandum of Understanding and Arrangements, Petition of the National Telecommunications and Information Administration to Amend Part 25 of the Commission's Rules to Establish Emissions Limits for Mobile and Portable Earth Stations Operating in the 1610-1660.5 MHz Band, Further Notice of Proposed Rulemaking**

Dear Ms. Dortch:

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), this letter is submitted on behalf of Verizon Wireless to urge the Commission to make clear, in acting on the above-referenced *Further Notice of Proposed Rulemaking*, that wireless resellers, not facilities-based carriers, are directly responsible for ensuring that handsets that resellers activate comply with the Commission's E911 rules. The Commission can implement that decision by adopting a new provision in Section 20.18 of its rules that specifically addresses resellers' obligations. This action will serve the public interest by ensuring that customers who purchase handsets from resellers will receive the benefit of E-911 service.

On October 21, 2003, the FCC released an *Order* granting OnStar, a reseller that purchases capacity on Verizon Wireless' network, a waiver from certain E911 requirements as applied to OnStar's personal calling service.<sup>1</sup> That decision has raised some significant concerns

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<sup>1</sup> In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Order*, FCC 03-242, CC Docket No. 94-102, (rel. October 21, 2003) ("*OnStar Order*").

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as it relates to OnStar and other resellers, and implicates the pending *Further Notice of Proposed Rulemaking* proceeding that will determine the scope of E911 Phase II handset sale and activation rules as they pertain to wireless resellers.<sup>2</sup>

The *OnStar Order* imposed new and unjustified regulatory obligations on Verizon Wireless as a facilities-based carrier.<sup>3</sup> The FCC is appropriately concerned that wireless consumers purchasing services provided by resellers, including telematics providers offering CMRS as a separate offering, enjoy the benefits of E911. However, such concerns are lawfully and appropriately addressed by placing any new burdens regarding compliant equipment or CPE directly on the reseller, the party responsible for sales and service to the consumer.<sup>4</sup> As the facilities-based provider, Verizon Wireless has already met its obligation to upgrade its nationwide network with E911 location capability and is charged with fulfilling requests for E911 service with the nation's PSAPs, two very significant undertakings. As the Commission explained in the *Scope NPRM*, "in a resale situation, the underlying facilities-based licensee is obligated to deploy E911 capabilities *in the network used by the reseller*."<sup>5</sup> Verizon Wireless has deployed E-911 capabilities throughout its network in compliance with Commission rules and orders. The further responsibility for selling and activating compliant handsets, devices, or other CPE, can and should be directly borne by the reseller competitor for their end-user customers as Verizon Wireless is today charged with doing for its own end-user customers.

There are salient differences governing Verizon Wireless's relationship with agents, with which it has control (consistent with the agent/principal relationship) over the product and services sold under the Verizon Wireless brand, versus resellers of its underlying service, who are retail competitors and over whom Verizon Wireless exercises no control.<sup>6</sup>

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<sup>2</sup> In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Further Notice of Proposed Rulemaking*, FCC 02-326, CC Docket No. 94-102, IB Docket No. 99-67, 17 FCC Rcd. 25,576 (2002) ("*Scope NPRM*").

<sup>3</sup> Verizon Wireless obtained a waiver in 2001 from certain E911 obligations, with accompanying benchmarks for the sale of AGPS/AFLT compliant handsets to its subscribers. The handset benchmarks are for sales and activation of compliant handsets that Verizon Wireless sells and activates for its subscribers. In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Verizon Wireless, *Order*, FCC 01-299, 16 FCC Rcd. 18,364, ¶¶ 31, 37 (2001). Verizon Wireless continues to meet its benchmarks for Verizon Wireless handsets sold and activated under its brand through Verizon Wireless stores (direct retail channel) and agents (indirect retail channel).

<sup>4</sup> It is the responsibility of resellers to purchase, provide, and maintain handsets for their customers' use. Resellers' equipment, including handsets, devices, and/or software, if not already approved for use on the Verizon Wireless network, is only reviewed to avoid any network-related problems or fraud.

<sup>5</sup> *Scope NPRM* ¶ 93 (emphasis added).

<sup>6</sup> Resale has been defined as an activity in which one entity subscribes to the communications services and facilities of another entity and then reoffers communications services to the public (with or without "adding value") for profit. See *Resale and Shared Use of Common Carrier Services and Facilities*, 60 FCC 2d 261, 263 (1976), *recon.* 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978). In the CMRS context, resellers typically offer service to consumers by purchasing airtime at wholesale rates from facilities-based providers and reselling it to end users at retail prices. See *Implementation of Section 6002(b)*

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As the Commission expressly acknowledged in the *Scope NPRM*, a telematics offering “may also include voice CMRS that is resold as an additional or premium service option to the customer.”<sup>7</sup> OnStar’s “personal calling service,” as the Commission acknowledges in the *OnStar Order*, is plainly a resold CMRS offering.<sup>8</sup> As with other resellers, Verizon Wireless has no direct or indirect control over, nor visibility into, OnStar’s business operations, billing systems, or customer records. The record in this proceeding clearly shows that resellers alone make their own independent decisions on which handsets to purchase and sell to consumers, and thus that facilities based carriers cannot be responsible for regulatory compliance with respect to resellers’ sales, marketing and activation of CPE, devices, or other equipment.<sup>9</sup>

Resellers operating on the Verizon Wireless network already enjoy the benefits of the upgraded E911 network and deployments with PSAPs. Verizon Wireless, however, cannot ensure, and should not be obligated to ensure, resellers’ compliance with upgraded E911 handset or equipment mandates, nor should it. The type of management control, reporting and visibility into a reseller’s billing systems, customer records and distribution network that would be necessary to accomplish such a task are fundamentally at odds with the competitor status of wireless carriers *vis a vis* resellers and contrary to the Commission’s CMRS resale policy.<sup>10</sup>

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of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Notice of Inquiry*, 17 FCC Rcd 24923, ¶ 57 (2002). CMRS resellers are competitors to facilities-based licensees. See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, *Seventh Report*, 17 FCC Rcd 12985, 13025 (2002). In 1981, to encourage competition in the marketplace the Commission extended its wireline resale policy to cellular service, prohibiting cellular licensees from restricting the resale of their services. Cellular Communications Systems, 86 FCC 2d 469, 511, 642 (1981), *modified*, 89 FCC 2d 58 (1982), *further modified*, 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, No. 82-1526 (D.C. Cir. Mar. 3, 1983). In 1996 the Commission extended the obligation to other CMRS providers, including broadband PCS licensees, in order to promote competition in the broadband CMRS market. See Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, *First Report and Order*, 11 FCC Rcd 18455 (1996). An agency relationship is fundamentally different, as reflected in the Communications Act itself. See 47 U.S.C. § 217 (holding carrier liable for “the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier or user, acting within the scope of his employment ...”). In contrast to a reseller competitor, agents “under common law owe a duty of loyalty to their principals, including a duty *not to compete with their principals* concerning the subject matter of the agency.” *Metro Communications, Inc. v. Ameritech Mobile Communications, Inc.*, 12 FCC Rcd 13083, ¶ 27 (WTB 1996) (emphasis added, citing Restatement (Second) of Agency § 393). Moreover, unlike a reseller, an agent is not a carrier and “the terms of a carrier’s relationship with its agents are not communications services or common carrier services subject to regulation by the FCC.” See *id.* ¶ 20.

<sup>7</sup> *Scope NPRM* ¶ 59.

<sup>8</sup> *OnStar Order* ¶ 18.

<sup>9</sup> Licensees explained at length the necessary limits of their ability to affect resellers’ handset decisions. Nextel Comments at 15; CTIA Comments at 3-4; Sprint Comments at 7; VZW Reply Comments at 10-11. Notably, reseller Virgin Mobile’s position is consistent with that of licensees. See Virgin Mobile Comments at 7-11.

<sup>10</sup> Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services; Personal Communications Industry Association’s Broadband Personal Communications Services Alliance’s Petition for

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As summarized below, there is ample legal authority supporting (1) directly placing any regulatory burden for selling and activating E911 handsets on resellers; and (2) direct regulation of resellers, especially for CPE-related regulatory mandates.

Legal Authority:

In the *OnStar Order*, the Commission did not address its authority to directly regulate resellers, including certain telematics offerings – an issue expressly raised in the *Scope NPRM*. The Commission unquestionably has authority to regulate the sale and distribution of customer CPE subject to Title III of the Act, whether by licensees or resellers. Requiring resellers to sell handsets is clearly within the scope of such authority.

- Non-licensed services meeting the definition of CMRS, such as resellers of CMRS, are mobile services within the meaning of Sections 3(n) and 332 of the Communications Act, and common carriers subject to Title II. The FCC acknowledged that there was no indication in the statute or legislative history that resellers are exempt from Section 332 regulatory classification.<sup>11</sup> Resellers are thus subject to Commission regulatory authority under Title II and Title III.
- The FCC appropriately found in the *Scope NPRM* that its regulatory authority to impose the 911 and E911 rules on resellers – including telematics providers offering CMRS services – flows from Section 201(b) of the Act (providing that the Commission may prescribe such rules and regulations as it deems necessary in carrying out the provisions of the Act) and extends to commercial mobile services by operation of Section 332.<sup>12</sup> In addition, Section 303(r) authorizes the FCC to “[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act ...” The Commission has already found that these statutory provisions authorize the Commission to impose of 911-related obligations on non-licensee entities.<sup>13</sup> The

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Forbearance for Broadband Personal Communications Services; Forbearance from Applying Provisions of the Communications Act to Wireless Telecommunications Carriers; Further Forbearance from Title II Regulation for Certain Types of Commercial Mobile Radio Services, *Memorandum Opinion and Order and Order on Reconsideration*, 14 FCC Rcd 16340, ¶ 29 (1999) (resellers capable of obtaining CPE directly from manufacturers), *aff'd on recon.*, *Order on Reconsideration of Memorandum Opinion and Order on Reconsideration*, 15 FCC Rcd. 16221, ¶ 4 (2000).

<sup>11</sup> See 47 C.F.R. § 20.7(h), citing 47 U.S.C. §§ 153(n) and 332. See *Implementation of Sections 3(n) and 332 of the communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411 (1994).

<sup>12</sup> *Scope NPRM* at ¶¶ 76 and 96.

<sup>13</sup> See Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Memorandum Opinion and Order*, CC Docket No. 94-102, FCC 03-262, ¶ 30 (rel. Nov. 3, 2003) (relying on sections 1, 4(i), 201, 303, 309, and 332 of the Act to impose 911 pseudo-ANI obligations on handset

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FCC clearly has authority to impose 911 and E911 requirements directly on non-licensee resellers' sales and activation of radio transmitters subject to Title III.

FCC Decisions Directly Regulating Resellers:

The Commission has directly imposed regulatory obligations on resellers in numerous instances.

- *Hearing Aid Compatibility*: the FCC required resellers of a digital wireless carrier's product offerings to carry, at a minimum, the same number of compliant phones that the carrier offers at its retail stores.<sup>14</sup>
- *Numbering Resource Optimization*: Resellers are responsible for filing NRUF reports of their numbering utilization with the NANPA. Specifically, carriers that receive intermediate numbers are required to report forecast and utilization data for such numbers in their inventories to NANPA to the same extent required for code and block holders. The FCC created a category, *e.g.*, intermediate numbers, for resellers precisely because the underlying facilities-based carrier does not control the provision of intermediate numbers to end users. The FCC distinguished between "carrier entities" such as resellers and "non-carrier entities" (such as retail dealers and unified message providers).<sup>15</sup>
- *Section 255*: Imposes an obligation on telecommunications service providers, including resellers, to provide accessible products and services for persons with disabilities.<sup>16</sup>
- *International Section 214 Authorizations*: A CMRS reseller must obtain international Section 214 authority in its own right in order to provide international service to its customers. It may not rely on the authority of its underlying facilities-based carrier.<sup>17</sup>
- *CALEA*: CMRS resellers are subject to CALEA.<sup>18</sup>
- *Universal Service*: CMRS resellers are required to contribute to Federal universal service programs.<sup>19</sup>

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manufacturers); Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Second Report and Order*, 14 FCC Rcd 10954 (1999) (same, regarding 911 call processing obligations).

<sup>14</sup> In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, *Report and Order*, WT Docket No. 01-309, RM-8658, FCC 03-168, ¶ 67 (rel. Aug. 14, 2003), 68 Fed. Reg. 54173 (Sept. 16, 2003).

<sup>15</sup> Numbering Resource Optimization, *Report and Order and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 7574, ¶¶ 20-21, 40 (2000).

<sup>16</sup> Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, *Report and Order and Further Notice of Inquiry*, 16 FCC Rcd 6417, ¶ 80 (1999).

<sup>17</sup> See 47 C.F.R. § 63.18.

<sup>18</sup> See Communications Assistance for Law Enforcement Act, *Second Order on Reconsideration*, 16 FCC Rcd 8959, ¶ 47 (2001).

<sup>19</sup> See 47 C.F.R. § 54.706(a)(16).

WILKINSON ) BARKER ) KNAUER ) LLP

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In conclusion, Verizon Wireless ask the Commission to determine that wireless resellers, not facilities-based carriers, are directly responsible for ensuring that handsets or other devices activated by resellers comply with the Commission's E911 handset sales rules.

Please contact the undersigned with any questions.

Sincerely,

/s/ Kathryn A. Zachem

cc: Samuel L. Feder  
Jennifer Manner  
R. Paul Margie  
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