

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

In the Matter of)
)
New Part 4 of the Commission's Rules) ET Docket No. 04-35
Concerning Disruptions to Communications)

REPLY COMMENTS OF NEXTEL COMMUNICATIONS INC.

Nextel Communications, Inc. ("Nextel"), respectfully submits this reply in response to the Federal Communications Commission's ("Commission's") Further Notice of Proposed Rulemaking in the above captioned docket.¹ Nextel's initial comments on the *Notice* recommended that the Commission preserve the voluntary outage reporting regime for wireless carriers, but proposed certain changes to the proposed rules in the event that the Commission nonetheless imposes further mandates on the fiercely competitive commercial mobile radio services ("CMRS") industry.²

I. The Commission Should Give Voluntary Outage Reporting a Chance to Work.

Voluntary outage reporting works, and should be given a chance to develop even further. Nextel urges the Commission to allow the Industry-Led Outage Reporting Initiative ("ILORI") to continue the development and implementation of voluntary reporting, as recommended to the Commission in the Network Reliability and Interoperability Council ("NRIC") VI Focus Group 2 Report in December 2003.³ The

¹ New Part 4 of the Commission's Rules Concerning Disruptions to Communications, *Further Notice of Proposed Rulemaking*, ET Docket No. 04-35, FCC 04-30 (rel. Feb. 23, 2004) ("*Notice*").

² See Comments of Nextel Communications, Inc., filed May 25, 2004.

³ See Network Reliability and Interoperability Council VI, Focus Group 2 – Network Reliability, FINAL REPORT, at 48 (dated Nov. 17, 2003).

ILORI consensus body was formed as a result of the recommendation from the NRIC VI Focus Group 2.⁴ This effort continues to grow, and this past March ILORI members incorporated the initiative into the ATIS Network Reliability Steering Committee (“NRSC”).⁵

The information reported under the ILORI process closely mirrors the information the *Notice* proposes to mandate. The ILORI process, like the proposed Commission mandate, also uses a web-based system for reporting service disruptions. Information is submitted to the National Coordinating Center (“NCC”) within the Department of Homeland Security (“DHS”), which ensures that company confidentiality is maintained.⁶ Finally, information could be shared with the Commission under the protection afforded by the Critical Infrastructure Information Act (“CIIA”).

II. There is no Substantial Link Between the Development of Best Practices and Mandatory Reporting.

The City of New York, National League of Cities, and National Association of Telecommunications Officers and Advisors (“NATOA”), collectively argue that wireline best practices have been a very useful resource to local government officials generally in order to respond to network outages, and to New York City in particular to plan and implement corrective action in light of the outages that resulted from the terrorist attacks of September 11, 2001.⁷ Based on this success, they argue that mandatory non-wireline

⁴ See Alliance for Telecommunications Industry Solutions (“ATIS”) Comments at 3.

⁵ See *id.* at 4.

⁶ See CTIA Comments at 7.

⁷ See NATOA Comments at 3. Incredibly, NATOA states that “no comparable best practices have yet been available to local governments with respect to non-wireline and, in particular, wireless outages.” In reality, there are *hundreds* of best practices related to wireless carriers, which have all been developed pursuant to a voluntary reporting regime. See Cingular Comments at 13-14.

service disruption reporting is necessary to facilitate the work of NRIC VII in developing best practices aimed at wireless communications and wireless emergency networks.⁸

Nextel could not agree more that the work of NRIC VII is crucial to further develop best practices aimed at wireless carriers. Nextel's CEO Tim Donahue serves as the Chairman of NRIC VII, and Nextel is well aware that one of the main goals of NRIC VII is the development of new wireless best practices where a gap analysis indicates that such best practices are needed.⁹ However, NATOA provides no justification for its contention that voluntary outage reporting data would *not* lead to the further development of best practices in the non-wireline area. In fact, nearly all of the current 750 NRIC Industry Best Practices are derived from historic technical support experience, or from efforts to address infrastructure vulnerabilities uncovered in the wake of September 11, 2001, rather than from information gleaned from mandatory wireline outage reporting.¹⁰ In addition, as several other commenters have stated, only about 5% of existing best practices can be said to have been derived from knowledge gained from outage reports filed by wireline carriers with the Commission.¹¹ As a result, the fact that a report is submitted pursuant to a mandate, rather than voluntarily, does not in any way affect the industry's ability to develop and implement best practices. Pursuant to a voluntary reporting process, wireless carriers have established important best practices and they

⁸ See NATOA Comments at 4.

⁹ "The Council shall perform a gap analysis to determine areas where new wireless Best Practices are needed. The Council shall survey the wireless industry concerning the effectiveness of the Best Practices. The Council shall focus on the special needs of the wireless industry and refine existing Best Practices to focus their applicability to the wireless industry." Charter of the Network Reliability and Interoperability Council – VII, at § B.3.a.

¹⁰ See Sprint Comments at 3.

¹¹ See AT&T Comments at 8, ATIS Comments at 9 n.15, CTIA Comments at 8, SBC Comments at 21, Sprint Comments at 3, USTA Comments at 5.

continue to refine them through NRIC VII.

NATOA states that mandatory, and public, outage reporting will provide an additional incentive to make investments needed to improve network reliability.¹² However, wireless carriers currently have the best incentive to improve their networks' reliability: competition. Consumers currently have any number of resources available to them to compare competing wireless networks. Wireless carriers know this, and some, particularly Nextel, choose to differentiate themselves, in part, on delivery superior reliability to their customers. It is quite clearly in all wireless carriers' interests to make investments to improve the reliability of their service because, if they do not, the next time a customer experiences an outage, that customer might elect to take his or her business to another provider. That, above all else, is more than enough incentive for wireless companies to continue to improve their networks' reliability.

III. Regardless of the Path the Commission Takes, Wireless Outage Data Must be Kept Confidential.

NATOA argues that voluntary reporting suffers from a "free rider" problem, whereby service providers have little or no incentive to comply voluntarily given that the costs of complying are externalized.¹³ Quite to the contrary, pursuant to the CIIA, wireless carriers have a very powerful incentive to participate voluntarily: the fact that the CIIA provides confidential treatment of highly sensitive information when it is submitted voluntarily.¹⁴

As the DHS states in its comments, the same data that is useful for identifying and

¹² See NATOA Comments at 9-10.

¹³ See *id.* at 12.

¹⁴ See Nextel Comments at 5 (discussing the CIIA's establishment of protection from the Freedom of Information Act to information submitted voluntarily to the Department of Homeland Security). See also BloostonLaw Rural Carriers Comments at 9, CTIA Comments at 8 & n.8, MCI Comments at 1-2, 7.

remediating vulnerabilities in the nation’s critical infrastructure can also be used to exploit those same vulnerabilities.¹⁵ According the DHS, the outage reporting data proposed in the *Notice* constitutes the type of critical infrastructure information that “requires special safeguarding.”¹⁶ Without confidential treatment of the information contained in outage reports, the DHS believes the availability of the reports proposed in the *Notice* “could provide a potential adversary with a virtual road map targeting network stress points and vulnerabilities *and a field guide to defeating ‘best practices’ and protective measures.*”¹⁷

Thus, again Nextel urges the Commission to allow the ILORI process a chance to work. The voluntary nature of the current reporting regime provides important protection—protection that the DHS deems critical to public safety.

IV. The Commission Should Take a More Deliberative Approach Before Proceeding Full Speed Ahead with Mandatory Outage Reporting.

Nextel supports CTIA’s comments that the Commission should reconsider, or at least adopt a more deliberative approach, before extending mandatory network outage reporting to wireless carriers.¹⁸ The DHS has yet to release its national strategic plan for “analysis, warning, information sharing, vulnerability reduction, mitigation, and aiding national recovery efforts for critical infrastructure,” and likely will not do so until much later this year.¹⁹ Rather than rush to make public information of the type which other

¹⁵ See DHS Comments at 3.

¹⁶ See *id.* at 14.

¹⁷ *Id.* at 14-15 (emphasis added).

¹⁸ See CTIA Comments at 10.

¹⁹ See *id.* at 10 & n.13. DHS states that it is also in the process of developing procedures to facilitate the handling and sharing of homeland security information among the various departments and agencies of the federal government, and between Federal and State and local governments. See DHS Comments at 8 n.17.

federal agencies are actually taking steps to *remove* from the public domain,²⁰ the Commission should wait for and then review the forthcoming DHS strategic plan to ensure that any Commission action is consistent with and meets overall national security objectives. Indeed, in their initial comments, the DHS points out that it is the entity with primary responsibility for coordinating protection activities for critical infrastructure sectors, including telecommunications.²¹ DHS further notes that even though the *Notice* treats these reporting matters as somehow distinct from homeland security interests, even the sections of the Telecommunications Act from which the Commission quotes fall within the zone of homeland security.²² Therefore, the Commission should not rush to judgment on issues squarely within the scope of DHS’s authority.

DHS “strongly believes” that the “most important” action the Commission should take in this rulemaking proceeding is to ensure that sensitive outage information be safeguarded from public disclosure.²³ Under the CIIA, the best way to ensure that outage reporting data is kept confidential is to see that information is submitted voluntarily. Indeed, giving the ILORI process a chance to work is the best way to ensure that the DHS’s goals are met and homeland security is adequately protected. The ILORI process puts outage information to immediate use and channels information into the further development of best practices while safeguarding the confidentiality of the data.²⁴

²⁰ See CTIA Comments at 9-10.

²¹ See DHS Comments at 5-6.

²² See *id.* at 6 n.11 (quoting 47 U.S.C. § 151: “the purpose of the national defense [and] for the purpose of promoting safety of life and property”).

²³ See DHS Comments at 3.

²⁴ See *id.* at 3. Nextel also supports the withdrawal of outage data if a further analysis after the initial report indicates that the outage did not rise to the reportable level. See, e.g., Verizon Comments at 22.

Nextel, with the DHS, “stands ready to work with the Commission and the carrier community to explore any viable model that will ensure robust sharing of complete and accurate network disruption information *on a non-mandatory basis* in a manner that will support effective industry collaboration and appropriately safeguard the information.”²⁵

V. Outage Reporting Requires a Federal Framework.

Nextel agrees with the DHS that state outage reporting ought to be minimized in favor of a federal framework.²⁶ The costs not only of complying with a patchwork of differing state regulations on outage reporting, but also with the increased chance that sensitive information could be released to the public, weigh heavily in favor of submitting outage reporting information voluntarily—and solely—to the DHS. Because much of outage reporting data from wireless carriers will likely constitute homeland security information, the best manner to ensure that states get the information they need while protecting the security of the information is to preempt state authority to demand such information directly from the carriers and, instead, channel the information through the DHS pursuant to the process and procedures outlined in the CIIA.²⁷

VI. The Proposed 120-minute Timeframe for Initial Reporting Does not Advance the Commission’s Goals.

As part of the ILORI process, carriers provide an initial report within 72 hours of an outage, and a final report within 30 days of the outage. There is little to be gained by

²⁵ DHS Comments at 10 (emphasis added).

²⁶ *See id.* at 8.

²⁷ *See id.* *See also* 6 U.S.C. § 133(a)(1) (“[C]ritical infrastructure information . . . that is voluntarily submitted to a covered Federal agency . . . (E) shall not, if provided to a State or local government agency – (i) be made available to any State or local law requiring disclosure of information or records; [or] (ii) otherwise be disclosed or distributed to any party by said State or local government or government agency . . .”).

insisting that an initial report be filed within 120 minutes,²⁸ and, as Verizon points out, although electronic filing might be convenient, it is the assembly of the outage data that takes time, not its actual filing.²⁹ Given that coordination in the event of a serious crisis already takes place through the NCC,³⁰ the 120-minute initial filing window does not further advance the stated goal of the Commission of “facilitat[ing] more rapid action in the event of a serious crisis, and []also facilitat[ing] more rapid, more coherent, and more accurate responses when multiple outages are occurring during simultaneous (or virtually coincident) crises.”³¹ Rather, it duplicates an ongoing effort of the type that the DHS is trying to coordinate among various federal agencies under its auspices and pursuant to a Presidential Directive.³²

VII. The Commission Should Resist Calls for More Outage Reporting on 911 Systems.

The Commission should reject NATOA’s proposals regarding 911 system outages. NATOA proposes that a 15-minute outage trigger a report, rather than the 30-minute proposal in the *Notice*, citing the fact that New York City’s PSAP often handles a huge volume of calls (sometimes 5000 per hour) during busy periods and that these calls are critical.³³ While Nextel agrees that 911 calls are critical, this line of reasoning, taken to its logical extreme, could be used to support no time limit for reporting 911 outages: if

²⁸ Nextel notes that while NATOA and the Connecticut Department of Public Utility Control (“CT DPUC”) state their support for a two-hour deadline for an initial report, neither provides any further justification for this proposed requirement beyond citing the *Notice* itself. *See* CT DPUC Comments at 4, NATOA Comments at 12.

²⁹ *See* Verizon Comments at 7 n.5.

³⁰ *See* DHS Comments at 10-13.

³¹ *Notice* at ¶ 30.

³² *See* CTIA Comments at 10.

³³ *See* NATOA Comments at 13.

15 minutes is a better standard than 30 minutes, then, similarly, 5 minutes is better than 15 minutes, and so on. Repairing outages affecting 911 systems are already a priority within the wireless carrier community. Shortening the reporting timeframe to 15 minutes will only divert resources away from repairing problems and restoring services as soon as possible.

Nextel also responds to NATOA's suggestion that mandatory 911 outage reporting is "part of the bargain" wireless carriers have with the public given the substantial cost the public is asked to bear to implement and sustain cutting-edge E911 technologies.³⁴ Nextel has made substantial investments to comply with E911 mandates already, and, these costs, like all operating costs in a fiercely competitive market, are ultimately passed along to Nextel's customers. Requiring the reports proposed in the *Notice*, and in the 15-minute time-frame suggested by NATOA, would require even further expenditures, leading, ultimately, to more of a burden to be shouldered by our customers. Rather than throw more resources at reporting outages, particularly when such additional resources offer no public benefit, Nextel urges that State and local governments ensure that the levies assessed on wireless customers earmarked for building and maintaining 911 systems actually are spent for those purposes.

VIII. The Commission Should Adopt the NRIC Focus Group 2 Standard for Reportable Events.

The proposed standard for reporting, based on potentially affected user minutes, is

³⁴ *See id.* at 5-6. It is ironic that NATOA's comments raise this issue since New York State has been a leader in raiding the very E911 funds paid by New York consumers. New York has chosen to spend consumers' hard-earned E911 dollars on non-E911 projects. *See* New York State Office of the State Comptroller, *Division of State Police Cellular Surcharge Revenues*, Report 2001-S-27 (March 20, 2002).

unnecessarily complicated.³⁵ Rather than pursue the approach in the *Notice*, wireless carriers ought to file outage reports based upon the more simple metric recommended by NRIC Focus Group 2: outages are reportable if they last for 30 minutes or longer and potentially affect 30,000 or more customers based on historical traffic data, or would affect a potential 90,000 calls.³⁶ This is a simple metric that accomplishes the Commission's goals of ensuring an outage of sufficient size generates a report while also avoiding the use of a "concentration ratio," which is largely inapplicable in wireless communication.

IX. CONCLUSION

In view of the foregoing, Nextel respectfully requests that the Commission take action consistent with the views expressed herein.

Respectfully submitted,
Nextel Communications, Inc.

By: 

Robert S. Foosner
Senior Vice President – Government Affairs

Laura L. Holloway
Vice President – Government Affairs

Jared M. Carlson
Counsel – Government Affairs

2001 Edmund Halley Drive
Reston, VA 20191

June 24, 2004

³⁵ See *Notice* at 38. See also, Nextel Comments at 10.

³⁶ See NRIC Focus Group 2 Final Report at § 4.3.5, p. 27.