KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ
BRUSSELS, BELGIUM
AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

May 12, 2005

TODD D. DAUBERT
DIRECT LINE (202) 955-9788
E-MAIL: tdaubert@kelleydrye.com

**VIA ELECTRONIC MAIL DELIVERY**

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

**Re: *Ex Parte* Presentation by USA Datanet, Inc. in WC Docket No. 04-36**

Dear Ms. Dortch:

Today, I sent the attached written ex parte notification to Chairman Kevin J. Martin. As required by Section 1.1206(b)(1), this *ex parte* notification is being filed electronically for inclusion in the public record of the above-referenced proceeding, and a copy is being e-mailed to Commissioners Kathleen Q. Abernathy, Jonathan S. Adelstein and Michael J. Copps, as well as Thomas Navin, WCB Chief.

Please direct any questions regarding this matter to the undersigned.

Sincerely,

Todd D. Daubert,
*Counsel for T-Mobile USA, Inc.*

Attachment

DC01/DAUBT/233738.1

KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP
1200 19TH STREET, N.W.
SUITE 500
WASHINGTON, D.C. 20036
(202) 955-9600

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 955-9792
www.kelleydrye.com

May 12, 2005

TODD D. DAUBERT
DIRECT LINE (202) 955-9788
E-MAIL: tdaubert@kelleydrye.com

**VIA ELECTRONIC MAIL DELIVERY**

Kevin J. Martin, Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

**Re: *Ex Parte* Presentation by USA Datanet, Inc. in WC Docket No. 04-36**

Dear Chairman Martin:

During USA Datanet's meeting with you yesterday as a member of the VON Coalition,[1] you emphasized the importance of ensuring that all customers of Voice over Internet Protocol ("VoIP") services have access to emergency 911 services, stressed the unacceptability of the type of 911 tragedies recently reported in the press, and expressed your desire to adopt an order that would require all VoIP service providers to offer, at a minimum, basic 911 service no later than the beginning of this year's holiday season. USA Datanet, as a provider of VoIP services, unequivocally shares your goals. Accordingly, we are writing to provide you with additional information regarding the best way to meet these goals.

We understand from news reports regarding the recent 911 tragedies that these events all involved the inability of a caller to reach emergency services via the responsible Public Safety Answering Point ("PSAP") when dialing 911 from a VoIP service. As such, these events all involved a failure to provide "basic" 911 services rather than a failure to provide "enhanced" 911 services. In order to prevent these tragedies from occurring in the future, therefore, the Commission needs to ensure that VoIP service subscribers have access to basic 911 service. Accordingly, USA Datanet respectfully submits that the Commission's immediate focus should be on ensuring that basic 911 services are ubiquitously available, particularly since requiring implementation of E911 at this time could delay the implementation of basic 911 services, as explained in more detail below.

---

1 The Von Coalition is filing a separate *ex parte* notice for that meeting.

***Basic 911 Services***

As a general matter, basic 911 services can be provided in one of two ways. First, 911 calls can be routed to the appropriate PSAP via a ten-digit telephone number. Second, 911 calls can be routed to the appropriate PSAP over dedicated 911 trunks.

Many PSAPs have established ten-digit telephone numbers to which emergency calls can be routed. Calls to these ten-digit telephone numbers are answered twenty-four hours a day and seven days a week by the same emergency personnel who answer emergency calls routed over dedicated 911 trunks. Emergency calls to these ten-digit numbers are treated exactly like emergency calls routed over dedicated 911 trunks. Several companies and technologies that provide real benefits to consumers (*e.g.*, OnStar) rely on the availability of these ten-digit telephone numbers to handle emergency calls.

It is also technically feasible for providers of VoIP services to deliver 911 emergency calls over dedicated 911 trunks. Providers of fixed VoIP services (*i.e.*, VoIP services that only permit the subscriber to use the service at one physical location) might be able to establish dedicated 911 trunks, or come to an economic arrangement with a third party who already has dedicated 911 trunks, to deliver emergency calls within 120 days. It is far more difficult for providers of nomadic VoIP services (*i.e.*, VoIP services that permit the subscriber to use the service in any location with access to the Internet), like USA Datanet, to ensure that 911 emergency calls are routed to the appropriate PSAP over dedicated 911 trunks. Unless the service provider already had a national network, like some VoIP service providers, a provider of nomadic VoIP services must either build a nationwide network from scratch or rely upon third-parties who have such 911 networks already constructed. Neither is possible within 120 days. That no party can build its own nationwide 911 network from scratch within 120 days is obvious. USA Datanet is unaware of any third party vender that currently offers, or that will be capable of offering within 120 days, nationwide coverage for 911 services routed over dedicated 911 trunks, despite actively seeking such a solution. As such, since the service is nomadic, the VoIP service provider would have to reach agreements with several third parties in order to obtain nationwide coverage, including the regional Bell Operating Companies and most, if not all, of the thousands of independent local exchange carriers across the nation. That no party could accomplish this task within 120 days should be obvious. Even if the nomadic VoIP service provider could achieve nationwide coverage by entering into agreements with three or four third parties, the arrangements could not be established within 120 days, and probably could not be implemented within 12 months.

During our meeting, you mentioned that it is unacceptable to route emergency calls to ten-digit "administrative" telephone numbers. USA Datanet interpreted your statement as meaning that emergency calls should never be routed to ten-digit telephone numbers that (1) were not established by the PSAP to receive emergency calls, and (2) are not answered by trained emergency personnel in exactly the same manner as emergency calls routed to the PSAP over dedicated 911 trunks. If this was your intent, USA Datanet agrees completely. Emergency

calls should only be routed to PSAPs in a manner which ensures that they are answered by trained emergency personnel.

To the extent the Commission imposes an obligation upon all VoIP service providers to offer basic 911 within 120 days of the effective date of the order, it is crucial that the Commission make clear that providers of nomadic VoIP services can continue to route emergency 911 calls to ten-digit telephone numbers established by PSAPs to accept emergency calls. Otherwise, the unintentional, unreasonable and unacceptable result of the order would be to deprive VoIP service subscribers who are currently receiving 911 emergency services from continuing to receive 911 emergency services from the VoIP service provider of their choice: Consumers would have fewer means to place 911 calls than they have today. This result would be directly contrary to your stated goals and the Commission's mandate under the Communications Act of 1934, as amended (the "Act").

Likewise, to the extent the Commission imposes an obligation upon all VoIP service providers to offer basic 911 within 120 days of the effective date of the order, the Commission also must make clear that providers of nomadic VoIP services will not face liability under the FCC's rules where they are ready, willing and able to deliver 911 calls to a ten-digit telephone number established by the PSAP, but that the PSAP is unwilling to accept emergency calls to a ten-digit number. The Commission has never imposed liability on any type of service provider for failing to deliver 911 information in areas where the PSAP is unable or unwilling to accept that type of information. To do so here would be unreasonable and inconsistent with the Commission's mandate under the Act, particularly because, as explained above, providers of nomadic VoIP services cannot establish dedicated 911 trunking or contract with third-parties to do so within 120 days.[2] By contrast, a customer notice requirement might be more reasonable to the extent the Commission believes it has the jurisdiction to impose such a requirement. By requiring nomadic VoIP service providers to notify their customers where basic 911 is unavailable due to the inability or unwillingness of the relevant PSAP to accept emergency 911 calls routed to ten-digit telephone numbers, the Commission would give consumers the choice of whether to use the VoIP service despite the unavailability of basic 911 service, which is particularly appropriate for nomadic VoIP services which many consumers use as secondary lines (*e.g.*, in a hotel where the primary line is available or in any location where they have access to other wireline or wireless services).

Requiring providers of nomadic VoIP services to implement basic 911 within 120 days without the clarifications set forth above would be not only unprecedented, but also unreasonable and inconsistent with the Act. Never before has the Commission imposed a 911 obligation with

---

[2] *See e.g., Ghattas v. U.S.*, 40 F.3d 281, 285-6 (8th Cir. 1994) (finding a regulation to be arbitrary and capricious because the agency "entirely failed to consider an important aspect of the problem" by failing to consider that compliance with the regulation, although possible in theory, was not possible as a practical matter) *See also, Motor Vehicle Mfrs. Assoc. of the U.S. v. State Farm Mut. Auto. Insur. Co.*, 463 U.S. 29, 43 (1983) (asserting "fail[ure] to consider an important aspect of the problem" as one of several bases for holding an agency rule to be arbitrary and capricious).

such a tight deadline,[3] particularly since the experience of other service providers (*e.g.*, CMRS providers) demonstrates the difficulties relating to 911 service arising from the fact that so many elements of 911 service are controlled by parties other than the service provider itself (*e.g.*, third-party equipment vendors, third-party emergency service providers and PSAPs). To make matters worse, the Commission has not requested comment on any of the proposals being considered, so parties have not had adequate time to provide sufficient information to the Commission to inform its decision.[4] USA Datanet respectfully urges the Commission to move forward, if at all, only in a manner consistent with the approach described here.[5]

***Enhanced 911 Services***

None of the recent 911 tragedies recently reported in the press were caused by the absence of E911. In fact, millions of Americans across the country do not have access to E911 today.[6] As such, there is no record evidence whatsoever to support the claim that the availability of E911 is so crucial that providers of nomadic VoIP services must make it available within 120 days, let alone at all. This remains true even in areas where E911 is available for other services

---

[3] For example, after receiving notice and comment, the Commission concluded that mobile satellite services carriers ("MSS") providing real-time, two-way, switched voice service that are interconnected with the public switched network must establish call centers to which all subscriber 911 emergency calls are routed and then forwarded to an appropriate PSAP. *See* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Report and Order and Second Further Notice of Proposed Rulemaking*, 18 FCC Rcd 25340, 25350, ¶ 24 (2003). The Commission determined that "emergency call centers are an appropriate first step for MSS carriers." *See id.* at 25349, ¶ 24. The Commission did not mandate specific procedures that MSS carriers were required to follow when operating call centers, but it did require minimum functionalities, including: requiring that all call centers be accessed by dialing "911"; requiring that all call centers ascertain the caller's phone number and location; and requiring that the call be transferred to the appropriate PSAP. *See id.* at 25352, ¶ 31. **Importantly, the Commission did not require that MSS carriers transmit ANI and ALI or that call centers use dedicated 911 trunks to route calls to PSAPs.** *See id.* at 25353, ¶ 32. Further, satisfied that MSS carriers could route 911 calls by using existing PSAP databases, the Commission did not require MSS carriers to compile and maintain such databases on their own. *See id.*

[4] In this proceeding, it cannot realistically be maintained that notice and comment, even on a very expedited schedule, would be impracticable, unnecessary or contrary to the public interest. *See* 5 U.S.C. 553(b) (exempting application of the APA's notice and comment requirements "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."). To the contrary, USA Datanet respectfully submits that notice and comment is particularly important in light of the seriousness of the issues and potential rules we understand the Commission is considering.

[5] Without the limitations USA Datanet has outlined in this letter, a broad rule requiring all VoIP service providers to implement 911 within 120 days would be unlawful. For example, appellate courts in several cases have held that broad rules are unlawful when the agency does not provide parties with a meaningful "safety valve" to achieve a just result in specific circumstances. *E.g.*, *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 965 (D.C. Cir. 2001); *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997). As one Court has stated, the FCC's "discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[6] *See, e.g.*, Anne Marie Squeo, Cellphone Hangup: When You Dial 911, Can Help Find You?, Wall Street Journal, May 12, 2005, at A1 ("Two years after the FCC mandated implementation of E911 by industry participants, less than half (41%) of the nation's public safety call centers are able to locate mobile phone users.").

(*e.g.*, traditional wireline services). Mandating E911 at this time would amount to fixing a problem that does not exist. Worse yet, imposing an E911 requirement on providers of nomadic VoIP services now would interfere with ongoing efforts of VoIP service providers to implement emergency 911 services that are better than traditional E911 services. In light of the lack of record evidence suggesting that the availability of E911 service on nomadic VoIP services is crucial, it would be inappropriate and inconsistent with the Administrative Procedures Act to impose an E911 requirement without first providing adequate notice and comment.

USA Datanet supports the availability of E911 type functionalities for nomadic VoIP services and is actively pursuing means for implementing advanced emergency service solutions. However, due to the significant technological differences between traditional communications and information services and nomadic VoIP services, requiring nomadic VoIP service providers to implement E911 based on systems designed for traditional wireline or wireless services will only interfere with efforts to implement emergency services that exceed the capabilities of traditional E911 services. Moreover, it is simply not possible for providers of nomadic VoIP services that do not already have a nationwide network to implement E911 within 120 days. Therefore, USA Datanet urges the Commission to provide notice and comment with respect to any E911 requirement it may be contemplating.

As required by Section 1.1206(b), this written *ex parte* presentation is being filed electronically for inclusion in the public record of the above-referenced proceeding, and a copy is being e-mailed to the parties listed below. Please direct any questions regarding this matter to the undersigned.

Sincerely,

Todd D. Daubert,
*Counsel for USA Datanet*

cc: Commissioner Kathleen Q. Abernathy
Commissioner Jonathan S. Adelstein
Commissioner Michael J. Copps
Thomas Navin, WCB Chief