

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

In the Matter of )  
 )  
Recommendations of the Independent Panel ) EB Docket No. 06-119  
Reviewing the Impact of Hurricane Katrina on )  
Communications Networks )

To: The Commission

**COMMENTS OF RURAL CELLULAR ASSOCIATION**

Rural Cellular Association (“RCA”)<sup>1</sup>, by its attorneys, respectfully submits its comments in response to the Commission’s Notice of Proposed Rulemaking in the above-captioned proceeding seeking input on steps the Commission should take to implement the recommendations presented by the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (“Independent Panel”). *See Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, FCC 06-83 (June 19, 2006) (“NPRM”). One of the Independent Panel’s recommendations calls for the Commission to expeditiously complete its rulemaking in EB Docket No. 04-296 in which it is exploring the expansion of the Emergency Alert System (“EAS”) to reach other technologies, such as wireless services. *See id.*, Appendix A, at 28 & n.151, 40. RCA will comment on how the Commission should address this particular recommendation consistent with its statutory authority and jurisdiction. *See id.* at 8 (¶ 18).

RCA has actively participated in the ongoing EAS rulemaking.<sup>2</sup> RCA submitted comments in

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<sup>1</sup> RCA is an association representing the interests of more than 90 small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA’s wireless carriers operate in rural markets and in a few small metropolitan areas. No member has as many as 1 million customers, and the vast majority of RCA’s members serve fewer than 500,000 customers. RCA was formed in 1993 to address the distinctive issues facing wireless service providers.

<sup>2</sup> *See, e.g.*, Comments of RCA, EB Docket No. 04-296 (Jan. 24, 2006) (“FNPRM Comments”); Reply Comments of RCA, EB Docket No. 04-296 (Feb. 23, 2006) (“FNPRM Reply Comments”).

which it suggested that the Commission may be without ancillary jurisdiction to direct Commercial Mobile Radio Service (“CMRS”) providers to transmit EAS messages over their networks. *See* FNPRM Comments, at 2-5.<sup>3</sup> It also suggested that the Commission would stay safely within the limits of its jurisdiction if it required that wireless handsets be programmed to monitor and receive EAS messages broadcast over a government radio network. *See id.* at 5. In particular, RCA recommended that CMRS providers be permitted to participate in the EAS by making handsets available to their customers that have the capability of receiving National Weather Service warnings broadcast by the National Oceanic and Atmospheric Administration’s Weather Radio All Hazards network. *See id.* at 8-11.

When it filed comments in the EAS rulemaking, RCA was concerned that some of its members may not have the financial resources to absorb the costs of complying with new, expanded EAS requirements. *See id.* at 10. It urged the Commission not to subject small CMRS providers to an “unfunded mandate” to provide a broadcast-based EAS service. *Id.* It suggested that a failure to establish a compensation or funding mechanism for wireless carriers could raise constitutional concerns. *See id.* at 5 n.6.

Several of RCA’s members recently expressed their concern that small and regional wireless carriers lack the financial wherewithal to comply with a Commission mandate that would require another “free” change-out of wireless phones and another major network upgrade.<sup>4</sup> Such carriers that employ CDMA and iDEN air interface technologies are still working to meet the 95% penetration level required

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<sup>3</sup> RCA pointed out that the Commission lacked explicit statutory authority to require CMRS providers to transmit over their networks information chosen by the President, or by federal, state, and local emergency operations managers, and to do so free-of-charge. *See* FNPRM Comments, at 2. Citing *American Library Ass’n v. FCC*, 406 F.3d 689, 702 (D.C. Cir. 2005), RCA argued that an exercise of the Commission’s ancillary jurisdiction over CMRS providers cannot be antithetical to a basic regulatory parameter established for CMRS. *See* FNPRM Reply Comments, at 2. It suggested that forcing CMRS providers to transmit over their networks the public alerts and warnings of non-network users for free would be antithetical to the basic regulatory parameters imposed by 47 U.S.C. §§ 153(43)-(46) and 332(d)(1). *See id.*

<sup>4</sup> *See* Letter from Clay Dover to Kevin J. Martin, WT Docket No. 04-296, at (July 18, 2006) (“Dover Letter”). A copy of the Dover Letter is attached hereto. RCA supports the passage of the “Warning, Alert, and Response Network Act,” which would provide for a federally funded one-year industry and government working group to define a viable approach for providing EAS alerts to the American public.

for E-911 Phase II, while those employing GSM are in the process of replacing their analog and TDMA handsets. *See* Dover Letter, at 1. A new EAS mandate that would require yet another change-out of all wireless phones without government-funded cost recovery would prove to be financially catastrophic to small wireless carriers. *See id.* Because carrier compensation is very much at issue, the Commission must proceed with caution to ensure that its EAS requirements do not directly implicate the Takings Clause of the Fifth Amendment, which provides that private property shall not “be taken for public use, without just compensation.”

As its text makes plain, the Takings Clause does not prohibit the taking of private property, but instead places a condition on the exercise of that power. *E.g., Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 536 (2005). It “is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking.” *Id.*, at 536-37 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987)) (emphasis in original). The Supreme Court has justified this regime by emphasizing the role of the Takings Clause in “barring Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole.” *Id.*, at 537 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.” *Id.* Thus, one of the two categories of regulatory action that are generally deemed *per se* takings for Fifth Amendment purposes is “where government requires an owner to suffer a permanent physical invasion of her property - - however minor.” *Id.*, at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Most other regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). Primary among the *Penn Central* factors are “[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.” 438 U.S. at 124. In addition, the “character of the government action” is a relevant factor. *Lingle*, 544 U.S. at 539. Thus, a court considers whether the regulatory action “amounts to a

physical invasion or instead merely affects property interests.” *Lingle*, 544 U.S. at 539.

A wireless carrier’s network equipment and transmitting facilities are its private property. Therefore, the Takings Clause will be implicated if the Commission imposes a requirement that a wireless carrier permit a governmental authority to physically connect with the carrier’s network so that the government can broadcast emergency warnings to the public over the carrier’s transmitting facilities. In RCA’s view, that physical invasion of the carrier’s network facilities would constitute a regulatory taking of private property for public use and be compensable under the Fifth Amendment. The constitutional result would be the same if the Commission mandates that a wireless carrier must broadcast EAS messages over its network at the government’s direction.

Many wireless carriers operate pursuant to authorizations acquired in the Commission’s spectrum auctions. In its public notices, the Commission described its spectrum auctions as “business investment opportunities” to become licensees subject to certain conditions and regulations. *See, e.g., Broadband PCS Spectrum Auction Scheduled for Jan. 12, 2005*, 19 FCC Rcd 18190, 18199-200 (2004). Wireless carriers invested in auctioned spectrum with expectations formed both by the Commission’s auction notices and by operation of law. For example, wireless carriers invested with the reasonable expectation that they could operate on their authorized frequencies to provide telecommunications for a fee directly to the public, *see* 47 U.S.C. §§ 153(46) and 332(d)(1), subject to the terms, conditions, and periods of their licenses. *See id.* § 301. They were also on notice of their obligation under 47 U.S.C. § 310(d) to maintain *de facto* control over their licensed operations such that they would have the “unfettered use” of all their transmitting facilities and equipment. *E.g., Ellis Thompson Corp.*, 9 FCC Rcd 7138, 7140 (1994). Consequently, licensees of auctioned CMRS spectrum have “distinct investment-backed expectations” that they will have the unfettered use of their own transmitting facilities and equipment to provide CMRS for profit in accordance with the conditions of their licenses.

RCA submits that the economic impact of EAS regulations could seriously interfere with the investment-backed expectations of CMRS licensees, particularly the licensees of auctioned CMRS spectrum. For example, a regulation that would force CMRS licensees to allow the government free use

of their transmitting facilities and equipment to broadcast EAS warnings would substantially interfere with their expectation of exclusive, for-profit use of their own facilities and equipment. Such a regulation would constitute a taking of private property for public use that would be compensable under the Takings Clause. Unless the EAS regulatory scheme provides just compensation to wireless carriers for the government's use of their private property, the United States presumably would be subject to the takings claims of the carriers under the Tucker Act. *See Bell Atlantic Telephone Companies v. FCC*, 24 F.3d 1441, 1444-45 (D.C. Cir. 1994).<sup>5</sup>

The Commission may have a duty to consider the constitutional implications of the various EAS regulatory schemes that it is contemplating. *Cf., Meredith Corp. v. FCC*, 809 F.2d 863, 874 (D.C. Cir. 1987). And it should avoid the risk of exposing the Treasury to liability under the Tucker Act. Therefore, RCA urges the Commission to consider how CMRS carriers can be justly compensated if their networks are to be appropriated for use to broadcast EAS warnings to the public. It also should bear in mind that a "strict test of statutory authority" will be applied by a reviewing court to any EAS regulations that implicate the Takings Clause. *Bell Atlantic*, 24 F.3d at 1447. Currently, the Commission is without express statutory authority to force CMRS providers to transmit EAS warnings free-of-charge to the public over their networks.

Respectfully submitted,

**RURAL CELLULAR ASSOCIATION**

*[filed electronically]*

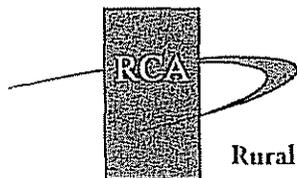
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August 7, 2006

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<sup>5</sup> "The Tucker Act remedy is presumed available unless Congress has explicitly foreclosed it by another enactment ... and nothing in the Communications Act does so." *Bell Atlantic*, 24 F.3d at 1445 n.2.



Rural Cellular Association

July 18, 2006

Kevin J. Martin, Chairman  
Federal Communications Commission  
445 12<sup>th</sup> Street, N.W  
Washington, D.C. 20554

Re: WT Docket No. 04-296 – Review of the Emergency Alert System

Dear Chairman Martin:

The undersigned rural wireless carrier members of the Rural Cellular Association (RCA) wish to express their concern over the potential impact of possible decisions in the above-referenced proceeding concerning the Emergency Alert System (EAS). Please note that RCA is comprised of more than ninety rural wireless carrier members who provide wireless communications services to persons living and traveling in approximately 50% of the geographic area of the United States. Note also that the RCA members utilize analog, CDMA, GSM, and iDEN air interface technologies.

Rural wireless carriers do not have the resources to absorb a mandate that would require another “free” change-out of wireless phones and another major network upgrade. RCA’s CDMA and iDEN members are still working diligently to meet the 95% penetration level required for E-911 Phase II and RCA’s GSM members are aggressively working to replace analog and TDMA handsets. A new EAS mandate that would require yet another change-out of all wireless phones without government funded cost recovery would prove to be financially catastrophic to small and regional rural wireless carriers.

It is the opinion of RCA that there is no existing technology deployed or available for near-term deployment (i.e., within two years or less) that will support a comprehensive, useful mass consumer wireless emergency alert service. RCA also believes that we should not attempt to retread old technology that was never designed to provide broadcast capabilities. There has been discussion about using Short Message Service (SMS) text-based messaging to provide EAS alerts as a short term approach. However, the use of SMS for EAS alerts is fraught with problems. SMS has major capacity problems that prevent the timely delivery of messages to a large number of subscribers, and the message length is limited to 140 characters or less thereby limiting the amount of useful information in the case of an emergency. EAS alerts delivered using SMS would not have a distinctive alert tone that would differentiate an EAS alert from a stock quote. There are also significant latency problems with SMS that could result in a delay of hours for EAS message delivery. SMS is also not geographic specific except for the case of using ZIP codes as used in Amber Alerts, but this approach prevents people who roam out of their home market from receiving local EAS alerts.

There also has been discussion about using a Cell Broadcast approach for delivering EAS alerts, but Cell Broadcast is also fraught with problems. First of all, based on the record, virtually all existing CDMA, GSM and iDEN wireless phones would have to be replaced. To make matters worse existing Cell Broadcast technologies leave a lot to be desired to provide EAS alerts. In the case of GSM Cell Broadcast the message length is even more limited than is SMS (i.e., 93 characters or less); there is no discrete EAS alert tone when a message is received; and an EAS message is not received if the phone is in use. According to the European Telecommunications Standards Institute (ETSI) the battery life of Cell Broadcast enabled GSM phones is cut in half thereby causing subscribers to disable the Cell Broadcast function. ETSI also reports that deployment of Cell Broadcast has been limited because of the lack of a business case to justify the cost of wide scale implementation. In addition, most if not all GSM phones would have to be replaced or upgraded to receive Cell Broadcast messages. In the case of CDMA Cell Broadcast technology is unproven and all CDMA wireless phones would have to be replaced. We also understand there is no Cell Broadcast capability for iDEN wireless phones. For all three air interface technologies major network upgrades would be required.

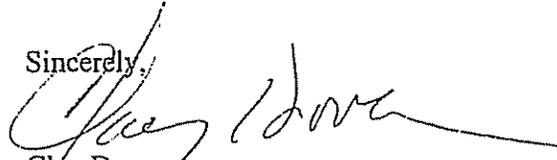
The long and short of it is that the use of either SMS or Cell Broadcast for providing EAS alerts on wireless phones would result in an inferior emergency alert service that has no commercial application and have a very high cost.

RCA believes that there is a better way to address the need for providing broadcast EAS messages than to retread old technologies. New and emerging wireless technologies that are designed to provide broadcast capabilities for both EAS alerts and commercial services should be considered instead. Such technologies include Multimedia Broadband Multicast Service, MediaFlo, new approaches using IP technology, and the integration of NOAA digital Public Alert Radio technology.

RCA and its members support the need for an advanced Emergency Alert System (EAS) and support the passage of the "Warning, Alert, and Response Network Act" (WARN Act). That Act would provide for a federally funded one-year industry and government working group to define a viable approach for providing EAS alerts to the American public. The working group would provide its recommendations for protocols, procedures, guidelines, technologies and standards for providing EAS alerts over wireless phones. Included in this effort would be the establishment of a service description that would include user requirements. RCA believes that such a process is absolutely mandatory. The WARN Act also would provide funding and an opt-in provision for wireless carriers (with full disclosure to customers) as to whether the carrier provides EAS capabilities.

As president of RCA I would be happy to talk or meet with you or your staff to discuss this further.

Sincerely,



Clay Dover  
President, Rural Cellular Association  
and  
Vice President & General Manager of  
Alaska Digital Wireless Communications

cc: Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell  
BCPI

RCA Members:

<u>Name</u>	<u>Company</u>
James Brooks	Inland Cellular
Jack Nuttall	Plateau Wireless
Ryan Shepherd	Cellular Properties, Inc. (Cellularone of East Central Illinois)
Ron Strecker	Panhandle Telecommunication Systems, Inc.
Laura Phipps	Leaco Rural Telephone Cooperative, Inc.
Tim Stearns	NEP Cellcorp, Inc.
Sherry Stegall	Cellular South
Ricky Gibbs	Advantage Cellular, Inc.
Tom Walsh	Illinois Valley Cellular
Larry Lueck	New-Cell, Inc.
Barry Williams	Farmers Cellular Telephone, Inc.
Tom Attar	Highland Cellular
Roy Shiro	Pine Telephone/Pine Cellular
Craig Freeman	TMP Corp. dba Simmetry Communications
John Nettles	Pine Belt Wireless
Bob Wilson	WESTEX Wireless
Slayton Stewart	Carolina West Wireless
Michael Pierce	Pioneer Wireless
Janet Helfrich	MTA Wireless
Wes Burnett	Viaero Wireless
Elizabeth Kohler	Rural Cellular Corporation
Michael Rosenthal	SouthernLINC Wireless
Carla Levesque	Great Western Cellular Partners, LLC
Dan Rule	California RSA No. 3, Limited Partnership d/b/a Golden State Cellular