Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	)	EB Docket No. 06-119
	)	WC Docket No. 06-63
	)	
	)	
	)	

MOTION FOR ADMINISTRATIVE STAY OF CTIA – THE WIRELESS ASSOCIATION®

CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW Suite 600
Washington, D.C. 20036
(202) 785-0081

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Paul W. Garnett
Assistant Vice President, Regulatory Affairs

Brian M. Josef
Director, Regulatory Affairs

Its Attorneys

July 31, 2007

TABLE OF CONTENTS

Page

I. SUMMARY

By this motion, CTIA – The Wireless Association® ("CTIA")[1] respectfully requests that the Federal Communications Commission ("Commission" or "FCC") enter an administrative stay of its decision to require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source in place by August 10, 2007 for all assets that are normally powered by local AC commercial power, including eight hours of back-up power at all cell sites,[2] pending further review.

An administrative stay is amply justified here. CTIA is likely to succeed on the merits of its legal arguments, and these arguments present, at a minimum, "substantial" legal issues warranting a stay. The rule was adopted on the basis of inadequate statutory authority under the Communications Act of 1934.[3] The rule also was promulgated in violation of the Administrative Procedures Act ("APA").[4] Among other things, the Commission failed to provide notice of this rule and, as a result of its last-minute promulgation, failed to consider important aspects of the regulation, such as its relation to numerous federal, state, and local environmental, building, and health and safety codes that substantially limit the placement of batteries, generators, and fuel cells. These

---

[1] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization covers Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, broadband PCS, ESMR, and AWS, as well as providers and manufacturers of wireless data services and products. AT&T, although a member of CTIA, is not participating in the instant filing.

[2] *See Recomms. of the Indep. Panel Reviewing the Impact of Hurricane Katrina on Commc'ns Networks*, Report and Order, 22 FCC Rcd 10,541, ¶ 77 and Appendix B (2007) ("Katrina Order" or "Order").

[3] *See* 47 U.S.C. §§ 151-614 (2000).

[4] *See* 5 U.S.C. §§ 551-559 (2000).

federal and state laws make compliance with the power mandate difficult, if not impossible, and create serious issues of preemption. Nor did the Commission ever explain why a one-size-fits-all mandatory minimum requirement of eight hours of back-up power for all wireless assets, rather than an approach that would allow carriers the flexibility to intelligently and efficiently deploy resources at important locations in order to manage network reliability in light of the nature of a particular emergency, was the proper course.

In addition, CTIA's members in the wireless industry will suffer serious and irreparable harm, including threats to their FCC licenses, unrecoverable economic injury, and impairment of goodwill, if forced to comply with the present rule. Compliance with the rule could put carriers at risk of violating other laws, exposing them to possible criminal liability and jeopardizing their licenses. Also, enforcement of the rule is likely to have serious, irremediable effects on wireless consumers, the environment, public health, and public safety, such as a loss of E-911 service, if cell sites are moved or disabled due to the difficulties of compliance, or the risk of exposure to an unsafe concentration of generators with combustible fuel on the roof of a school. Further, any non-compliance with the mandate could endanger wireless providers' present financing arrangements and the ability to procure financing in the future. In addition, compliance efforts would impose a tremendous economic burden on carriers; these costs are either unrecoverable or, if recovered in the forms of higher rates, will result in harm to customer goodwill. Moreover, the balance of harms to wireless carriers, wireless consumers, and to the general public, given the irreparable nature of these injuries, favors granting a stay. Finally, maintaining the *status quo* in this case will not result in any appreciable harm to

the public interest and will avoid the serious consequences that will follow from the enforcement of the rule.

For these reasons, and in the interest of fairness and efficiency, the Commission's new rule should be stayed pending review of the rule. The wireless industry should not be compelled to expend significant resources complying with the current rule, only to have it substantially modified, eliminated, or invalidated, as is likely given its legal and practical infirmities. Nor should the public be put at risk for the disruption in service and other health and safety dangers that could occur if the rule takes effect. Indeed, the public interest would be affirmatively served by a stay, which would allow the Commission to proceed in this matter with a full understanding of the facts, law, and consequences of a mandatory back-up power regime.

CTIA respectfully asks that the Commission act on this request by 2 pm on August 2, 2007. Should the Commission fail to act by that date and time, CTIA will treat the Commission's inaction as a denial for purposes of seeking further relief.[5]

II. BACKGROUND

In response to the devastation of Hurricane Katrina in 2005, the Commission, pursuant to the Federal Advisory Committee Act, Public Law 92-463, as amended,[6]

[5] If an administrative stay or other relief as to the effective date of the rule is timely granted, CTIA intends to file a petition for reconsideration of the Katrina Order, if necessary. (Such a petition is due on August 10, 2007, thirty days from the date of publication in the Federal Register. *See* 72 Fed. Reg. 37,655, 37,655 (July 11, 2007)). CTIA genuinely desires to work with the agency to resolve this matter and thus is filing the instant motion out of an abundance of caution. If appropriate relief on the effective date is not timely forthcoming, however, CTIA intends to pursue judicial remedies in order to protect the legal interests of its members. Accordingly, this motion includes arguments applicable to both a motion for stay pending reconsideration and a motion for stay pending judicial review.

convened an expert panel to review the impact of Hurricane Katrina on communications infrastructure in the areas affected by the hurricane and to make recommendations to the Commission regarding ways to improve disaster preparedness, network reliability, and communications among first responders such as police, fire fighters, and emergency medical personnel.[7]

The report of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks (the "Katrina Report" by the "Katrina Panel") was submitted to the Commission on June 12, 2006. Among other recommendations, the Katrina Report stated that:

> [I]n order to ensure a more robust E-911 service, the FCC should encourage … [s]ervice providers, network operators and property managers [to] ensure availability of emergency/back-up power (*e.g.*, batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown/blackouts, terrorism). The emergency/back-up power generators should be located onsite, when appropriate.[8]

---

[6] 5 U.S.C. App. § 2 (1988).

[7] *See* Katrina Panel Charter, *available at* http://www.fcc.gov/eb/hkip/HKIPCharter.pdf (last visited July 31, 2007); *see also Notice of Est. of the Comm.'s Indep. Panel Reviewing the Impact of Hurricane Katrina on Commc's Networks*, 71 Fed. Reg. 933 (Jan. 6, 2006).

[8] INDEP. PANEL REVIEWING THE IMPACT OF HURRICANE KATRINA ON COMMC'NS NETWORKS, REPORT AND RECOMMS. TO THE FED. COMMC'NS COMM. 39 (filed June 12, 2006) ("Katrina Report"). This suggestion was, in turn, based on the best practices guidelines of the National Reliability and Interoperability Council ("NRIC") relating to emergency back-up power. The relevant NRIC recommendation encouraged service providers to "ensure availability of emergency/back-up power … to maintain critical communications services during times of commercial power failures." *NRIC VII Recommendation 7-7-5204*; *see id.* ("Service providers, network operators and property managers should ensure availability of emergency/backup power (*e.g.*, batteries,

To seek public comment on the recommendations of the Katrina Panel, the Commission issued a Notice of Proposed Rulemaking ("Katrina NPRM") on June 19, 2006, inviting comment on what actions the Commission should take to address the Katrina Panel's recommendations.[9] The Commission did not seek specific comment on back-up power requirements for communications facilities, but rather sought comment on the recommendations made by the Katrina Panel generally.[10] Indeed, requirements for back-up power were mentioned in the Katrina NPRM only in relation to the needs of state and local first responders[11] and the necessity of ensuring 911 services.[12] The entire discussion of the back-up power issue as it relates to service providers was as follows:

> [T]he panel recommends that the Commission encourage the implementation of certain NRIC best practices intended to promote the reliability and resiliency of the 911 and E-911 architecture. In particular, the Independent Panel recommends that service providers and network operators … ensure availability of emergency back-up power capabilities (located on-site, when appropriate). … We seek comment on how the Commission can best encourage implementation of these recommendations consistent with our statutory authority and jurisdiction.[13]

---

generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown/blackouts, terrorism)").

9 *Recomms. of the Indep. Panel Reviewing the Impact of Hurricane Katrina on Commc'ns Networks*, Notice of Proposed Rulemaking, EB Docket No. 06-119, 21 FCC Rcd 7320 (2006).

10 *See id.* at 7322 (¶¶ 6-7).

11 *Id.* at 7325 (¶ 15).

12 *Id.* at 7326 (¶ 16).

13 *Id.*

Following notice and comment, the Commission adopted a Report and Order implementing many of the recommendations of the Katrina Panel. While much of the Order simply adopted or rejected the recommendations of the panel, in the area of back-up power requirements the Commission promulgated a new rule that had not been suggested by the panel. Of all the recommendations made by the Katrina Panel, which urged the Commission to encourage the industry voluntarily to adopt best practices, this was the only one that the Commission converted into a federal mandate.

New Section 12.2 of the Commission's rules states:

> Local exchange carriers (LECs), including incumbent LECS (ILECs) and competitive LECs (CLECs), and commercial mobile radio service (CMRS) providers must have an emergency back-up power source for all assets that are normally powered from local AC commercial power, including those inside central offices, cell sites, remote switches and digital loop carrier system remote terminals. LECs and CMRS providers should maintain emergency back-up power for a minimum of 24 hours for assets inside central offices and eight hours for cell sites, remote switches and digital loop carrier system remote terminals that are normally powered from local AC commercial power. LECs that meet the definition of a Class B company as set forth in Section 32.11(b)(2) of the Commission's rules and non-nationwide CMRS providers with no more than 500,000 subscribers are exempt from this rule.[14]

Read literally, the Commission's new rule appears to require CMRS providers to install back-up power facilities for "all assets," including those owned by the company that are

[14] *See* Katrina Order at Appendix B.

normally powered by local AC power.[15] The sweeping breadth of this requirement encompasses assets that are not even remotely related to the provision of communications services (such as microwave ovens in company office kitchens and wall clocks in company conference rooms), let alone emergency communications services.

However, the problems with the new rule would not be solved even if the back-up power requirement for CMRS providers were interpreted to be limited to cell sites (one of the locations specifically mentioned in the rule). Many cell sites currently do not have generators or batteries capable of providing eight hours of back-up power, as required by the new rule, and it would be difficult, if not prohibitively expensive or even impossible, to satisfy this requirement at every cell site location. Moreover, the mandatory nature of the rule deprives carriers of the flexibility needed to respond to particular emergencies in the most sensible and efficient way possible.

III. CTIA SATISFIES THE CRITERIA REQUIRING A STAY OF THE BACK-UP POWER REQUIREMENT IN THE KATRINA ORDER.

Under the Communications Act of 1934 and the APA, the FCC may stay its decisions "when … justice so requires."[16] In deciding whether to grant a stay, it is well-established that the Commission looks to the same four factors as federal courts: (1)

---

[15] Although the rule uses the language "all assets" to describe the scope of the back-up power rule, CTIA believes that this is a scrivener's error, and that the Commission did not intend to extend the requirement to assets clearly unrelated to the provision of communications services. However, out of an abundance of caution and because the Commission or a court could enforce a literal and more expansive—though, CTIA believes, unreasonable—interpretation of the requirement, this motion will treat the requirement as covering "all assets."

[16] 5 U.S.C. § 705.

the likelihood of success on the merits; (2) the likelihood of irreparable injury; (3) harm to other parties; and (4) the public interest.[17] Although CTIA offers compelling legal and practical objections to the new back-up power rule, when a serious legal question is involved or a substantial irreparable injury is alleged, a movant need only present a substantial case on the merits and show that the balance of the equities weighs in favor of granting a stay to succeed.[18] As explained below, CTIA's motion amply satisfies each aspect of the Commission's requirements for a stay.

A. CTIA Is Likely to Prevail on the Merits of Its Arguments Regarding the Katrina Order and, at a Minimum, Raises Substantial Legal Issues.

CTIA is likely to prevail on the merits of its arguments regarding the Katrina Order and, at a minimum, raises "substantial" legal issues that warrant a stay pending further review. The eight-hour back-up power requirement was enacted on the basis of inadequate statutory authority. In addition, the Commission's adoption of the back-up power requirement violates the Administrative Procedures Act in numerous respects: (1) by failing to provide adequate notice of the requirement; (2) by failing to articulate any

---

[17] *See Va. Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958), *as revised by Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc. (Assignor) and Clear Channel Broad. Licenses, Inc. (Assignee), for Consent to Assignment*, 559 F.2d 841, 842-43 (D.C. Cir. 1977); s*ee also Applications of Cumulus Licensing Corp.*, 16 FCC Rcd 1052, 1054 (¶ 5) (2001); *Applications of Shareholders of CBS Corp. and Viacom, Inc. for Transfer of Control of CBS Corp. and Certain Subs.*, 16 FCC Rcd 5831, 5832 (¶ 3) (2001).

[18] *See Cuomo v. United States Nuclear Regulatory Comm'n*, 772 F.2d 972, 974 (D.C. Cir. 1985) ("To justify the granting of a stay, a movant need not always establish a high probability of success on the merits. Probability of success is inversely proportional to the degree of irreparable injury evidenced."); *Providence Journal Co. v. Fed. Bureau of Investigation*, 602 F.2d 1010 (1st Cir. 1979).

explanation as to why it adopted the rule; (3) by adopting the rule in the absence of any record evidence to support the new mandate in general or the choice of the eight-hour minimum in particular; (4) by failing to consider several important aspects of the problem it sought to address; (5) by failing to explain why less restrictive alternatives, such as the best practices regime recommended by the Katrina Panel, were inadequate; and (6) by adopting a rule that does not rationally advance but instead undermines its stated purpose.

1. The Commission Relied on Inadequate Statutory Authority In Imposing the Eight-Hour Emergency Back-Up Power Requirement.

It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress."[19] In imposing the far-reaching eight-hour emergency back-up power requirement, the Commission identified a single source of authority: Section 1 of the Communications Act, 47 U.S.C. § 151.[20]

---

[19] *Am. Library Ass'n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

[20] *See* Katrina Order at ¶ 77 and n.101 (adopting back-up power rule "pursuant to our authority under Section 1 of the Communications Act"). Section 1 provides:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

Section 1, however, merely sets forth the general purposes for which the Commission was created and is a "general jurisdictional grant."[21] Section 1 delegates no independent statutory authority to the Commission, and certainly does not delegate "express statutory authority to promulgate regulations" governing the specific amount of emergency back-up power for all of a wireless carrier's AC-powered assets, or even all of a wireless carrier's cell sites.[22] It is thus an inadequate statutory basis for the FCC's requirement. Even in cases where the Commission has relied on Section 1 *in addition to* other provisions of Title I of the Act, such as Section 4(i), 47 U.S.C. § 154(i), to adopt regulations pursuant to its ancillary authority, the courts have routinely rejected such efforts as unlawful,[23] emphasizing that "Congress 'does not . . . hide elephants in mouseholes.'"[24]

Thus, it is clear that Section 1, standing alone, is not the type of clear expression of Congressional intent that would be necessary to impose such an extreme requirement

---

47 U.S.C. § 151.

[21] *Am. Library Ass'n.*, 406 F.3d at 691.

[22] *Id.* at 692.

[23] *See, e.g., id.* (rejecting FCC's assertion of ancillary power to impose broadcast flag regulations under Title I); *see also Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (rejecting Commission's claim of plenary authority to require video description of television programs under Sections 151, 152(a), 154(1), and 303(r)); *Ill. Citizens Comm. for Broad. v. FCC*, 467 F.2d 1397, 1401 (7th Cir. 1972) (finding that FCC lacked ancillary authority to regulate objects that interfere with television transmission, holding that such authority does not extend to "any and all activities that 'substantially affect communications'").

[24] *Am. Library Ass'n*, 406 F.3d at 704 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

on the wireless industry. In other words, Congress did not drop the "elephant" of an eight-hour minimum mandatory back-up power requirement for all of a wireless carrier's assets powered by local commercial AC into the "mousehole" of Section 1. Indeed, this would be particularly anomalous in the context of CMRS, which since its inception has been largely deregulated at the federal level.[25] But that generalized purpose provision is all the Katrina Order cites as authority for its back-up power mandate. While it may be possible that the Commission might be able to do a better job of explaining its statutory authority for the back-up power rule than it did in the Order,[26] the present explanation is unsustainable.[27]

2. The Commission Violated the APA in Adopting the Eight-Hour Emergency Back-Up Power Requirement.

---

[25] *See Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238, 1245 (11th Cir. 2006) (describing "the pro-competitive, deregulatory framework for [wireless service providers] prescribed by Congress") (internal quotation omitted); *Tower Asset Sub, Inc., v. McHenry County Conservation Dist.*, 2002 U.S. Dist. LEXIS 20258, at *4 (N.D. Ill. Oct. 18, 2002) (explaining that, in the Telecommunications Act of 1996, "Congress sought to provide for the development of nationwide wireless services by facilitating deregulation and encouraging competition"); *Pet. of N.Y. State Pub. Serv. Comm'n to Extend Rate Regulation*, Report and Order, 10 FCC Rcd 8187, 8190 (¶ 18) (1995) (recognizing Congress's "general preference in favor of reliance on market forces rather than regulation" of wireless service).

[26] *But see id.* (holding that "at most, the Commission only has general authority under Title I to regulate apparatus used for the *receipt* of radio or wire communication *while those apparatus are engaged in communication*") (emphasis added).

[27] "[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). Thus, if the "grounds" an agency offers for its action "are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *Id.*

Under the APA, an agency must provide notice of, and an opportunity to comment on, new regulations.[28] Further, the APA requires a court to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In determining whether agency action is arbitrary and capricious, "[t]he court' s review is not merely a summary endorsement, . . . but should be searching and careful." *NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982).

a. The Commission Failed to Provide Adequate Notice that it Was Considering a Federal Mandate that Wireless Providers Maintain Eight Hours of Emergency Back-Up Power at All Cell Sites.

The Commission failed to provide the required notice that it was considering adopting an inflexible federal mandate that wireless providers deploy back-up power facilities for all commercially powered assets, including eight hours of emergency back-up power for all cell sites. "The Administrative Procedure Act requires that an agency publish notice of its proposed rulemaking that includes 'either the terms or substance of the proposed rule or a description of the subjects and issues involved'"[29] and "disclose in detail the thinking that has animated the form of a proposed rule."[30] "Notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected

---

[28] 5 U.S.C. § 553 (b), (c).

[29] *Ariz. Pub. Serv. Co. v. EPA*, 211 F.3d 1280, 1299-1300 (D.C. Cir. 2000) (quoting 5 U.S.C. § 553(b)(3)).

[30] *HBO, Inc. v. FCC*, 567 F.2d 9, 35 (D.C. Cir. 1977).

parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review."[31]

The Katrina NPRM and the Katrina Report failed to provide the required notice of the eight-hour emergency back-up power requirement in at least three ways. First, neither the Katrina NPRM nor the Katrina Report provided notice that the FCC might adopt an eight-hour back-up power *mandate*; rather back-up power, like all of the other recommendations of the Katrina Panel, was suggested only as a "best practices" consideration for the carriers.[32] Second, in neither document is the scope of this recommendation described as extending to *all assets* of the carrier – or even to *all* cell sites. Indeed, the scope of the recommendation is never specified at all. This issue is discussed only in the NRIC recommendation itself, and there it is limited to assets necessary to maintain "*critical* communications services."[33] Third, neither the Katrina NPRM nor the Katrina Report provides sufficient notice that the Commission intended to select a specific durational requirement for emergency power, let alone an eight-hour

---

31 *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005).

32 *See* Katrina NPRM, 21 FCC Rcd at 7326 (¶ 16) (noting Katrina Panel recommendation that "the Commission *encourage* the implementation of certain NRIC best practices intended to promote the reliability and resiliency of the 911 and E-911 architecture," in particular that carriers "*should* ensure availability" of emergency power capabilities, and asking "how the Commission can best *encourage* implementation of these recommendations") (emphasis added); *see also* Katrina Report at 39 (suggesting that service providers "*should* ensure availability" of emergency/back-up power and citing NRIC guidelines) (emphasis added).

33 *NRIC VII Recommendation* 7-7-5204 (emphasis added).

standard. Rather, the NPRM simply asked about the "*availability* of emergency back-up power capabilities."[34]

The requirement that wireless providers maintain eight hours of emergency back-up power at all cell sites cannot be characterized as a "logical outgrowth" of the Katrina NPRM. Under the APA, "[w]hile an agency may promulgate final rules that differ from the proposed rule, a final rule is a logical outgrowth of a proposed rule only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period."[35] In this case, commenters had no basis to anticipate a mandatory back-up power requirement for a particular length of time and, as evidenced by the lack of relevant comments, in fact did not. Because neither the recommendations of the Katrina Report, nor the Katrina NPRM, nor any comments filed in response to the Report or NPRM, contains any suggestion that eight hours of back-up power must be installed at all cell cites, let alone all assets of a wireless carrier, the Commission failed to satisfy the notice requirements of the APA.[36]

---

[34] *Katrina NPRM*, 21 FCC Rcd at 7326 (¶ 16) (emphasis added).

[35] *Int'l Union*, 407 F.3d at 1259 (internal quotations and citation omitted); *see also Envtl. Integrity Project v. EPA*, 425 F.3d 992, 996 (D.C. Cir. 2005) ("Given the strictures of notice-and-comment rulemaking, an agency's proposed rule and its final rule may differ only insofar as the latter is a 'logical outgrowth' of the former."); *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445-46 (D.C. Cir. 1991); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

[36] The consideration in applying the logical outgrowth test is "whether a new round of notice and comment would provide the first opportunity for interested parties to offer comments that could persuade the agency to modify its rule." *Ariz. Pub. Serv. Co*, 211 F.3d at 1299 (quotation omitted). An issue decided in a final rule is not the logical outgrowth of a proposal when an agency "did not afford a … public notice of its intent to

No commenter proposed a minimum mandatory back-up power requirement for all AC-powered assets of wireless service providers like the final rule adopted by the Katrina Order—not surprising given the absence of any notice or any logical suggestion that the Commission was considering adopting such a rigid mandate. As the Order noted, the National Emergency Number Association ("NENA") urged in its comments that "the FCC or the state commissions, as appropriate, require all telephone central offices to have an emergency back-up power source."[37] But this comment regarding back-up power at wireline central offices has nothing to do with cell sites or any other assets of a wireless provider, nor does it suggest a minimum time requirement. Another commenter cited in the Order suggested that local exchange carriers, competitive local exchange carriers, and wireless telephone providers be required to demonstrate they "have adequate back-up procedures in place."[38] This statement, however, has nothing to do with back-up power sources but rather emergency plans in general and the importance of disseminating them to field personnel.[39] Even if these commenters had presaged the rule at issue, which they did not, their comments would not be sufficient to cure the Commission's lack of notice.

---

adopt, much less an opportunity to comment on … [that issue]." *Int'l Union*, 407 F.3d at 1261.

[37] Comments of NENA, EB Docket No. 06-119, WC Docket No. 06-63, at 6 (filed Aug. 7, 2006) (cited at Order ¶ 76).

[38] Comments of St. Tammany Parish Commc'ns Dist. I, EB Docket No. 06-119, WC Docket No. 06-63, at 2 (filed Aug. 4, 2006) (cited at Order ¶ 76 n.97).

[39] *Id.* (stating that "it is imperative that . . . wireless providers be required to demonstrate they have adequate back-up procedures in place and that these procedures are fully explained to the field personnel and readily available to field personnel in the event of failed communications between the field offices and home office").

The agency, not commenters, is obligated to give interested parties notice of its intentions, so that parties need not guess at what the final rule might be.[40] For this reason alone, the rule cannot stand.[41]

b. The Commission's Rule is Arbitrary and Capricious in Several Respects.

One requirement of reasoned decisionmaking under the arbitrary and capricious standard is that an agency provide "a concise general statement of [the] basis and purpose of the rules ultimately adopted"[42] and "explain why it has exercised its discretion in a given manner."[43] In this case, the Commission has failed to articulate a satisfactory explanation for requiring eight hours of emergency back-up power at all cell sites. Indeed, the Commission has failed to articulate any explanation for the requirement at all.

---

40 *See Fertilizer Inst. v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991) (explaining that the "fact that some commenters actually submit[] comments [discussing an issue not raised by the NPRM] is of little significance" and cannot cure a notice problem); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (holding that an agency "must itself provide notice of a regulatory proposal" and that, where it has "failed to do so, it cannot bootstrap notice from a comment").

41 *See, e.g.*, *United States v. Goodner Bros. Aircraft, Inc*., 966 F.2d 380, 384 (8th Cir. 1992) (finding that rulemaking that does not comply with the required procedures is held invalid and should be vacated); *W.C. v. Bowen*, 807 F.2d 1502, 1505 (9th Cir. 1987), *opinion amended, rehearing denied* 819 F.2d 237 (9th Cir. 1987) ("An agency rule which violates the APA is void.").

42 *HBO*, 567 F.2d at 35.

43 *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49 (1983).

When an agency "has failed to provide a reasoned explanation …, [a court] must undo its action."[44]

An agency decision is also arbitrary and capricious when it lacks "support in the record."[45] The Commission has failed to cite record evidence in support of its new rule, which is unsurprising because the record in the Katrina proceeding is entirely devoid of such evidence. At most, the record contains two passing and unrelated references by NENA and St. Tammany Parish (noted above) and brief statements by AT&T and Verizon that they already have back-up power facilities at their wireline central offices facilities and voluntary best practices include maintaining some back-up power supply for critical communications services.[46] The record contains no information regarding the need for a mandatory back-up power requirement, the type or duration of back-up power that would be adequate, the cost of compliance on the industry, or the time that will be required to comply. In particular, there is no record support whatsoever for the Commission's choice of eight hours as the correct minimum standard for emergency

---

[44] *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

[45] *NAACP v. FCC*, 682 F.2d 993, 997 (D.C. Cir. 1982) (stating that an agency "must disclose in detail the . . . data upon which [a] rule is based"); *HBO*, 567 F.2d at 35.

[46] *See* Comments of AT&T Inc., EB Docket No. 06-119, WC Docket No. 06-63, at 13 (filed Aug. 7, 2006) ("It is considered a best practice for LECs to have back-up batteries and/or diesel generators *in every central office*. During most emergencies, therefore, central offices are able to maintain constant telecommunications services within the community for a limited period of time after loss of commercial power. All of AT&T's *central offices* are equipped with back-up batteries and/or diesel generators.") (emphasis added); Comments of Verizon, EB Docket No. 06-119, WC Docket No. 06-63, at 7 (filed Aug. 7, 2006) ("Every *critical component* in Verizon's networks is protected by automatic power back-up systems. … This is accomplished by installing large banks of batteries for network equipment and diesel generators to charge those batteries.") (emphasis added).

power back-up for cell sites. While the Commission has some latitude in setting numerical limits, it cannot "pluck[]" a number "out of thin air."[47] The lack of record evidence is fatal to the Commission's back-up power rule.

The Commission's rule also is arbitrary and capricious because the Commission "failed to consider [several] important aspect[s] of the problem."[48] First, as explained in greater detail below, compliance with the rule raises potential conflicts with federal, state and local rules governing back-up power facilities.[49] To the extent the rule actually conflicts with state and local laws, serious issues of preemption are raised.[50] Second, compliance with the back-up power requirement will require significant investment, time, and energy by the wireless industry. The Commission's statement that its back-up power

---

47 *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 462 (D.C. Cir. 2001) (explaining that, although the Commission's numbers need not be "precisely right," they must be "within a zone of reasonableness"); *WJG Tel. Co., Inc. v. FCC*, 675 F.2d 386, 388-89 (D.C. Cir. 1982) (stating that "an agency may not pluck a number out of thin air when it promulgates rules in which [such] terms play a critical role" and the choice of numerical limits by an agency must "reflect[] its informed discretion").

48 *State Farm*, 463 U.S. at 43; *see also Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (stating that an agency must "consider[] the relevant factors"). *NAACP*, 682 F.2d at 997 (explaining that an agency's decision is arbitrary and capricious unless "based on a consideration of the relevant factors").

49 *See infra* at Section III.B.1.

50 *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'") (quoting *English v. Gen. Electric Co.*, 496 U.S. 72, 79 (1990), and *Hines v. Davidowitz* 312 U.S. 52, 67 (1941)).

rule will not create an undue burden[51] does not fairly consider these issues; it merely makes a conclusory statement about them. Third, compliance with the rule could have substantial negative effects on wireless consumers in terms of reduced coverage and higher prices, as also discussed below.[52] The Katrina Order considers none of these factors, nor are they discussed anywhere in the record.

The Commission also had a duty to consider less restrictive alternatives to the mandatory eight-hour back-up power requirement and to explain why it rejected such alternatives.[53] The Commission never considered the adequacy of the voluntary best practices NRIC regime on emergency back-up power that the Katrina Panel actually recommended, nor did it ever explain why a mandatory legal obligation on this issue, alone among all the issues addressed by the Panel in its extensive report, was needed. The FCC's failure to do either further renders the new rule arbitrary and capricious.[54]

Finally, the rule is arbitrary and capricious because it does not reasonably further, but rather undermines, the goal articulated by the Commission and thus lacks a "'rational

---

[51] *Katrina Order* at ¶ 78.

[52] *See infra* Section III.B.5.

[53] "[A]n agency has a duty to consider responsible alternatives to its chosen policy and to give a reasoned explanation for its rejection of such alternatives." *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1169 (D.C. Cir. 1987) (internal quotations omitted).

[54] *Yakima Valley Cablevision, Inc. v. FCC*, 794 F.2d 737, 746 n.36 (D.C. Cir. 1986) ("The failure of an agency to consider obvious alternatives has led uniformly to reversal.")

connection between the facts found and the choice made.'"[55] By rigidly imposing a one-size-fits-all federal requirement of eight hours of back-up power at all cell sites, the rule deprives wireless providers of the flexibility needed to efficiently and intelligently deploy their resources to plan for and respond to emergency situations. Given their unique knowledge of their own proprietary networks, providers are the parties best situated to make these decisions. Under the rule, however, wireless providers must reflexively install eight hours of back-up power at all cell sites, rather than identifying the most important links in their network for the support of critical communications and protecting them not just with adequate power but, for example, hardening them from wind gusts or even terrorist attacks, or pre-positioning equipment. There was no explanation as to why the Commission felt it necessary to substitute its own judgment for that of carriers on these issues. Moreover, different emergencies require different responses: eight hours worth of generator power does little good when an operational site is under water due to flooding. And different areas of the country face different types of emergency risks: while hurricanes are a particularly acute problem in Florida, that is not true in Arizona; whereas California is susceptible to earthquakes, North Dakota is not; and highly populated urban areas such as New York or Washington, D.C. may face special risks of terrorism not present in other parts of the country. By diverting manpower and resources away from efforts to tailor emergency communications plans to these various situations, the rule perversely undermines the goal of public safety.

---

[55] *State Farm*, 463 U.S. at 43 (citing *Burlington Truck Lines, Inc*. v. *United States*, 371 U.S. 156, 168 (1962)); *see also Morall v. DEA*, 412 F.3d 165, 181 (D.C. Cir. 2005).

Further, as explained below, enforcement of the rule in its present form could, due to the impossibility of timely compliance and in some cases any compliance at all, ultimately lead to the termination or disruption of wireless cell sites and thus could threaten the availability of E-911 service.[56] As also explained below, enforcement of the rule could result in health, safety, and environmental risks to the public.[57] Accordingly, the rule, adopted in the interest of public safety may irrationally hinder rather than promote that important interest.

For all of these reasons, the Commission's adoption of the broad back-up power requirement was done without fair notice or opportunity for carriers to comment on the burdensome and disruptive consequences of the rule, and is arbitrary and capricious. Given these serious defects, CTIA is likely to succeed on the merits of its argument that the rule is unlawful.

B. A Stay Will Avoid Irreparable Injury to Wireless Providers, Wireless Consumers, and the General Public.

If the Commission's new rule is allowed to take effect, wireless providers, wireless consumers, and the general public will suffer irreparable harm. The requirement that CMRS providers have eight hours of back-up power for *all assets* that are normally powered by local AC commercial power, including assets located at *all* cell sites, will require carriers to take actions that: (1) may violate federal, state and local legal requirements; (2) pose potential threats to public health, public safety and the

---

56 *See infra* Section III.B.2.

57 *See id.*

environment; (3) cannot be met by the effective date of August 10, 2007; (4) could endanger certain wireless providers' present debt financing arrangements and the ability to procure financing in the future; and (5) will require substantial financial expenditure, which, to the extent it may be recovered at all, will have to be recovered through increased fees resulting in the loss of customer goodwill. Accordingly, granting the requested stay will avoid numerous, substantial irreparable injuries to both carriers and the public.

1. Compliance with the Order Implicates and May Violate Federal, State and Local Requirements.

In order to comply with the rule, carriers would be required to install and maintain a large number of battery and fuel-powered back-up power systems.[58] Because these systems contain lead, sulfuric acid, oils and flammable liquids, they are subject to a host of federal, state and local environmental and safety laws that strictly limit or significantly impact their installation and use. For example, nationwide fire codes require stationary battery banks to have spill control and containment mechanisms to prevent exposure from leaking electrolytes; these codes also require special venting and seismic protection for the batteries and power cells.[59] Depending on the location of a cell site, the need to

[58] Battery-powered systems available to the telecommunications sector primarily consist of banks of lead-acid batteries. Fuel-powered back-up systems primarily consist of diesel-powered generators.

[59] *See, e.g.*, NFPA § 110: Standard for Emergency and Standby Power Systems; NFPA § 70: National Electrical Code, Art. 480 (defining requirements for battery storage); International Fire Code § 608 (Stationary Storage Battery Systems). These standards are imposed in all 50 states.

comply with these codes may make it impossible to comply with the Commission's new back-up power requirement.[60]

State and local building codes and site leases also often limit the placement of generators and batteries. Such codes and leases may impose specific restrictions on the weight of equipment placed on roofs and, by extension, the amount of batteries, generators, and fuel that may be stored or kept on rooftops.[61] The batteries necessary to satisfy the rule could weigh between 600-1,000 pounds per transmitter (*i.e.*, in addition to the weight of the transmitter and associated equipment).[62] At a multi-carrier site, compliance with the requirement could require the addition of several thousand pounds of additional weight.[63] This is simply not permitted under many building codes and

---

[60] *See* Declaration of Richard A. Craig (Ex. 1) ("Verizon Wireless Declaration") ¶ 6 (discussing need to obtain permits "to ensure compliance with zoning and air permitting regulations in the case of generators"); Declaration of Steve Olson (Ex. 2) ("Rural Cellular Declaration") ¶ 7 (stating that compliance with Order would likely require additional state and local permits).

[61] *See, e.g.*, New York City Admin. Code § 27-561(d)(5) ("Where equipment is placed on roofs, the design shall provide for the support of such equipment."); *Id*. at § 27-557(b)(2) ("Floors that support any items of machinery, electrical or mechanical equipment, or other concentrated live load in excess of one thousand pounds (including the weights of pads or bases) shall be designed to support such weight as a concentrated load or group of concentrated loads.") (applicable also to roofs, via § 27-561(c)).

[62] *See* Declaration of Tony Kent (Ex. 3) ("Cellular South Declaration") ¶ 6 (stating that "to provide 8 hours of back-up power, 600-1,000 pounds of batteries would be needed).

[63] *See* Cellular South Declaration ¶ 6 (stating that "as much as 3,000 to 5,000 pounds of batteries would be required [at multiple-carrier cell sites]"); *see also* Declaration of John B. Scola (Ex. 4) ("Cincinnati Bell Declaration") ¶ 7 (stating that the cabinets that normally house cell site batteries "weigh approximately 1,500 pounds" including the batteries).

leases.[64] Local building codes also impose detailed requirements for plans and permits related to the construction of fuel-burning equipment or fuel storage, requiring certain amounts of ventilation, insulation, and clearance from walls.[65] Moreover, cell transmitters are often located in church steeples and building rooftops where space is tight.[66] Thus, locating a generator or the requisite batteries in such locations may be physically impossible, as well as violative of local zoning and other regulations.[67] Local noise abatement rules also limit the placement and operation of power sources.[68]

---

64 *See* Cellular South Declaration ¶ 6 (stating that it "may or may not be feasible" to renegotiate leases); Verizon Wireless Declaration ¶ 4 (stating that "the terms of lease agreements often limits the type and amount of equipment that Verizon Wireless can use on the property"); Rural Cellular Declaration ¶ 6 (discussing factors in renegotiating leases).

65 *See, e.g.*, New York City Admin. Code § 27-180 ("[A]pplications for equipment work permits shall be accompanied by plans in the following cases and in accordance with the following requirements: … (c) Fuel-burning and fuel-oil storage equipment. Plans for fuel-burning equipment and fuel-oil storage equipment shall contain at least the following data and information: (1) The kind or grade of fuel to be used. (2) The location, arrangement, size, load, and maximum capacity of the burning, storage and fuel-pumping equipment. (3) The method or means of providing air to the equipment space, showing duct and opening sizes. (4) The location, size, and materials for all breechings; the height and size of all chimneys and gas vents; the thickness and type of all insulation materials; and the clearances from combustible walls, partitions, and ceilings.(5) Diagrams of all piping, including vent and fill piping for oil systems, and all safety cut-off and relief devices and valves in piping.")

66 *See* Declaration of Bill Leonard (Ex. 5) ("Cricket Communications Declaration") ¶ 6 (referring to its cell sites that are "located in tight spaces such as closets or in church steeples"); Cellular South Declaration ¶ 7 (stating that many of its cell sites "are on rooftops").

67 *See* Cellular South Declaration ¶ 6 (stating that compliance may not be possible because "[m]any cell sites do not have sufficient space to comply with these requirements"); Verizon Wireless Declaration ¶ 4 (stating that sometimes "there simply is not any space available to install sufficient back-up power to meet the FCC requirement"); Cincinnati Bell Declaration ¶¶ 8-9 (discussing space limitations); Rural

In addition to these safety requirements, many federal and state environmental requirements also are implicated by the new back-up power rule. Section 311 of the federal Clean Water Act ("CWA")[69] requires businesses that handle, transport or store oil or petroleum above certain quantities to prepare and update written "SPCC Plans." These plans are required to prevent or contain spills and keep hazardous chemicals from polluting streams, rivers and other bodies of water. Because the new rule will likely require installation and maintenance of a significant number of additional generators, certain telecommunications facilities may have to store larger quantities of fuel. If the location of the facility is such that it could be reasonably expected to discharge oil into navigable waters or adjoining shorelines, carriers would be required to develop SPCC Plans for those sites.[70]

The increase in the number of batteries and generators required to comply with the rule also implicates the federal Emergency Planning and Community Right-to-Know Act ("EPCRA").[71] EPCRA Sections 302, 303, 311 and 312 require entities to notify state and local fire departments of certain hazardous substances located at their facilities or sites of operation. Lead-acid batteries contain sulfuric acid and lead. Generators contain

---

Cellular Declaration ¶ 6 (stating that, "at many sites, [Rural Cellular] does not currently lease sufficient space to accommodate additional batteries or generators").

68 *See* Verizon Wireless Declaration ¶ 6 (stating that "some states such as California . . . have strict . . . noise abatement controls"); Cellular South Declaration ¶ 9 (discussing need to "construct additional walls around generators for noise abatement purposes").

69 33 U.S.C. §§ 1251-1387.

70 *See* 40 C.F.R. Part 112.

71 42 U.S.C. §§ 11001-11050.

diesel, oil and other hazardous substances that are subject to EPCRA requirements. If these materials are present in quantities above certain threshold limits, the facility must designate an emergency planning representative to coordinate with local emergency response personnel and develop response plans to be followed in case of any release of the substances.[72] The owner or operator of the site may also be required to comply with certain annual reporting requirements.[73] These factors increase the likelihood that carriers' attempts to comply with the Federal requirement will be blocked at the local level.

The installation of a large number of diesel generators, in particular, raises a number of issues under the federal Clean Air Act ("CAA").[74] Diesel generators emit nitrogen oxides ("NOx") and particulate matter ("PM"). These substances are designated as "criteria" air pollutants for which the U.S. Environmental Protection Agency ("EPA") has established national ambient air quality standards.[75] States could be subject to sanctions if newly-installed or upgraded diesel generators at cell sites located within their borders cause the air quality for NOx and PM to fall below the EPA standards. Under the CAA, each State must develop a plan describing how it will attain and maintain the

---

72 *See* 40 C.F.R. Part 355 (regulations implementing EPCRA Sections 302 and 303).

73 *See* 40 C.F.R. Part 370 (regulations implementing EPCRA Sections 311 and 312).

74 42 U.S.C. §§ 7401-7671(q).

75 *See* CAA § 108, 42 U.S.C. § 7408. EPA has established ambient air quality standards that the states must then implement. *See* CAA §§ 109, 110, 43 U.S.C. §§ 7426, 7471. These standards are set at levels requisite to protect public health.

national ambient air quality standards for "criteria" pollutants.[76] Placing a large number of diesel generators in the same general vicinity could have a significant adverse impact on air quality for NOx and PM—an impact States did not plan for in the development of their most recent SIPs. If a State does not attain the air quality standards for NOx or PM, it could face CAA-required sanctions and other penalties. In addition, the EPA recently promulgated regulations under the CAA that require owners or operators of stationary diesel generators to install non-resettable hour meters on their generators, conduct tests on certain generators to demonstrate compliance with applicable performance standards, and potentially install pollution control technology.[77] Knowing violations of certain provisions of the CAA, including permitting requirements and SIP elements, are a felony.[78]

---

[76] This plan is called the State Implementation Plan ("SIP"). In general, it is a collection of programs, including: air quality monitory programs; emissions inventories, which describe the sources and categories of emissions to the air for a given pollutant; pollution control strategies; formal measures enforceable by EPA, states, and citizens, which ensure that needed reductions in air pollution will be achieved; and periodic reviews to evaluate whether those needed reductions were actually achieved.

[77] *See* 40 C.F.R. §§ 60.4200(a)(3), 60.4205(d), 60.4209(a), 60.4211(b)(5), (d)(1), 60.4212, and 60.4213.

[78] Specifically, Section 502 of the CAA makes it "unlawful for any person . . . to operate [a source] subject to standards or regulations under section [111] . . . except in compliance with a permit issued by a permitting authority." 42 U.S.C. § 7661a(a). A company that knowingly violates Section 502 commits a crime. *See* 42 U.S.C. 7413(c)(1). Thus, because stationary diesel engines/generators are subject to standards under Section 111 of the CAA, *see* 42 U.S.C. § 7411; 40 C.F.R. §§ 60.4200-4219, a company that installs and operates a generator without a permit is potentially subject to criminal liability. Likewise, upgrading an existing generator in a manner that would bring it out of compliance with its permit conditions is a criminally punishable act.

Section 113 of the CAA also makes it crime to violate the provisions of a SIP. *See* 42 U.S.C. § 7413(c)(1). Some localities have adopted rules, which are part of a

Many state and local governments also have enacted laws and ordinances (and adopted provisions in their SIPs) that would require carriers to obtain permits before installing new diesel generators (or any other source of regulated pollutants) at cell sites.[79] These governments also have the authority to require modifications to the proposed installation and operation of the air pollutant prior to grant of the permit. The issuance of these permits can be delayed for months while government authorities negotiate changes to installation plans that address their concerns about noise pollution, fuel leakage, ventilation, and other problems.

In short, carriers face a host of federal, state and local laws that heavily regulate the placement, installation, and operation of generators, batteries, and fuel cells. Compliance with the rule puts carriers at risk of running afoul of these myriad regulations. The economic and reputational consequences of such conduct, which could put carriers in jeopardy of enforcement litigation, constitute irreparable harm that should

---

state's SIP, that would require diesel generators to be permitted before construction and/or operation. *See infra* note 79. Installation of a generator without such a permit could lead to criminal sanctions under Section 113.

[79] In California, for example, companies must demonstrate compliance with the State's emission limits for stationary diesel generators prior to installing a diesel generator with a rated brake horsepower greater than 50. *See* Cal. Code Regs. tit. 17, § 93115(e)(4). Pursuant to that law, many local air quality districts in California require that such generators receive a permit before installation. *See, e.g.*, San Diego Air Pollution Control District, Rules and Regulations, Rules 10, 10.1, 11(a)(5) (stating that sources subject to regulation under Section 111 of the CAA must obtain a permit before construction), *available at* http://www.sdapcd.org/rules/rules/REG2.html. Many town and city governments require permits for the installation of diesel generators of any size. *See, e.g.*, City of Rockville, Emergency Generator Installation Requirements, *available at* http://www.rockvillemd.gov/residents/inspections/generator.htm (last visited July 18, 2007).

be avoided by a stay.[80] The potential criminal liability from knowing violations of the CAA could also lead to revocation of a wireless provider's FCC license,[81] the basis of its entire business, which constitutes further irreparable harm.[82]

2. Compliance with the Rule Could Threaten Public Health, Public Safety, and the Environment.

Even if the installation of the requisite back-up power facilities at certain cell sites does not violate a specific law or ordinance, compliance with the new rule could still pose

---

[80] *See, e.g., Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1051-52 (S.D. Cal. 2006) (holding that the "imminent threat of litigation arising from the enforcement of [a regulation]" that compels a party to violate inconsistent federal and state laws poses an "irreparable harm, that cannot be adequately compensated at a later time"). In order to avoid the violation of other state and federal laws, as well as violation of the FCC's back-up power rule, service providers may be forced to shut down or move cell sites. *See infra* Sections III.B.3 and III.B.5. In addition to creating significant public interest harms, such action could expose the providers to class action or other civil suits by customers alleging inadequate service. The threat of such liability likewise constitutes irreparable harm.

[81] *See Application of TRW Inc., Transferor and Northrop Grumman Corp., Transferee for Consent to Transfer of Control of Authorization to Construct, Launch and Operate a Ka-Band Satellite System in the Fixed-Satellite Serv.*, 17 FCC Rcd 24,625, 24,628 (¶ 8) (2002) ("[U]nder the Commission's Title III public interest review, the Commission considers the character qualifications of an applicant or licensee. To this end, the Commission has determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions. . . . [T]he Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.") (citing *Policy Regarding Character Quals. in Broad. Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1209-10 (¶¶ 55-57) (1986), *modified*, 5 FCC Rcd 3252 (1990), *recon. granted in part*, 6 FCC Rcd 3448 (1991), *modified in part*, 7 FCC Rcd 6564 (1992); *MCI Telecommc'ns Corp.*, 3 FCC Rcd 509, 512, n.14 (1988)) (other citations omitted)).

[82] *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (holding that threat to existence of business constitutes irreparable injury); *see also ABA Distribs., Inc. v. Adolph Coors Co.*, 661 F.2d 712, 714 (8th Cir. 1981) (stating that the "improper deprivation of an inveterate enterprise that, but for the defendant's challenged action, could be expected to continue" constitutes irreparable harm).

a threat to public health, public safety, and the environment. The proliferation of regulations concerning the location, installation, and operation of generators and battery-powered systems underscores the extent of concerns about safety. Installation of back-up power equipment—even if performed consistent with applicable requirements—may nevertheless create potential safety concerns in some cases. For sites where compliance with all applicable regulations is impossible, or at least will be impossible by the August 10, 2007 effective date, the only alternative for the carrier may be to shut down its transmitter, thereby reducing or degrading coverage and negatively affecting consumer service and public safety.

The installation of a generator and its combustible fuel on the roof of a school or public building where a transmitter may be located may not run afoul of any law or ordinance but may nevertheless pose a public health risk. This is a particular concern where a rooftop location would expose such facilities to lightning and other weather conditions that could compromise the equipment, making it more susceptible to fuel leakage and fire. Similarly, the location of such equipment in a church steeple—another popular cell site location—may not provide adequate ventilation despite meeting the minimum requirements in applicable rules and may thus pose a health risk to the public.

The new rule also threatens irreparable harm to public safety by imposing a requirement with which wireless carriers will not be able to comply, at least before the effective date of August 10, 2007.[83] As a result, carriers will have little choice but to

[83] *See infra* Section III.B.3; *see also* Cricket Communications Declaration ¶ 8 (stating that the company "cannot comply with the Order's August 10, 2007 deadline"); Cincinnati Bell Declaration ¶ 11 (stating that the "August 10, 2007 deadline … is impossible to meet"); Verizon Wireless Declaration ¶ 3 (stating that compliance "cannot

shut down or move certain transmitters rather than risk operating in violation of the Commission's new rule or endangering public health and safety.[84] This would adversely affect the coverage and capacity of wireless service in the area of the decommissioned or relocated transmitter to the detriment of wireless customers.[85] Since wireless service is relied upon by private citizens to call 911 and for other public safety purposes, as well as by first responders for critical communications, any reduction in the scope of service will adversely and irreparably affect public safety.

3. Compliance Is Plainly Not Possible by the Effective Date.

The current effective date of August 10, 2007 (thirty days after publication of the Order in the Federal Register) is manifestly unrealistic.[86] Thousands of cell sites across the country currently do not have back-up power facilities that meet the new requirements and will need to be brought in line with the new rule.

As explained *infra* Section III.B.5, to comply with the new rule, carriers will have to conduct structural and electrical studies, renegotiate leases, obtain necessary permits,

---

… be accomplished by the August 10 effective date"); Rural Cellular Declaration ¶ 5 (stating that compliance is not possible by the August 10, 2007 deadline).

84 *See* Cellular South Declaration ¶ 12 (stating that "the company may be forced to shut down [certain] cell site[s]" and resulting loss of coverage); Cincinnati Bell Declaration ¶ 12 (explaining that inability to comply could force it to "discontinue use" of certain cell sites and resulting loss of coverage); Rural Cellular Declaration ¶ 12 (stating that "it would be necessary for [Rural Cellular] to discontinue use of, or relocate … cell sites" where it could not comply with the Order); Verizon Wireless Declaration ¶ 4 (noting that company may be left "with little choice but to identify and secure a new cell site location if it is to satisfy the Commission's back-up power mandate, which could be disruptive to customer service").

85 *See* Cellular South Declaration ¶ 12; Cincinnati Bell Declaration ¶ 12; Rural Cellular Declaration ¶ 12.

86 *See supra* note 83.

comply with local, state, and federal safety and environmental regulations, and modify cell sites, even before they can begin the process of ordering and installing back-up power sources. It will take wireless carriers much longer than thirty days to obtain the local permits necessary for the installation and operation of power generators, batteries, and fuel tanks. Because permits would have to be solicited and obtained from local and state authorities all across the country and inventory forms for fuel located at many sites would have to be carefully prepared and submitted to the appropriate regulatory bodies, full compliance by the August 10, 2007, effective date is simply not feasible.

Even after the steps required to comply with the new rule have been identified and assessed, it would still take wireless carriers significantly longer than thirty days to order and receive the necessary generators and battery equipment.[87] Given the number of new generators/batteries the rule requires to be installed, this delivery time is likely to increase significantly as distributors are flooded with orders.[88] Finally, it will take time for

---

[87] *See* Verizon Wireless Declaration ¶ 5 (stating that timeframe from purchase of backup equipment to installation is normally "4 to 6 months" but would take longer given high demand for equipment caused by the new rule); Rural Cellular Declaration ¶ 11 (estimating time required to comply as "significantly longer than 3-5 months" because of short supply of equipment due to effect of Order); Cellular South Declaration ¶ 8 ("estimat[ing] that it would take approximately 8 weeks to get battery cabinets, and 12 to 16 weeks to get generators installed from the date that a purchase order is submitted to our vendors"); Cincinnati Bell Declaration ¶ 11 (expressing an "8 to 12-week time frame" that "is likely to increase substantially due to the high demand for emergency back-up equipment created by the Order").

[88] Cincinnati Bell Declaration ¶ 11 (expressing an "8 to 12-week time frame" that "is likely to increase substantially due to the high demand for emergency back-up equipment created by the Order"); Cricket Communications Declaration ¶ 8 (stating that "scarcity of necessary equipment and contractors [due to effect of Order] may contribute to additional delays" in complying with Order); Cellular South ¶ 9 (stating that "process may take even longer due to the demand for emergency back-up equipment that the FCC's requirement [would create]"); Verizon Wireless Declaration ¶ 5 (stating that

wireless carriers to install these new back-up power sources. As noted below in Section III.B.5, installation of back-up facilities at each site will require a tremendous commitment in terms of man-hours.[89]

Accordingly, unless the Commission grants an administrative stay, wireless providers will be faced with a choice between violating the Commission's new rule or shutting off or moving non-compliant cell sites that today provide valuable service to consumers. Because neither option furthers the Commission's and the industry's common goal of ensuring essential communication service, an administrative stay will avoid these potentially irreparable harms and allow all cell sites to continue operating while the rule is reviewed.

4. Enforcement of the Rule Could Endanger Certain Wireless Providers' Present and Future Debt Financing Arrangements.

As explained above, compliance with the eight-hour backup power mandate may be practically and legally impossible in many cases. Any non-compliance with the mandate could endanger certain wireless providers' present debt financing arrangements and the ability to procure financing in the future, thus causing them further irreparable injury.

---

timeframe from purchase of backup equipment to installation is normally "4 to 6 months"); Rural Cellular Declaration ¶ 10 (anticipating that short time to comply with Order will increase delays in compliance by producing decrease in supplies and increase in demand). The occurrence of a hurricane or tropical storm, common at this time of year, could cause further delays.

[89] *See infra* note 95.

In the finance world, some wireless providers are required to certify, as a condition of finance instruments such as bond indentures, that they are in compliance with all FCC and other applicable regulations.[90] Accordingly, enforcement of the rule would threaten these carriers' existing financing arrangements by putting them in alleged breach of their contracts, and could even lead to the calling of present debt.[91] Enforcement would also make it more difficult for such carriers to obtain financing in the future and increase the cost of such financing.[92]

This threat to present and future financing in turn jeopardizes the business ventures that these carriers are funding or would otherwise fund with these instruments. This harm is, by its very nature, impossible to remedy with backwards-looking judicial action,[93] and should be avoided by the entry of an administrative stay.

---

[90] *See* Cricket Communications Declaration ¶ 10 (explaining that "[l]enders typically require the company to certify that it is in compliance with all applicable regulations, including FCC regulations, as a condition to financing").

[91] *See id*. ("Enforcement of the 8-hour back-up power requirement could prevent Cricket from satisfying the conditions necessary to obtain new financing or increase the cost of the financing Cricket is able to obtain.").

[92] *See id*. ("The inability to secure financing at favorable rates could jeopardize current and future business ventures that Cricket is funding or would otherwise fund via such financial instruments.").

[93] *See supra* note 81; *see also Nat'l Fisheries Inst., Inc., v. United States Bureau of Customs And Border Prot.*, 465 F. Supp. 2d 1300, 1310-12 (Ct. Int'l Trade 2006) (treating as irreparable harm the fact that, absent an injunction, parties would suffer "burdens on their credit availability [that] will impede severely the operation of their businesses and ultimately will force them out of the business"); *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37-38 (2d Cir. 1995) (holding that deprivation of opportunity to expand business is irreparable harm); *Alcatel Space, S.A. v. Loral Space & Commc'ns Ltd.*, 154 F. Supp. 2d 570, 584 (S.D.N.Y. 2001) ("Although the loss of these contracts may not destroy Alcatel's business, the limited number of satellite opportunities available warrants a finding of irreparable harm."), *aff'd*, 25 Fed.Appx. 83 (2d Cir. 2002); *T.I.M.E.-DC, Inc. v. N.Y. State Teamsters Conference Pension & Retirement Fund*, 580

5. Compliance Would Impose a Tremendous Economic Burden on Wireless Carriers, Which May Not Be Recoverable and Is Likely to Impair Goodwill.

Although the Commission asserted its expectation in the Katrina Order "that this requirement will not create an undue burden,"[94] that is simply not correct.[95] Even if the

---

F. Supp. 621, 631 (N.D.N.Y. 1984) ("The threats of diminished consumer confidence *and elimination of business opportunities* are clearly consequences constituting irreparable harm") (emphasis added).

94 *Katrina Order* at ¶ 78.

95 Many of the tens of thousands of cell sites across the country do not have eight hours of back-up power in place and a significant number of non-critical sites have no back-up power whatsoever. *See, e.g.*, Verizon Wireless Declaration ¶ 3 (discussing number of cell sites without eight hours of backup power). Since wireless carriers generally do not already have the back-up power equipment needed to bring the remainder of their sites into compliance, the new rule will require them to purchase, install, and maintain such equipment. *See* Cellular South Declaration ¶¶ 5, 10 (discussing need for new equipment and costs); Cricket Communications Declaration ¶¶ 3, 9 (same); Cincinnati Bell Declaration ¶ 6 (same); Rural Cellular Declaration ¶ 10 (same). The cost of doing so to meet the agency's requirements will be substantial. *See* Cellular South Declaration ¶ 10 ("The cost of installing battery cabinets … will be approximately $25,000-$30,000 per cell site, and … the cost of installing generators will be approximately $15,000-$20,000 per cell site."); Cricket Communications Declaration ¶ 9 (estimating cost of compliance at their DAS sites at "over $6.5 million"); Rural Cellular Declaration ¶ 10 ("The costs for RCC associated with meeting the 8-hour back-up power requirement would be significant.").

In addition to the cost of batteries and generators, wireless carriers will incur significant costs related to surveying their facilities, obtaining the permits, contractual waivers, and other permission to install the new equipment, where installation is even possible. *See* Cincinnati Bell Declaration ¶ 7 (discussing need for engineering study before installing new battery cabinets); *id.* ¶ 8 (discussing limitations of concrete pads and need to renegotiate for more space); *id.* ¶ 10 (discussing need to comply with building codes, zoning restrictions, and environmental rules); Verizon Wireless Declaration ¶ 4 (discussing need to renegotiate leases); *id.* ¶ 6 (discussing need to seek permits from state and local jurisdictions); *id.* ¶¶ 7-9 (discussing likelihood and difficulty of relocating sites); Rural Cellular Declaration ¶ 6 (discussing need for structural studies); *id*. (discussing need to renegotiate leases); *id*. ¶¶ 7, 8 (discussing need for additional state and local permits); Cricket Communications Declaration ¶ 5 (discussing need for "structural evaluations" to determine whether weight from additional power sources could be supported); *id.* ¶ 6 (discussing need to renegotiate leases); *id.* ¶ 7 (discussing

new rule is interpreted as limited to cell sites and the other specified locations, compliance may inflict irreparable harm upon wireless carriers in the form of unrecoverable economic damages. These damages would result from: (1) money lost to government regulation that cannot be recouped; and (2) lost customers and goodwill, neither of which can be calculated and both of which are irremediable through monetary damages.

The new rule presents wireless carriers with a "Catch-22": if they are to recover the substantial costs of compliance on such short notice, they will have to raise their rates; however, to the extent that wireless providers raise their rates, they will suffer an impairment of their carefully cultivated customer goodwill. Wireless carriers must thus choose between two possible irreparable harms—unrecoverable compliance costs, or loss of goodwill. Either way, in the absence of an administrative stay, wireless carriers cannot avoid an irreparable injury.

If wireless carriers do not recover their compliance costs by raising rates on wireless consumers, they have no other remedy at law. Federal agencies generally enjoy sovereign immunity from money damages incurred as a result of their regulatory

---

likely need for "state and local permits prior to installation"); Cellular South Declaration ¶ 6 (discussing need for renegotiation of leases); *id.* ¶¶ 5, 9 (explaining that company must "perform structural analyses for a substantial number of its cell sites" and discussing need to obtain permits and "construct additional walls around generators for noise abatement purposes"); *id.* ¶ 11 (discussing diversion of human resources to install new emergency back-up power sources).

The planning and installation processes would also divert substantial employee resources and economic investment from other pressing activities. *See* Cellular South Declaration ¶ 11 (discussing diversion of human resources to install new emergency back-up power sources). Given that the new requirement has been imposed in the middle of hurricane season, compliance could distract from other emergency preparedness activities.

decisions.[96] Accordingly, expenditures incurred complying with the Commission's new rule that cannot be recovered through the market will not be recoverable from the government and constitute an irreparable injury.[97]

Even to the extent that wireless carriers are able to recover the cost of compliance with the Commission's new rule by passing on some of the costs to consumers, the resulting higher service fees are likely to result in a loss of customers or customer goodwill that the wireless industry has worked so hard to build. Similarly, if wireless carriers are unable to comply with the new rule by the effective date, they may be forced to shut off or move certain transmitters,[98] resulting in a reduction or degradation of coverage, which in turn would be likely to diminish customer goodwill. The resulting lost relationships and damage to wireless carriers' goodwill are "difficult, if not impossible to quantify in terms of dollars"[99] and constitute quintessential irreparable injury.[100]

---

96 *Ranger v. Tenet*, 274 F. Supp. 2d 1, 6 n.2 (D.D.C. 2003) ("[M]oney damages are generally unavailable in cases involving review of a federal agency's administrative decision.") (citations omitted).

97 *See Iowa Utils. Board v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) ("[T]he incumbent LECs would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules were eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market."); *Baker Elec. Coop. Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (sovereign immunity precluded adequate remedy at law); *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (irreparable injury found where plaintiff's right to a remedy was barred under the Eleventh Amendment).

98 *See supra* Section III.B.2.

99 *Med. Shoppe Int'l Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003); *see also Ross Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d. 12, 19 (1st Cir. 1996)

C. A Stay Will Not Harm Other Parties.

In evaluating the third prong of the stay standard, the determinative question is "whether injunctive relief would significantly harm other interested parties."[101] Even if any such harm is identified, however, it is necessary to "balance the competing claims of injury and … consider the effect on each party of the granting or withholding of the requested relief."[102]

Significantly, a stay in this case will simply preserve the *status quo* while further review is conducted. A stay would not in any way affect generators or back-up batteries currently in place at cell sites or other system locations, nor would it impact any discretionary carrier plans to install such equipment. Similarly, a stay would not affect carrier emergency response plans—in many cases updated since Hurricane Katrina—for deploying mobile back-up power sources in the wake of a hurricane or other emergency. Rather, a stay would protect carriers and consumers from the ramifications of significant compliance challenges—many of which are unrelated to the preservation of essential

---

(irreparable injury results where business would "lose incalculable revenues and sustain harm to its goodwill").

[100] *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5th Cir. 1981) ("If customers are likely to stop patronizing a supplier … the impossibility of calculating the value of this loss of goodwill amounts to irreparable injury.") (citing *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 473 (2d Cir. 1980)).

[101] *Randolph-Sheppard Vendors of Am. v. Weinberger*, 795 F.2d 90, 110 (D.C. Cir. 1986).

[102] *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987).

communication service—while the basis and scope of the back-up power requirement are carefully studied.

Second, a stay would actually prevent harm to others. Staying the rule would protect against the harms described above, including potential threats to public health and safety, environmental damage, and a potential reduction in service quality. A stay would not pose any threat to consumer or public safety. The record in this proceeding contains no evidence that wireless carriers' current discretionary deployment of back-up power sources in any way puts consumers—or even the continuity of wireless service—at risk. Rather, the Katrina Report concluded that a major contributor to outages was that fuel was not available to refill deployed generators during the prolonged commercial outage.[103] The Katrina Report also concluded that cellular base stations on wheels were successfully used to restore service throughout the affected region.[104] Implementing lessons learned from Hurricane Katrina, wireless providers have generally updated their emergency plans to ensure their critical facilities have adequate back-up power and that they have appropriate mobile facilities to deploy as needed. Other legislative actions taken in the wake of Hurricane Katrina have also improved preparedness by the wireless industry.[105] Moreover, carriers certainly recognize that it is in their own best interests to

---

103 *Katrina Report* at 14.

104 *Id.* at 9.

105 For example, because the Warning, Alert and Response Network Act classified telecommunications providers as "essential service providers" under the Stafford Act, wireless carriers should be able to more quickly access a disaster site to bring in additional fuel for existing generators as well as back-up power sources and mobile transmitters. *Katrina Order* at ¶¶ 37-38. The Katrina Order also directed the agency's

ensure that their networks remain operational during natural and man-made disasters.[106] Accordingly, a stay poses no risk to wireless consumers or to the public welfare.

Finally, a stay would have no preclusive effect on the imposition of the back-up power requirement (or a modified version thereof) in the event the rule ultimately takes effect. A stay would simply preserve the *status quo* in the interim and would not result in any appreciable harm to any other parties.

D. The Public Interest Requires a Stay.

The public interest in this case compels a stay of the back-up power requirement. As we have shown, the back-up power rule would create insurmountable compliance problems for the wireless industry.[107] If the rule is substantially modified, eliminated, or invalidated, as is likely, it would certainly not be in the public interest to proceed with enforcing this requirement, with its onerous legal and logistical problems and costs, while appropriate review is conducted.

Beyond the Order's effect on the wireless industry, broader public interest concerns also strongly favor a stay. The scope of the requirement as worded is clearly a mistake. The rule was adopted without prior notice, sufficient record evidence, or adequate consideration; and the regulation implicates and potentially conflicts with numerous federal, state, and local laws. There is no public interest in the enforcement of

---

Public Safety and Homeland Security Bureau to help to ensure priority power restoration for communications facilities. *Id.* at ¶¶ 43-44.

[106] Comments of CTIA – The Wireless Association®, EB Docket No. 06-119, WC Docket No. 06-63, at 9 (filed Aug. 7, 2006).

[107] *See supra* Section III.B.

such a rule.[108] Indeed, the public interest would be affirmatively served by a stay, which would allow the Commission to proceed in this matter with a full understanding of the facts, law, and consequences of a mandatory back-up power regime.

Moreover, attempts to install generators, batteries, or fuel cells in locations such as schools or hospitals, or where space is at a premium or ventilation is less than optimal, could result in unsafe conditions that could harm the employees of wireless providers or members of the public. Carriers unable to comply with the new requirement may feel compelled to shut off or move certain transmitters where generators cannot be safely or legally installed, resulting in a reduction of wireless coverage and E-911 service that is plainly contrary to the public interest. Finally, the dedication of manpower and resources to the deployment of power sources sufficient to satisfy the rule could distract from other important carrier activities, including preparation for and recovery from hurricanes, tropical storms, and other national disasters; preparation for national security emergencies; and scheduled upgrades in technology and system equipment. For all of these reasons, the public interest requires that the Commission grant the requested stay.

IV. CONCLUSION

CTIA respectfully requests a stay of the Commission's new rule, 47 C.F.R. § 12.2, requiring CMRS providers, among other telecommunications services providers, to have emergency back-up power sources for all assets that are normally powered by local AC commercial power – including eight-hours of back-up power at all cell sites – pending review of the rule. If the regulation is allowed to become effective, it

---

[108] *See Vikonics, Inc. v. United States*, Civ A. No. 90-2423, 1990 WL 157925, at *2 (D.D.C. Oct. 4, 1990) (explaining that "the public interest favors government compliance with applicable statutes and regulations").

will irreparably injure the wireless industry and wireless consumers, actually harming rather than promoting the interests of public safety. A stay of the rule, however, will not harm any third party and will serve the public interest. For these reasons, CTIA has satisfied the requirements for a stay and urges the Commission to move expeditiously to grant its request.

Respectfully submitted,

*__/s/ __ Christopher Guttman-McCabe*_____
CTIA – THE WIRELESS ASSOCIATION®
1400 16th Street, NW Suite 600
Washington, D.C. 20036
(202) 785-0081

Michael F. Altschul
Senior Vice President, General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Paul W. Garnett
Assistant Vice President, Regulatory Affairs

Brian M. Josef
Director, Regulatory Affairs

July 31, 2007

Its Attorneys

EXHIBIT 1

Verizon Wireless Declaration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	EB Docket No. 06-119
Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	)	WC Docket No. 06-63

Declaration of Richard A. Craig

I, Richard A. Craig, hereby declare as follows:

1. My name is Richard A. Craig, and I am Director of Engineering and Operations Support at Verizon Wireless, Inc. ("Verizon Wireless"). I have been employed at Verizon Wireless for 11 years. My responsibilities include ensuring network compliance with Federal, state and local regulations and providing design standards and oversight for network building projects.

2. This declaration is intended to support the *Motion for Stay* filed by CTIA – The Wireless Association® in EB Docket No. 06-119 and WC Docket No. 06-63. The *Motion for Stay* requests a stay of the FCC decision ("Order") to apparently require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source for all assets that are normally powered by local AC commercial power, including eight hours of back-up power for assets located at all cell sites. CMRS carriers with more than 500,000 subscribers must comply with this requirement by no later than 30 days from publication of the Order in the Federal Register (*i.e.*, August 10, 2007).

3. Verizon Wireless is a national CMRS carrier with more than 500,000 subscribers. It has approximately 26,000 cell sites throughout the United States. Virtually all of Verizon Wireless's cell sites currently have some form of emergency back-up power employing generators, batteries or a combination of the two. However, more than 1,800 of these sites have less than 8-hours of back-up power today. These sites do not have 8 hours of back-up power primarily due to factors beyond Verizon Wireless' control. As a result, bringing them into compliance with the new FCC standard, as explained below, will be extremely difficult, if not impossible, and cannot in any event be accomplished by the August 10 effective date for the FCC requirement.

4. Purchasing and installing additional emergency back-up power presents many difficulties. Many of Verizon Wireless's cell sites are located on property leased from third parties. In some cases, there simply is not any space available to install sufficient back-up power to meet the FCC requirement. In other cases, building code restrictions, such as weight limits on rooftops, limit the ability to install sufficient back-up power. Even where space or building code restrictions do not limit back-up power installation, the terms of lease agreements often limits the type and amount of equipment that Verizon Wireless can use on the property. While Verizon Wireless could seek to renegotiate these leases, this would be a time consuming and potentially costly exercise that could not be completed by the August 10, 2007 deadline. In fact, I expect that lessors who do not want back-up power equipment such as batteries or generators stored on their property would refuse to renegotiate the leases, leaving Verizon Wireless with little choice but to

identify and secure a new cell site location if it is to satisfy the Commission's back-up power mandate, which could be disruptive to customer service.

5. Under normal circumstances, and assuming none of these limitations apply, it can take anywhere from 4 to 6 months from the time a purchase order is placed for back-up power equipment to the time it is actually installed at a single cell site. If there are space limitations, this process can take as long as 12 months, assuming additional space is available, which is not always the case. Verizon Wireless purchases back-up power equipment from third parties. I expect the FCC mandate that the entire telecommunications industry install emergency back-up power sources for all assets normally powered by local AC commercial power, even if limited to cell sites, will lead to an unprecedented demand for emergency back-up equipment. This demand will likely place a severe strain on the supply chain for batteries and generators and lead to backlogs that would cause even further delays.

6. Furthermore, Verizon Wireless cannot simply purchase and install emergency back-up power equipment without obtaining the necessary permits from state and local jurisdictions to ensure compliance with zoning and air permitting regulations in the case of generators. Local zoning laws can limit the amount of equipment that can be installed at a particular site, restrict the size of generators that can be used, and impose other restrictions that affect Verizon Wireless's ability to comply with the Commission's mandate in a timely manner or at all. Although the time required to obtain local permits and comply with zoning regulations varies from jurisdiction to jurisdiction, local zoning boards and other regulatory

agencies are likely to be flooded with applications for permits as a result of the Commission's action, which would make compliance with the mandatory back-up power requirements unfeasible for several years. Furthermore, some states such as California, which has 35 different air quality districts, have strict air pollution and noise abatement controls. Compliance with such controls will take a significant amount of time depending on the number of cell sites affected by those standards.

7. With respect to the approximately 1,800 Verizon Wireless cell sites that currently lack 8-hours of back-up power, the factors discussed above make it difficult, if not impossible, to modify these cell sites in order to provide 8 hours of back-up power as required by the FCC's new rule. To avoid violation of the FCC requirement at these sites, Verizon Wireless would have to pursue other locations where compliance with the FCC requirement would be feasible.

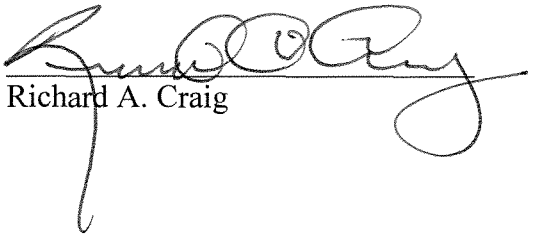
8. Even if Verizon Wireless took the drastic step of attempting to relocate these sites, there may be few, if any, alternative cell site locations in certain dense metropolitan markets served by Verizon Wireless that could satisfy the coverage requirements for the network and not present the same set of challenges and limitations that prevent meeting the 8-hour back-up requirement today. One example is Manhattan, where space limitations are severe, individual cell site density may be no greater than ¼ square mile and Verizon Wireless's ability to locate alternative cell site locations is significantly constrained.

9. In some parts of the country, local opposition to cell sites has lead to cumbersome zoning rules, restrictions and delays, which result in the site search and permitting

projects taking as long as 18 to 24 months on average. I have personally been involved in a number of projects that have taken as long as four to six years to complete due to the repeated trial and error process of selecting the best candidate site from a list of potential locations within the search area, negotiating a lease for the property, preparing design documents and submissions for the permitting process, only to be delayed and denied in zoning and having to begin anew. I would expect Verizon Wireless to encounter even more significant delays if the company were forced to simultaneously relocate a significant number of cell sites, which could be disruptive to customer service.

10. The cost associated with relocating approximately 1,800 cell sites would be significant. These financial resources would be better used to expand coverage into rural areas and expand capacity in metropolitan areas.

11. I declare under penalty of perjury that the statements made are true and correct to the best of my knowledge and belief.



Richard A. Craig

Executed on July 18, 2007

EXHIBIT 2
Rural Cellular Declaration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
	)	EB Docket No. 06-119
Recommendations of the Independent Panel	)	WC Docket No. 06-63
Reviewing the Impact of Hurricane Katrina on	)	
Communications Networks	)	
	)	

Declaration of Steve Olson

I, Steve Olson, hereby declare as follows:

1. My name is Steve Olson. I am Engineering Director at Rural Cellular Corporation ("RCC"). I have been employed as engineering director to RCC since 1998. I am responsible for the design and performance of over 1200 cell sites.

2. This declaration is intended to support the *Motion for Stay* filed by CTIA – The Wireless Association® in EB Docket No. 06-119 and WC Docket No. 06-63. The *Motion for Stay* requests a stay of the FCC decision ("Order") to apparently require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source for all assets that are normally powered by local AC commercial power, including eight hours of back-up power for assets located at all cell sites. CMRS carriers with more than 500,000 subscribers must comply with this requirement by no later than 30 days from publication of the Order in the Federal Register (*i.e.*, August 10, 2007).

3. RCC is a CMRS carrier that provides wireless services to more than 700,000 subscribers located in the Midwest, Northeast, Northwest and the Southern regions of the United States.

4. To provide coverage for its subscribers RCC utilizes over 1200 cell sites. The vast majority of RCC's cell sites have some back-up power, either dry cell batteries or generators.

5. However, RCC estimates that approximately 20% do not have 8-hours of back-up power. Moreover, RCC believes that it would be impractical, if not impossible, for RCC to reengineer its network so that these cell sites comply with the Commission's 8-hour back-up power requirement, and it certainly could not do so by the August 10, 2007 deadline.

6. Weight, space, and ventilation issues present serious, if not insurmountable, obstacles to compliance with the Commission's Order. Many of RCC's cell sites are located on rooftops. Structural studies would have to be conducted to determine if a location is presently capable, or could be made capable, of sustaining the weight imposed by the addition of batteries or generators. Additionally, at many sites, RCC does not currently lease sufficient space to accommodate additional batteries or generators. At those cell sites, RCC would have to renegotiate its leases with the property owners in order to install the necessary equipment or secure additional space, even assuming it were available. The ability of RCC to renegotiate these leases to place such equipment at each of the sites will hinge on site specific variables including the availability of additional space, a landlord's contractual obligations to other tenants, and the

landlord's willingness to negotiate a new lease to accommodate space for additional batteries or generators. Finally, some of RCC's cell sites do not have sufficient ventilation to accommodate an increase in the number of batteries necessary to meet the 8-hour back-up power requirement. Inadequate ventilation may present serious safety concerns that would have to be addressed prior to the installation of additional dry cell batteries.

7. In many of the regions where RCC maintains cell sites, the addition of generators, or the expansion of equipment space to accommodate additional batteries, would likely require state and local permits prior to installation.

8. Vermont provides an example of the obstacles RCC would face in order to make the necessary changes to cell sites in that state that currently do not meet the 8-hour back-up power requirement. On the local level, each Town and City in Vermont has a different zoning law governing wireless communications facilities, each requiring separate analysis and an engagement with local officials. 24 V.S.A. § 4414(12). While in some instances the municipality might require only a building permit, in other cases municipal officials will require site plan review or an amendment to a conditional use approval, meaning that an elected / appointed board will review the application at a public meeting after some public notice period prior to RCC being able to obtain a building permit. Typically, the local permitting approval process can take anywhere from a month to three months following submission of the permit application. Longer times may result depending on the level of opposition a project encounters (*e.g.*, if proximity of a

new generator to an existing residential neighborhood generates concern regarding noise or proximity of propane tanks to residents).

9. Many RCC sites in Vermont also are subject to a state land use permitting regime, known as Act 250, 10 V.S.A. § 6001 *et seq*. An Act 250 permit amendment would be required for each covered site. Even assuming a global permit amendment application could be submitted to add generators at each site in all the nine Act 250 "districts," we anticipate that regulators would request detailed information to assess impacts on noise, power consumption, soil erosion (due to ground disturbances), and other matters prior to issuing the permit, and may even require hearings with the appointed district commissions. Even under a best case scenario, Act 250 permit amendments can take three months from the filing of an application. State regulators frequently will wait until the conclusion of the municipal land use permitting process before processing a state land use permit application, resulting in further delay. A very similar state-based land use permitting regime applies to those RCC sites located in a large region of upstate New York known as the Adirondack Park.

10. The costs for RCC associated with meeting the 8-hour back-up power requirement would be significant. RCC does not have on hand a sufficient number of batteries and generators for compliance and would have to purchase the requisite batteries and generators in a market that will certainly face a shortage of supply relative to the increased demand resulting from the Commission's Order. In normal circumstances, and not including labor, installation, and regulatory costs, a generator costs anywhere from $5,000 to $15,000 (depending

on the number of carriers present at a site and how costs are apportioned). Batteries sufficient to meet the 8-hour back-up power requirement typically cost approximately $4,500 per site (again, not including labor, installation, and regulatory costs).

11. Under the circumstances, the August 10, 2007 deadline for compliance with the Commission's 8-hour back-up power requirement is unreasonable. The number of cell sites that RCC would have to reengineer to meet the 8-hour back-up requirement together with the space, lease, and structural issues as well as the permitting obstacles described above would make it impossible for RCC to meet the Commission's deadline. The studies, construction, permitting, and installation process that must be completed would take, in the best of circumstances, at least 3 months to install additional batteries at a site and 5 months to install a generator. Because of the large volume of sites that RCC would need to reconfigure, together with the expectation that the necessary batteries and generators will be in short supply resulting from the Commission's Order, RCC anticipates that the time necessary to come into compliance at all possible sites will actually be significantly longer than 3-5 months.

12. Even if the Commission were to give CMRS providers additional time to comply with the Order, RCC believes that it would be unable to meet the 8-hour back-up power requirement at all of its cell sites. Rather than risk being in violation of the Commission's rules, it would be necessary for RCC to discontinue use of, or relocate, these cell sites. Doing so would inconvenience our customers, who would experience decreased coverage, or even no coverage at all in some areas.

I declare under penalty of perjury that the statements made are true and correct to the best of my knowledge and belief.

Steve Olson

Executed on July 23, 2007

2058315.2

EXHIBIT 3
Cellular South Declaration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	EB Docket No. 06-119
Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	)	WC Docket No. 06-63

Declaration of Tony Kent

I, Tony Kent, hereby declare as follows:

1. My name is Tony Kent and I am Senior Vice President, Engineering and Network Operations, at Cellular South, Inc. I have been employed at Cellular South for over 12 years with responsibilities including engineering, building and operating the wireless network, switches and cell sites. As part of my responsibilities, I led the restoration of Cellular South's network following Hurricane Katrina. Prior to joining Cellular South, I worked for BellSouth for 14 years.

2. This declaration is intended to support the *Motion for Stay* filed by CTIA – The Wireless Association® in EB Docket No. 06-119 and WC Docket No. 06-63. The Motion for Stay requests a stay of the FCC decision ("Order") to apparently require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source for all assets that are normally powered by local AC commercial power, including eight hours of back-up power for assets located at all cell sites. CMRS carriers with more than 500,000 subscribers must comply

with this requirement by no later than 30 days from the publication of the Order in the Federal Register (*i.e.*, August 10, 2007).

3. Cellular South is a licensed CMRS carrier with more than 500,000 subscribers in Mississippi and portions of Alabama, Tennessee and Florida and, therefore, it must comply with the FCC Order.

4. Cellular South currently has approximately 1,400 cell sites throughout Mississippi and portions of Alabama, Tennessee and Florida. The vast majority of Cellular South's cell sites are collocated with those of other CMRS providers that are also subject to the FCC Order.

5. Cellular South's cell site facilities are currently equipped with up to 4 hours of back-up battery power. In addition, approximately 40% of Cellular South's cell site facilities are equipped with back-up generators. In order for Cellular South to comply with the Commission's requirement that CMRS providers maintain emergency back-up power for a minimum of 8 hours for all cell sites, Cellular South would have to either install additional batteries at most of its cell sites or install generators at those cell sites that currently do not have a generator. However, Cellular South may not be able to install additional batteries or generators at a number of its cell sites, and certainly could not do so by the August 10, 2007 deadline. At a minimum, the new requirements contained in the Order will cause Cellular South to have to negotiate with cell site owners and other collocated carriers for the space necessary to meet these requirements, perform structural analyses for a substantial number of its cell sites to determine the feasibility of installing new batteries or a generator, obtain permits and other

necessary authorizations, ensure compliance with all state and local building codes as well as federal and state environmental regulations, and install the necessary new equipment.

6. For example, in a single-carrier cell site, to provide 8 hours of back-up power, 600 to 1,000 pounds of batteries would be required. In multiple-carrier cell sites, as much as 3,000 to 5,000 pounds of batteries would be required. For some cell sites located on towers with adjacent ground space, Cellular South, along with other collocated carriers, will need extra space on the ground adjacent to the tower for the batteries or a generator. To obtain such space, Cellular South will have to renegotiate its leases with cell site owners in an effort to lease additional space, which may or may not be feasible depending on the availability of additional space, the landlord's contractual obligations to other tenants, and the landlord's willingness to make additional space available for the placement of batteries or generators. Even where Cellular South is the cell site owner, it will nevertheless have to deal with collocated carriers in most cases, and in some instances, it simply may not own or lease sufficient ground space adjacent to the tower to accommodate the new space requirements. The installation of a generator would require even more space than batteries, and in certain jurisdictions, propane tanks used to store fuel for generators must be placed 10 to 15 feet away from the generator itself as well as any other equipment. Many cell sites do not have sufficient space to comply with these requirements, and Cellular South would still have to obtain the necessary permits and authorizations, even assuming the availability of sufficient space.

7. A number of Cellular South's cell sites are on rooftops. In addition to space limitations, the placement of additional batteries or a generator adjacent to these cell sites raises structural issues as well. Cellular South will have to perform a structural engineering analysis prior to installation to determine whether the rooftop can support the added weight. Many rooftop cell sites were not engineered with the additional weight requirements made necessary by the Order in mind, and many of those structures may simply not be able to physically support the weight of either additional batteries or a generator.

8. Cellular South also has antennas located within church steeples or on other pre-existing structures. Often, cell site equipment is located in buildings, basements or other enclosed spaces for such cell sites, which simply do not have sufficient additional space to accommodate the batteries necessary to provide for 8 hours of back-up power or a generator and its fuel supply. Of course, even if the space is physically available at such sites, Cellular South will need to re-negotiate its lease with the landlord in these instances as well, and the landlord may or may not agree to make such space available to Cellular South.

9. Given these issues and concerns, the August 10, 2007 deadline is particularly problematic. Where additional space might be available but negotiations with cell site owners and/or other collocated carriers are necessary, securing the permission necessary to place additional batteries or a generator at the cell site will take some time. Where a structural engineering analysis is needed, a minimum of two weeks will be required for each cell site. After completion of negotiations and any necessary structural analysis, assuming that the structure can accommodate

the additional equipment and weight, Cellular South will have to obtain permits from local jurisdictions for the installation of battery cabinets, generators and oil tanks, which may take from as little as a few days to as much as one month. Once permits are successfully obtained, we estimate that it will take approximately 8 weeks to get battery cabinets, and 12 to 16 weeks to get generators installed from the date that a purchase order is submitted to our vendors. This process may take even longer due to the demand for emergency back-up equipment that the FCC's requirement has created. At some locations, due to local regulations (especially in residential areas), we will also be required to construct additional walls around generators for noise abatement purposes, which will further delay the installation of the back-up equipment.

10. The Order will create an undue financial burden on Cellular South. In addition to any increase in rental payments made necessary by the additional space requirements, we estimate that for medium-sized cell sites, the cost of installing battery cabinets, if needed, will be approximately $25,000 to $30,000 per cell site, and we estimate that the cost of installing generators will be approximately $15,000 to $20,000 per cell site. The annual maintenance cost for a generator is approximately $1,000 to $2,000. Structural engineering analysis will cost approximately $2,000 to $4,000 per cell site. Thus, Cellular South likely will incur millions of dollars in additional expenses in order to comply with the FCC Order.

11. To comply with the Order, Cellular South will also have to divert significant human resources to work on the installation of emergency back-up power sources.

Such diversion of resources could place at risk efforts to ensure the reliability and resiliency of the network infrastructure and preparation for the current hurricane season.

12. At a few cell site locations, for the reasons mentioned above, we anticipate that it will be impossible for Cellular South to install back up power generators or batteries. In those instances, we will attempt to seek an alternative suitable location. However, if we are unable to secure such a location, the company may be forced to shut down the affected cell site. Such action could and probably would have an adverse effect on coverage in the affected areas, which would in turn impact quality of service and the ability of customers to make calls during times of emergency.

13. For the reasons stated above, Cellular South supports CTIA's *Motion to Stay*.

I declare under penalty of perjury that the statements made are true and correct to the best of my knowledge and belief.

Tony Kent

Executed on July 19, 2007

EXHIBIT 4
Cincinnati Bell Declaration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	EB Docket No. 06-119
Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	)	WC Docket No. 06-63

Declaration of John B. Scola

I, John B. Scola, hereby declare as follows:

1. My name is John B. Scola. I am Director, Real Estate Management & Network Operations, at Cincinnati Bell Wireless, Inc. ("Cincinnati Bell"). I have been employed at Cincinnati Bell for 12 years. My responsibilities include the following: (a) wireless construction management; (b) wireless network operations; (c) wireless site portfolio management; and (d) wireless site acquisition management.

2. This declaration is intended to support the *Motion for Stay* filed by CTIA – The Wireless Association® in EB Docket No. 06-119 and WC Docket No. 06-63. The *Motion for Stay* requests a stay of the FCC decision ("Order") to apparently require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source for all assets that are normally powered by local AC commercial power, including eight hours of back-up power for assets located at all cell sites. CMRS carriers with more than 500,000 subscribers must comply

with this requirement by no later than 30 days from publication of the Order in the Federal Register (*i.e.*, August 10, 2007).

3. Cincinnati Bell is a CMRS carrier that provides wireless services to more than 500,000 subscribers located in Ohio, Kentucky and Indiana.

4. To provide coverage for its subscribers Cincinnati Bell utilizes approximately 750 cell sites. These cell sites include: cellular towers; rooftop antennae; "repeaters," which are small sites intended to amplify outdoor signals for improved reception in buildings and other enclosed locations; "microcells," which are small base stations mounted on utility poles or other similar structures and are used to extend coverage in areas such as valleys or more remote locations; and, finally, "picocells," which are small cellular base stations designed to improve coverage in indoor areas such as office buildings and shopping centers where outdoor signals do not reach well.

5. All of Cincinnati Bell's cell sites have back-up battery power, although the amount available at each site varies. Because Cincinnati Bell serves a relatively small geographic area, the company has 17 mobile generators that it deploys to a particular cell site location when electrical power has been disrupted. As a result, cell sites that can readily be served by a mobile generator in the event of a loss of power are not equipped with extensive back-up battery power. By contrast, cell sites in hard to reach areas, such as rooftop antennae, that cannot readily be served by mobile generators are engineered for longer battery life. In addition, some sites, particularly microcells and picocells, are located in areas where it is not practical to install numerous back-up batteries, such as utility poles and building

utility closets; as a result, these sites have minimal back-up battery power available.

6. Cincinnati Bell estimates that approximately 80% of its cell sites, including its repeater, microcell, and picocell sites, would not meet the FCC's 8-hour back-up power requirement. It would be impractical, if not impossible, for Cincinnati Bell to reengineer its network so that every cell site complies with this requirement, and it certainly could not do so by the August 10, 2007 deadline.

7. Cincinnati Bell would be unable to install additional batteries at a number of its cell sites due to weight limitations. Typical cell site batteries are housed in cabinets. These cabinets (including the batteries) weigh approximately 1,500 pounds. Based on a preliminary review of the company's network records, I believe many of Cincinnati Bell's cell sites would require the installation of new battery cabinets in order to meet the FCC's 8-hour back-up power requirement and many rooftop cell site locations would not be structurally capable of sustaining the weight of an additional cabinet. Of course, a new cabinet could not be installed until Cincinnati Bell has conducted an engineering study with the landlord's approval, which takes time and money.

8. The absence of space to add additional batteries presents a second limitation. At its leased cell tower locations; for example, Cincinnati Bell has constructed concrete pads that house existing equipment used to operate the company's 2G and 3G networks. These pads typically house three or four existing equipment cabinets, each of which has its own back-up batteries. In order to add additional back-up batteries, Cincinnati Bell would be required to purchase and install

additional cabinets, which are unlikely to fit on the existing pads occupying the space currently leased by Cincinnati Bell. Consequently, it would be necessary for Cincinnati Bell to rent additional space, although there are no guarantees that such space is even available. At least five or six wireless carriers compete in Cincinnati Bell's market, and many of these carriers lease space at the same cell tower locations. Thus, space is at a premium, and it is unlikely that a property owner would be able to accommodate requests by multiple carriers for the additional space at a cell tower location required to comply with the FCC's 8-hour back-up power requirement. Even assuming such space were available to expand existing compounds, Cincinnati Bell would have to renegotiate its existing lease with each property owner. Furthermore, expansion outside the originally approved compound space could trigger the FCC's environmental compliance regulations, which would require Cincinnati Bell to engage in Section 106 consultations under the National Historic Preservation Act and file applications with the appropriate State Historic Preservation Officers for review and comment on the potential impact on historic properties. *See* 47 C.F.R. § 1.1307. Compliance with these requirements can take considerable time and resources.

9. In other locations, the lack of space is even more pronounced. For example, cell site equipment housed in utility closets in a building have minimal back-up battery power, at least in part because of space constraints. The batteries required to provide 8-hours of back-up power to these cell sites would require a significant amount of space that is nonexistent in a typical building utility closet.

10. The installation of additional batteries or generators also would require compliance with existing building codes, zoning restrictions, and environmental rules. Although Cincinnati Bell has not had sufficient time to assess the impact of these requirements on the company's compliance with the FCC's Order, it is impossible for Cincinnati Bell to satisfy all applicable building codes, zoning restrictions, and environmental rules that would implicated by the company's installing additional batteries or generators by the FCC's August 10, 2007 deadline.

11. The August 10, 2007 deadline also is impossible to meet given the time it routinely takes to acquire and install back-up power equipment. Before the FCC adopted its Order, Cincinnati Bell was in the midst of an extensive upgrade and battery replacement project. As part of this project, Cincinnati Bell is proactively identifying and replacing batteries that may be subject to failure. This project has been ongoing for approximately three years, during which time it has taken 8 to 12 weeks from the time Cincinnati Bell placed an order for batteries to the installation of the batteries. This 8 to 12-week time frame is likely to increase substantially due to the high demand for emergency back-up equipment created by the Order.

12. Even if the Commission were to give the industry additional time to comply with the Order, Cincinnati Bell estimates that it would be unable to meet the 8-hour back-up power requirement at approximately 20% of its cell sites. So as not to be in violation of the FCC's Order, Cincinnati Bell would have little choice but to discontinue use of these cell sites. Doing so would inconvenience our customers,

who would experience decreased coverage, or even no coverage at all in some areas.

13. I declare under penalty of perjury that the statements made are true and correct to the best of my knowledge and belief.

John B. Scola

Executed on July 19, 2007

EXHIBIT 5
Cricket Communications Declaration

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	EB Docket No. 06-119
Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks	)	WC Docket No. 06-63

Declaration of Bill Leonard

I, Bill Leonard, hereby declare as follows:

1. My name is Bill Leonard, and I am Vice President of Technical Operations at Cricket Communications, Inc. ("Cricket"), a wholly owned subsidiary of Leap Wireless International, Inc. I have been employed at Cricket for six and a half years. I am responsible for regional radio frequency engineering, construction, site acquisition, fixed network engineering, network operations and maintenance, and interconnection engineering for Cricket.

2. This declaration is intended to support the *Motion for Stay* filed by CTIA – The Wireless Association® in EB Docket No. 06-119 and WC Docket No. 06-63. The *Motion for Stay* requests a stay of the FCC decision ("Order") to apparently require commercial mobile radio service ("CMRS") providers to have an emergency back-up power source for all assets that are normally powered by local AC commercial power, including eight hours of back-up power for assets located at all cell sites. CMRS carriers with more than 500,000 subscribers must comply with this requirement by no later than 30 days from publication of the Order in the Federal Register (*i.e.*, August 10, 2007).

3. Cricket is a CMRS carrier with more than 500,000 subscribers and, therefore, it must comply with the FCC requirement. At present, Cricket maintains and operates equipment at approximately 4,800 cell sites across the United States. Approximately 4,500 of these cell sites utilize either batteries or generators for back-up power. For those cell sites with back-up power, the average amount of available back-up power is approximately 4 to 5 hours under normal operating conditions. None of these sites has 8 hours of back-up power, and Cricket would have to install additional batteries or generators to satisfy the FCC's 8-hour back-up power requirement.

4. Further, approximately 300 sites in the San Diego market do not have any back-up power. These sites are part of Cricket's innovative Distributed Antenna System (DAS) network. The DAS network consists of wireless telecommunications links, or "nodes," that are mounted on street lights and utility poles along municipal right-of-way and utility assets and connected via fiber optics. This technology allowed Cricket to bring competing wireless service to the San Diego market quickly while meeting the desire of local residents for unobtrusive, low-impact antennas that blend into the landscape. The DAS network also allows Cricket to expand its network capabilities without engaging in lengthy permitting requirements for the construction or use of traditional cellular towers.

5. At some of Cricket's cell sites that currently have back-up power, it would be impossible to install additional batteries or generators due to space and weight limitations. At the very least, it will be necessary for Cricket to conduct structural

evaluations of these cell sites to determine whether additional weight can be supported and, if so, whether structural improvements would be required.

6. Roughly 100 of Cricket's cell sites, including those located in tight spaces such as closets or in church steeples, do not have sufficient space to add batteries or install generators. In other cases, the additional space may be available to Cricket but only if it renegotiated its current leases. Landlords' obligations to other tenants and a willingness to negotiate in good faith may present serious obstacles to Cricket's ability to acquire the additional space necessary to meet the FCC's 8-hour back-up power requirement.

7. Property use laws and permitting laws also pose a substantial obstacle to Cricket's compliance with the Order. For instance, Cricket spent years negotiating with the legal and land use departments of the utility companies and municipalities in San Diego County for the deployment of the DAS sites. While Cricket's contractor was able to secure approvals to install nodes to street lights and utility poles, the approvals were based on the limited visual impact that the nodes would have in the area. The technical solution that exists for battery back-up at each DAS site would effectively triple the size of the equipment necessary on each street light and utility pole. As a result, Cricket will have to secure permits to install the additional equipment. I estimate it will take 18 months to 2 years to obtain approvals. Alternatively, Cricket would have to pursue negotiations to increase the volume and square footage of each one of the DAS sites. I anticipate this process would take years, not months, to be resolved.

8. Cricket cannot comply with the Order's August 10, 2007 deadline, if at all. Cricket estimates that, for those cell sites where it is technically feasible to install additional batteries or a generator to provide sufficient back-up power, it will take, at a minimum, 18 to 24 months for Cricket to comply with the Order. Furthermore, because all CMRS providers will be concurrently seeking to comply with the order, batteries, generators, and the contractors often utilized to prepare cell sites will be in short supply. The scarcity of necessary equipment and contractors may contribute to additional delays.

9. Cricket will be financially burdened by the Order. The cost associated with purchasing and installing additional battery cabinets at each one of the DAS sites, including zoning/building application fees and engineering studies, would be over $6.5 million. The cost associated with bringing all of Cricket's non-DAS sites into compliance with the Order would be over $23 million.

10. Because Cricket will not be able to fully comply with the FCC 8-hour back-up power requirement, Cricket's present financing arrangements and ability to procure financing in the future could be adversely impacted. Lenders typically require the company to certify that it is in compliance with all applicable regulations, including FCC regulations, as a condition to financing. Enforcement of the 8-hour back-up power requirement could prevent Cricket from satisfying the conditions necessary to obtain new financing or increase the cost of the financing Cricket is able to obtain. The inability to secure financing at favorable rates could jeopardize current and future business ventures that Cricket is funding or would otherwise fund via such financial instruments.

I declare under penalty of perjury that the statements made are true and correct to the best of my knowledge and belief.

Bill Leonard

Executed on July 19, 2007