



1200 EIGHTEENTH STREET, NW
WASHINGTON, DC 20036

TEL 202.730.1300 FAX 202.730.1301
WWW.HARRISWILTSHIRE.COM

ATTORNEYS AT LAW

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BY ELECTRONIC FILING

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20054

For Public Inspection

Re: *Motion for Stay of Sprint Nextel Corporation, Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, EB Docket No. 06-119, WC Docket No. 06-63*

Dear Ms. Dortch:

Sprint Nextel Corporation ("Sprint Nextel") hereby submits a redacted version of its Motion for Stay filed in the above-captioned proceeding. This redacted version is available for public inspection. Sprint Nextel is filing under separate cover a confidential, non-redacted version of this Motion for Stay along with a confidential declaration in support of the Motion for Stay.

We are filing electronically one copy of this letter and the redacted motion in the above-captioned dockets, and we are providing courtesy copies to staff in the Office of General Counsel.

Respectfully submitted,

/s/

Christopher J. Wright
Charles Breckinridge
Counsel for Sprint Nextel Corporation

Enclosures

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 STAY
OF SPRINT NEXTEL CORPORATION**

Pursuant to Sections 1.41 and 1.43 of the Commission’s rules, Sprint Nextel Corporation (“Sprint Nextel”) respectfully asks the Commission to stay the effective date of its “Backup Power Rule” pending review of the rule by the D.C. Circuit. *See Recommendations of the Independent Panel*, Order, EB Docket No. 06-119, WC Docket No. 06-63, App. B (rel. June 8, 2007) (adopting rule) (“*Initial Order*”); *Recommendations of the Independent Panel*, Order on Reconsideration, EB Docket No. 06-119, WC Docket No. 06-63, App. B (rel. Oct. 4, 2007) (adopting revised rule) (“*Reconsideration Order*”); *see also Sprint Nextel v. Federal Communications Commission*, No. 07-1480 (D.C. Cir. filed Nov. 27, 2007). The rule is subject to substantial challenge and Sprint Nextel will suffer

irreparable harm if it is not stayed. Sprint Nextel will consider this motion denied if the Commission takes no action by the end of the day on December 11, 2007.

In the particulars relevant to this proceeding, the Backup Power Rule imposes two obligations on CMRS providers. First, it requires each provider to file a report within six months of the rule's effective date identifying which of its cell sites (and other assets) are equipped with eight hours of backup power, which ones are not, and which are exempt from any backup power requirement. Second, it requires CMRS providers to bring non-compliant, non-exempt cell sites (and other assets) into compliance or to file, within twelve months of the rule's effective date, a compliance plan that details how the provider will provide emergency backup power.

There are two legal difficulties involved in the FCC's adoption of the Backup Power Rule. First, the FCC adopted the rule pursuant to the ancillary jurisdiction afforded to it under Sections 1 and 303(r) of the Communications Act of 1934, as amended, *see* 47 U.S.C. §§ 151, 303(r), but neither provision empowers the FCC to act as it did. Second, the FCC did not comply with the requirements of the Administrative Procedure Act ("APA").

If the rule takes effect despite these legal issues, Sprint Nextel will face staggering and irreparable harm. Specifically, the rule would require Sprint Nextel

to expend as much as [REDACTED]—an unrecoverable sum—to conduct site visits to more than [REDACTED] cell sites and, where necessary, to upgrade the sites’ backup power systems.

Moreover, a stay would not expose other parties to any harm. To the contrary, a stay would leave existing backup power systems in place, allow continued exploration of realistically achievable backup power solutions, and prevent a diversion of resources away from critical network upgrade projects. Finally, a stay would benefit the public interest as it would relieve carriers of the need to choose between violating the new rule (because compliance is probably impossible under the rule’s timeline) and reducing network reliability by shutting down non-compliant cell sites.

BACKGROUND

In response to the devastation that Hurricane Katrina wrought on the communications infrastructure and its impact on first responders’ ability to communicate during and after the storm, the FCC convened an expert panel (the “Katrina Panel”) to make recommendations related to disaster preparedness, network reliability, and first-responder communications. The Katrina Panel’s report, issued on June 12, 2006, presented the FCC with an array of specific

proposals. See Katrina Panel, Report and Recommendations at 31-42 (“*Katrina Report*”) (attached to *Recommendations of the Independent Panel*, Notice of Proposed Rulemaking, EB Docket No. 06-119 ¶ 6 (rel. June 19, 2006) (“*NPRM*”). Of relevance to this proceeding, the Katrina Panel recommended that the FCC “encourage” service providers and network operators to implement “best practice recommendations” related to the “availability of emergency/back-up power (*e.g.*, batteries, generators, fuel cells) to maintain *critical* communications services during times of commercial power failures.” *Id.* at 39 (emphasis added). In brief, the Katrina Panel’s recommendation extended only to “encouraging” adherence to certain best practices, and those best practices extended only to backup power for “critical communications services” – not backup power at every cell site in a provider’s network. *Id.*

One week after the *Katrina Report*’s release, the FCC issued a Notice of Proposed Rulemaking to “seek comment on the recommendations.” *NPRM* ¶ 6. The *NPRM* discussed briefly the Katrina Panel’s backup power recommendations:

[T]he panel recommends that the Commission *encourage* the implementation of certain . . . best practices intended to promote the reliability and resiliency of the 911 and E911 architecture. In particular, the Independent Panel recommends that service providers and network operators . . . *should* ensure availability of emergency back-up power capabilities (located on-site, when appropriate).

NPRM ¶ 16 (emphasis added). The *NPRM* provided no other notice related to the

possibility of a backup power requirement.

In response to the *NPRM*, a wide array of CMRS providers commented on the Katrina Panel's various proposals, including the backup power "best practices" recommendation. *See, e.g.*, Comments of Sprint Nextel Corp. at 8-10, EB Docket No. 06-119, WC Docket No. 06-63 (filed Aug. 7, 2006) ("*Sprint Nextel Comments*"). None of the comments addressed the possibility that CMRS providers might be *required* to ensure eight hours of backup power at all cell sites. This omission is not surprising because nothing in the *Katrina Report* or the *NPRM* indicated that such a rule might be forthcoming.

On June 8, 2007, the FCC issued an order that "implement[ed] several of the [Katrina Panel's] recommendations." *Initial Order* ¶¶ 1, 6. In a divergence from the recommendations presented in the *Katrina Report* and the *NPRM*—which had both proposed "encouraging" adherence to "best practices"—the *Initial Order* mandated that CMRS providers have "an emergency backup power source for all assets that are normally powered from local AC commercial power." *Id.* App. B. The *Initial Order* called for twenty-four hours of backup power in central offices and eight hours of backup power for cell sites and other dispersed equipment. *See id.*

The new rule surprised entities all across the communications industry

(including CMRS providers), as evidenced by the fact that seven parties filed petitions for reconsideration noting several legal issues—including lack of statutory authority and violations of the APA. *See Reconsideration Order* ¶ 1 n.1.

In response to those petitions, the FCC issued the *Reconsideration Order*, which altered the rule in a manner that diverges further from the recommendations issued by the Katrina Panel. In its current form, the rule’s first part obliges CMRS providers to audit their networks. Within six months of the rule’s effective date, providers must submit a report listing which assets (including which cell sites) comply with the rule, which do not, and which are exempt due to (1) safety risks, (2) private legal obligations, or (3) Federal, state, tribal or local law. *See id.* App. B (Section 12.2(a), (b), & (c)(1)). An exemption claim for any cell site or other asset must be accompanied by a description of the facts supporting the claim. *See id.* App. B (Section 12.2(c)(2)).

The rule’s second part requires CMRS providers to bring non-exempt assets into compliance or to file, within twelve months of the rule’s effective date, a “certified emergency backup power compliance plan.” *Id.* App. B (Section 12.2(c)(4)). The plan must detail the provider’s procedure for ensuring the provision of “emergency backup power to 100 percent of the area covered by any non-compliant asset in the event of a commercial power failure.” *Id.*

ARGUMENT

In determining whether to grant a stay of one of its orders, the Commission applies the four-factor test established in *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). A petitioner must demonstrate that: (1) it is likely to prevail on the merits of its petition for review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and, (4) a stay is in the public interest. These four factors are all present here. “If the last three factors strongly favor the party requesting the stay, then the Commission may grant the stay if a petitioner makes a substantial case on the merits, rather than demonstrating likely success.” *Telephone Number Portability, Joint Petition for Stay Pending Judicial Review*, Order, 18 FCC Rcd. 24,664 ¶ 4 (2003).

I. Likelihood of Success on the Merits

There are two legal infirmities with the FCC’s Backup Power Rule, either of which justifies remand to the agency. First, Congress did not delegate authority to the FCC to promulgate the rule. Second, the rulemaking process did not meet requirements established by the APA and the courts.

A. Congress Has Not Delegated Authority to Issue the Rule

Congress has never delegated authority to the FCC to impose rules mandating the manner in which carriers power their operations, let alone rules directing carriers to provide backup power for specified periods of time. The lack of delegated authority renders the Backup Power Rule unlawful, as “administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.” *Am. Library Ass’n. v. FCC*, 406 F.3d 689, 691 (D.C. Cir. 2005).

When it issued the first version of the rule in June 2007, the FCC relied on a single source of authority: the jurisdictional grant found in Section 1 of the Communications Act of 1934, as amended. *See Initial Order* ¶ 77 (claiming authority under 47 U.S.C. § 151). As the D.C. Circuit has recognized, however, Section 1 is a “general jurisdictional grant.” *Am. Library Ass’n.*, 406 F.3d at 691. It does not delegate any substantive authority to the FCC, and it does not empower the FCC to promulgate rules requiring CMRS providers to ensure that all cell sites have eight hours of emergency backup power.

The FCC apparently recognized the limitations of Section 1. In response to the petitions for reconsideration challenging its authority, the FCC relied on *two* sources of authority for the revised version of the rule: Section 1 and Section 303(r). *See Reconsideration Order* ¶ 17 (claiming authority under 47 U.S.C. §§

151 & 303(r)). However, Section 303(r) does not empower the FCC to act absent specifically-delegated authority contained in another statutory provision. *See Motion Picture Ass’n v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002) (“The FCC must act pursuant to *delegated authority* before any ‘public interest’ inquiry is made under § 303(r).”) (emphasis in original).

Indeed, the FCC itself has recognized that with respect to CMRS public safety issues it may act only pursuant to specifically delegated authority, not the generalized statements found in Sections 1 and 303(r). *See Improving Public Safety Communications in the 800 MHz Band*, Memorandum Opinion and Order, 20 FCC Rcd. 16,015, 16,042-43 ¶¶ 62-64 (2005) (indicating that Sections 1 and 303 do not provide authority to amend CMRS licenses to serve the public interest, but concluding that the specific delegation of authority in Section 316 does).

B. The Rulemaking Did Not Meet Procedural Requirements

The APA requires agencies to publish meaningful notice of proposed rules, to produce rules that are well-reasoned and supported by the record, and to refrain from any arbitrary or capricious decisions. *See, e.g., Owner-Operator Indep. Drivers Ass’n v. Fed. Motor Carrier Safety Admin.*, 494 F.3d 188, 199-203 (D.C. Cir. 2007). The FCC’s process in adopting the Backup Power Rule (including the

requirement that carriers file compliance reports six months after the effective date) did not meet these requirements.

1. *Absence of Notice*

The APA requires agencies to publish notice of proposed rules because “[o]therwise, interested parties will not know what to comment on.” *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983).

In the *NPRM*, the FCC sought comment on the Katrina Panel’s recommendation that it “encourage” carriers to implement certain best practices related to backup power. *NPRM* ¶ 16. Nothing in the *NPRM* or in the *Katrina Report* suggested the possibility of a backup power mandate or hinted at a rule requiring eight-hours of backup power at all cell sites.

Sprint Nextel (and other commenters) informed the FCC of its positive view of the best practices proposal and its ongoing adherence to several published backup power standards. *See Sprint Nextel Comments* at 8-10. However, no one submitted comments reflecting the possibility that the *NPRM* might lead to a mandate requiring eight hours of backup power at all cell sites, which indicates that the notice was not sufficient. *See, e.g., Nuvio Corp. v. FCC*, 473 F.3d 302, 310 (D.C. Cir. 2006) (reasoning that the existence of comments on proposed rules indicates that the agency had provided sufficient notice).

The FCC itself tacitly acknowledged that it had not provided meaningful notice when it stated that the idea of issuing a *requirement* (as opposed to *encouraging* adherence to best practices) arose from “suggestions” contained in two sets of comments. *See Initial Order* ¶ 77; *Reconsideration Order* ¶ 13.

Leaving aside the question as to whether these two commenting parties urged the imposition of an eight-hour backup rule on CMRS providers – and they did not – an agency “must *itself* provide notice of a regulatory proposal. Having failed to do so, it cannot bootstrap notice from a comment.” *Small Refiner*, 705 F.2d at 549 (emphasis in original); *see also id.* at 546-47 (“[I]f the final rule deviates too sharply from the [agency’s] proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.”).

In addition, FCC has asserted that the rule was a “logical outgrowth” of the notice provided in the *NPRM*. *See Reconsideration Order* ¶ 12. But a rule constitutes a logical outgrowth only “if interested parties ‘should have anticipated the agency’s final course in light of the initial notice.’” *Owner-Operator*, 494 F.3d at 209. The fact that the detailed comments filed by several CMRS industry parties as well as parties in other segments of the industry lacked any discussion of the Backup Power Rule’s wide ranging impact demonstrates that it was not a logical outgrowth of the *NPRM*. *See, e.g., Nuvio Corp.*, 473 at 310 (reasoning that the

existence of comments on proposed rules indicates that the agency had provided sufficient notice). Based on the lack of notice provided—not even a hint at the eight-hour requirement or the compliance reporting requirement—the parties could not anticipate the FCC’s ultimate course.

2. *Lack of Record Support*

There is no evidence or data in the FCC’s rulemaking record to support the backup power mandate in general, the asset compliance reporting requirement, or the eight-hour backup power obligation. Critical data, such as the average length of a power outage or the time in which the vast majority of blackouts are resolved, were not taken into account.

Indeed, the only clear record evidence on point gives no suggestion that an eight or 24-hour backup power requirement would be suitable: the *Katrina Report* observes that existing base-station generators typically provide backup power for 24 to 48 hours but that the “long duration of the power outages in the wake of Katrina substantially exceeded [those] capabilities.” *Katrina Report* at 7. In other words, the Katrina Panel provided data indicating that backup power would have had to last substantially longer than 48 hours to provide continuous service during and following the hurricane. While a 48-hour backup power requirement would be entirely unreasonable for other reasons, it is notable that it was the one and only

reference point for the amount of backup power that would have been necessary to last the duration of the Katrina disaster, and this relevant fact was wholly disregarded by the FCC.

Additionally, the FCC never suggested, nor did parties provide comment on, the possibility of conducting an audit of [REDACTED] cell sites in a six-month period. Had the Commission raised this as a proposed requirement, carriers could have explained the time, money and effort required to complete such a process and, moreover, could have demonstrated to the Commission that a six-month window is probably insufficient to complete the required audit. Given that the Commission failed to raise its possibility, carriers did not comment on the audit process and it is therefore unsupported by the record.

The absence of either record support or a reasoned explanation for the FCC's chosen course amounts to a violation of the APA. *See Owner-Operator*, 494 F.3d at 203. This is particularly true in the case of numerical limits – such as the eight-hour requirement for cell sites – because an agency cannot just “pluck[] [the number] out of thin air.” *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1137 (D.C. Cir. 2001).

3. *No Consideration of Alternatives*

The APA also requires agencies 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).

Nothing in the *Initial Order* or the *Reconsideration Order* suggests that the FCC ever considered any alternatives, and it did not provide the required explanation for rejecting them. While there are several alternatives that the FCC *should* have considered (*e.g.*, perhaps a four-hour rule, or different requirements depending on the varying blackout threats in different regions, or a solution that might help address flooding), there is one, however, that undeniably merited a close look: the Katrina Panel’s recommendation. Even though the discussion of backup power in the *Katrina Report* and the *NPRM* focused exclusively on the panel’s recommendation, there is no indication that the FCC considered it. And, even if it did, the FCC has not explained why it elected to reject the expert panel’s recommendation.

The FCC’s compressed time frame for compliance also precluded consideration of alternatives that could better serve the public interest. The mandated rush to compliance virtually ensures that Sprint Nextel will have to employ diesel generators that require the onsite storage of a large quantity of diesel fuel or employ vastly increased numbers of batteries that hold large quantities of

concentrated sulfuric acid.¹ Sprint Nextel is experimenting with alternatives to diesel generators and batteries such as solar panels, geothermal cooling to avoid the heat buildup that requires power-hungry air conditioning systems for the iDEN network, or generators that run on propane or liquefied natural gas that avoid the hazards and burdens associated with storage of large quantities of diesel fuel on site. The FCC never considered the possible public interest benefits associated with these alternatives because it never took notice of their existence.

4. *No Meaningful Assessment of Important Aspects*

The Backup Power Rule is also arbitrary and capricious, and therefore in violation of the APA, because the FCC has “entirely failed to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The FCC adopted the rule ostensibly in an effort to avoid the calamitous

¹ Many localities closely regulate the installation and use of generators, even specifying the types of generators that may be used. With respect to batteries, the California Office of Environmental Health Hazard Assessment (“COEHHA”) regards strong inorganic acid mists containing sulfuric acid as a chemical known to the State of California to cause cancer. See COEHHA, Notice to Interested Parties (March 14, 2003) (*available at* http://www.oehha.ca.gov/prop65/CRNR_notices/list_changes/31403strongacids.html). Moreover, the California Department of Industrial Relations, Division of Occupational Safety and Health (“DOSH”), is currently planning to establish permissible exposure levels for sulfuric acid. See, e.g., DOSH Meeting Agendas (*available at* <http://www.dir.ca.gov/dosh/DoshReg/5155Meetings.htm>).

communications failures that occurred during and after Hurricane Katrina’s landfall. But, even though the rule would require Sprint Nextel to spend somewhere between approximately [REDACTED] on network assessments and upgrades, it would not prevent a repeat if another hurricane were to hit the Gulf Coast.

As the Katrina Panel explained, the massive flooding that accompanied the storm incapacitated the transmission lines that connect cell towers to the network. *See Katrina Report* at 9. Backup power supplies—whether they provide electricity for eight hours or eighty hours—are useless when sites and lines are submerged in flood waters. Not considering this fact – arguably the defining feature of the Katrina disaster – amounts to a violation of APA processes.

II. Irreparable Injury

As written, the Backup Power Rule exposes Sprint Nextel to irreparable injury. Absent a stay, the FCC’s rule would require Sprint Nextel to spend approximately [REDACTED] to audit its network of cell sites and somewhere between [REDACTED] (depending on conditions discovered on the ground) to implement upgrades to bring the sites into compliance. *See* Declaration of Eric Woodruff ¶¶ 20-24, 27-29 (“*Woodruff Decl.*”) (attached as

Exhibit A). In particular, Sprint Nextel would need to visit and inspect approximately [REDACTED] individual cell sites in about six months, or approximately [REDACTED] per week. *See id.* ¶¶ 16, 19, 24. Once that inspection is complete, it would have to devote even greater resources and time to bringing all of its assets into compliance with the FCC’s wholly-unsupported eight-hour requirement. *See id.* ¶¶ 27-29.

This financial injury—totaling somewhere between approximately [REDACTED]—is imminent and certain to occur because the FCC has established tight deadlines for compliance with the Backup Power Rule. As a result, carriers have been forced to begin compliance work even before the rule has formally taken effect and work around the clock to have any chance of complying.

The injury is also unrecoverable. *See Wisconsin Gas v. FERC*, 758 F.2d 669, 675 (D.C. Cir. 1985) (concluding that unrecoverable economic loss constitutes irreparable harm). The resources spent on compliance would result in capital expenses that would not provide any noticeable service improvements to subscribers. There is no way that Sprint Nextel could recover those sums as damages in litigation, and the competitive market landscape precludes it from passing the costs on to consumers. *See Woodruff Decl.* ¶¶ 25, 30; *see also* letter from Andre Lachance, counsel for Verizon Wireless, to Marlene Dortch, EB

Docket No. 06-119, WC Docket No. 06-63 (Sept. 4, 2007) (indicating Verizon Wireless will not have to expend significant resources to comply with the eight-hour requirement because its “internal design standard is for 8 hours or more of back-up power, available at every cell site, where possible.”).

III. Harm to Other Parties

A stay would not harm other interested parties in any respect. It would simply preserve the *status quo*. Carriers’ existing backup power systems would remain in place—and nothing in the record indicates that those systems expose consumers or others to any risk. On the contrary, parties offered numerous examples (in both the rulemaking proceeding and in the Katrina panel discussions) of steps they have taken to harden their networks – particularly in high-risk areas such as the Southeastern United States – and try to ensure a high level of operational capabilities and performance during catastrophic events. *See, e.g.*, T-Mobile Comments in Support of Petitions for Reconsideration at 7, EB Docket No. 06-119, WC Docket No. 06-63 (filed Sept. 4, 2007); Comments of Sprint Nextel Corporation at 4, EB Docket No. 06-119, WC Docket No. 06-63 (filed Aug. 7, 2006); CTIA – The Wireless Association Comments at 6-13, EB Docket No. 06-119, WC Docket No. 06-63 (filed Aug. 7, 2006).

Perhaps more importantly, a stay would prevent the diversion of resources away from critical needs. As explained above, the rule would require Sprint Nextel (and others) to devote enormous sums of money and work-hours to the task of auditing its network and installing additional backup power systems. A stay, by contrast, would permit carriers to continue devoting those resources to other needs, such as storm preparation and recovery, national security emergencies, and routine upgrades to networks and equipment to better serve consumers, as well as public safety entities.

IV. Impact on the Public Interest

A stay would benefit the public interest. Absent a stay, many CMRS providers will face a choice between violating the new Backup Power Rule (because compliance on the specified timeline is probably impossible) or shutting down non-compliant cell sites and assets. Of course, those cell sites and assets are critical to CMRS providers' ability to provide service to consumers and, in the event of a disaster or emergency, to first responders. Shutting the sites down would degrade network reliability for all users.

