



Sprint Nextel
2001 Edmund Halley Drive
Reston, VA 20191
Office: (703) 433-4143
Fax: (703) 433-4142

Laura Holloway Carter
Vice President
Government Affairs-Federal Regulatory
laura.carter@sprint.com

January 28, 2008

Via Electronic Submission

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

Re: *Motion for Stay of Sprint Nextel Corporation, In the Matter of Wireless E911 Location Accuracy Requirements, PS Docket No. 07-114; CC Docket No. 94-102, WC Docket No. 05-196*

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/ Laura H. Carter
Laura H. Carter

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

In the Matter of)	
)	
Wireless E911 Location Accuracy Requirements)	PS Docket No. 07-114
)	
Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket 94-102
)	
Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling)	
)	
911 Requirements for IP Enabled Service Providers)	WC Docket No. 05-196

**SPRINT NEXTEL CORPORATION
PETITION FOR STAY PENDING JUDICIAL REVIEW**

Laura H. Carter
Vice President, Government Affairs

Charles W. McKee
Director, Government Affairs

Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191
703-433-3786

January 28, 2008

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**SPRINT NEXTEL CORPORATION
PETITION FOR STAY PENDING JUDICIAL REVIEW**

Pursuant to 47 C.F.R. §§ 1.41 and 1.43, Sprint Nextel Corporation (“Sprint Nextel”) respectfully requests the Federal Communications Commission (“FCC” or “Commission”) stay the effective date of its Report and Order in the above captioned dockets pending judicial review.¹ The *Order* imposes obligations which are not technically feasible to implement and is accordingly unlawful. In addition, the implementation dates were established without notice or opportunity to comment in violation of the Administrative Procedure Act (“APA”) and the Commission’s own rules.² Given the likelihood that this *Order* will be overturned on appeal and the potential irreparable harm it may cause if not stayed, Sprint Nextel requests that the Commission stay the *Order* pending judicial review.

¹ Report and Order, *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, CC Docket 94-102 and WC Docket No. 05-196, FCC 07-166 (rel. November 20, 2007) (the “*Order*”).

² 5 U.S.C. §553; 47 C.F.R. §1.415(c).

INTRODUCTION AND SUMMARY

Undoubtedly motivated by good intentions, the FCC has imposed a radical change to its rules governing the accuracy of wireless 911 location technology. While Sprint Nextel supports the goals of the Commission, the overwhelming record evidence demonstrates that the new standards cannot be met. The technical explanations, engineering affidavits, manufacturer's comments and comments from carriers that operate these systems, demonstrate the technical infeasibility of the new standards. While the Commission may have a strong desire that technology support its goals, it cannot base its decision merely on its "experience regarding implementation of similar public safety mandates,"³ nor can it impose standards that are technically impossible to meet. Moreover, the FCC cannot establish benchmarks and specific timeframes without providing notice or the opportunity to comment.

Wireless 911 has been a tremendous success by any measure. Individuals are now able to call for help in situations that would have been unheard of when the concept of "911" was first initiated in the 1968.⁴ Public safety can be reached from locations as varied as the hiking trails of a national park to the trunk of a moving car. Providing information regarding the location of these calls, however, has been more problematic. The 911 system was designed in an era of rotary phones with fixed locations. The dynamic wireless radio environment is vastly more complex than these systems ever anticipated.

³ *Order* at ¶ 14. The Commission freely acknowledges, however, that it did not obtain information on this issue from its engineering staff before reaching its conclusion. See Statement of Commissioner Copps.

⁴ Report and Order, *In the Matter of Revision of the Commissions Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, FCC 96-264 (July 26, 1996) ("First Report and Order"), ¶ 3.

The Commission first addressed this issue in 1996 when it established an obligation that wireless carriers provide the location of the cell site transmitting a 911 call within one year.⁵ The Commission also gave carriers five years to deploy a system that could provide the latitude and longitude of a caller within 125 meters 67% of the time.⁶ Subsequently, the Commission revised its accuracy standards, acknowledging that different location technologies or strategies had different performance characteristics. Specifically, the FCC held that carriers using a network based technology must locate callers within 100 meters for 67 percent of calls and within 300 meters for 95 percent of calls.⁷ Carriers using a handset-based GPS location system are required to locate callers within 50 meters for 67 percent of calls and within 150 meters for 95 percent of calls.⁸ In so ruling, the Commission acknowledged that the operational characteristics of different technologies warranted differing treatment under the rules.

The Commission never specified the manner in which carriers were to test the operational performance of their systems, although it provided guidelines that were expressly “not intended to establish mandatory procedures.”⁹ These guidelines, as well as subsequent FCC Orders, acknowledged that accuracy measurement would not occur at the PSAP level but at a broader geographic level.¹⁰ Indeed, the FCC expressly recognized that various carriers would measure performance on a network-wide basis.¹¹

⁵ *First Report and Order* at ¶10.

⁶ *Id.*

⁷ Third Report and Order, *In the Matter of Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket 94-102, FCC 99-245 (October 6, 1999), ¶12.

⁸ *Id.*

⁹ OET Bulletin 71, *Guidelines for Testing and Verifying the Accuracy of Wireless E911 Location Systems*, (April 12, 2000)(“*OET Bulletin*”).

¹⁰ *OET Bulletin* at p. 4, “It may be appropriate to subject a wireless service provider’s entire advertised coverage area within a metropolitan area or similar region.”

¹¹ See, e.g., Order, *Cingular Wireless LLC*, 18 FCC Rcd 11746, 11750-51 n. 10 (2003); Order, *AT&T Wireless Servs., Inc.*, 17 FCC Rcd 19938, 19942 n.10 (2002).

Sprint Corporation and Nextel Communications, Inc. each separately concluded that a handset-based GPS location technology was the appropriate solution for their respective air interfaces (CDMA and iDEN).¹² Handset-based GPS is the most accurate and robust location technology currently offered by wireless carriers.¹³ The combined companies have invested more than XXXXXX dollars in the development and deployment of these systems.¹⁴ Implementation required the construction of redundant national platforms, switch upgrades and replacement of almost its entire handset base with new GPS enabled equipment.¹⁵ Sprint Nextel has deployed Phase II service to more than 4,348 PSAPs and has recently certified to the Commission that it has converted 95% of its existing handsets to GPS enabled models.¹⁶

While these systems were being deployed, the Association of Public-Safety Communications Officials-International, Inc. (“APCO”) filed a Petition with the Commission seeking a further modification of the existing rules.¹⁷ Specifically, APCO sought the imposition of a new requirement that carriers measure the performance of their systems within the political boundaries of each individual PSAP requesting service. Because there are currently estimated to be more than 6,000 PSAPs within the United

¹² Declaration of Jay P. Pabley (attached hereto as Exhibit A) at ¶8.

¹³ *Id.* at ¶9.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*; Letter from Laura Carter, *In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Sprint Nextel Corporation, WT Docket No. 05-286; In the Matter of Request for Waiver of Location-Capable Handset Penetration Deadline by Nextel Partners, Inc., WT Docket No. 05-302*, (January 4, 2008).

¹⁷ Association of Public-Safety Communications Officials-International, Inc., Request for Declaratory Ruling, CC Docket 94-102 (filed October 6, 2004).

States, this new rule would require a dramatic increase in the overall accuracy of the current technology still being deployed.¹⁸

In response to APCO’s request, the FCC referred this matter to the Network Reliability and Interoperability Council (“NRIC”) as part of its Charter VII. Specifically, Issue 1(a) of Charter VII directed NRIC to recommend “accuracy requirements for location information, particularly for rural, suburban, and urban areas and recommend ways to verify that accuracy requirements are met.”¹⁹ In response to this Charter, the industry, vendors and public safety reviewed the capabilities of wireless technology and the best means of achieving the highest levels of performance for 911 systems. On December 16, 2005, NRIC released its report recommending multiple steps for improving location accuracy, but acknowledging that “[g]iven the current state of technology, it is understood that the FCC accuracy rules will not be met at every PSAP.”²⁰ The FCC failed to adopt the recommendations of NRIC and provides no discussion of its conclusions in the *Order*.

On June 1, 2007, the Commission issued a Notice of Proposed Rulemaking seeking comment on APCO’s 2004 proposal on an expedited basis.²¹ Specifically, the FCC sought comment on the appropriate geographic area for measuring carrier compliance with the 911 rules, tentatively concluding that it should adopt the APCO proposal that compliance be measured at the PSAP level.²² The FCC also sought

¹⁸ More than 40% of the counties within the United States have not deployed the ability to receive the current location information generated by wireless networks. NENA Press Release, January 2, 2007.

¹⁹ www.nric.org/charter_vii

²⁰ NRIC Report, pg. 21.

²¹ Notice of Proposed Rulemaking, *In the Matter of Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, CC Docket 94-102, and WC Docket No. 05-196, FCC 07-108 (June 1, 2007)(“*NPRM*”).

²² Although APCO had subsequently modified its proposal to use larger geographic areas, in acknowledgement of the technical limitations of wireless networks, the Commission chose to adopt the

comment on whether it should defer enforcement of its proposed new rule in light of the technical limitations facing carriers.²³ In a second proceeding to be resolved at a later date, the FCC indicated it would address the length of time such deferment should last, the accuracy standard to be met, the manner in which testing would be conducted and the schedule for such testing.²⁴

Although the Commission established a bifurcated comment schedule, it is important to note that the issues raised in *Part A* of the *NPRM* (the geographic measurement standard and whether enforcement of the new rule should be deferred) are directly impacted by the decisions the Commission will make in the still pending *Part B* of the *NPRM*.²⁵ *Part B* will establish, among other things, whether the accuracy standard will be changed,²⁶ how compliance testing is to be accomplished,²⁷ and the manner in which data is to be provided.²⁸ In addition, *Part B* was to address potential benchmarks and timeframes, although the Commission has preemptively ruled on those issues. Without resolution of the remaining issues raised in *Part B*, it is unclear how a carrier will be able to demonstrate compliance with *Part A*.

In response to the *NPRM*, substantial comments were filed by all current location vendors, carriers and public safety. Literally *all* acknowledged the reality that current

original proposal. See Supplement to Request for Declaratory Ruling, *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket 94-102 (February 5, 2005).

²³ *NPRM* at ¶6.

²⁴ *NPRM* at ¶8.

²⁵ *NPRM* at ¶ 5-7 sets forth a comment cycle for the issue of geographic measurement standards ("*Part A*"), while the *NPRM* at ¶8-19 raises issues related to the period of deferment of a new standard, what level of accuracy should be obtained, what compliance timeframes should be met and how testing should be conducted ("*Part B*").

²⁶ *NPRM* at ¶12.

²⁷ *NPRM* at ¶14.

²⁸ *NPRM* at ¶16.

technologies could not meet the new standard the Commission proposed.²⁹ More specifically, however, the vendors that have developed and deployed handset based GPS systems acknowledged that these carriers could not meet the 50 meter for 67% of calls and 150 meters for 95% of calls standard within each PSAP jurisdictional boundary.³⁰ It is important to note that handset based providers are held to a higher standard than those deploying a network based solution. No vendor suggested that it could meet the higher GPS accuracy standard (50/150 meters) in every PSAP.

Indeed, the only vendor to come close to suggesting that its technology might be able to meet this standard stopped short of claiming it could comply with the accuracy requirements within every PSAP. True Position indicated that with the future development of a new CDMA version of its current UTDOA technology, combined with a new hybrid technology that incorporated existing GPS data, deployed over many years and involving the construction of thousands of additional cell sites, it might meet the FCC standard in “the vast majority of cases.”³¹ The FCC rules do not call for compliance in the “vast majority” of cases, however.³²

Even more perplexing than the Commission’s decision to mandate implementation of the impossible, however, was its decision to require this deployment within a five year window with interim benchmarks.³³ These benchmarks were based

²⁹Comments of Verizon Wireless at p.10-14; Comments of T-Mobile at p. 5-10; Comments of Qualcomm, Inc. at p. 4-7; Comments of Motorola, Inc. and Nokia at p. 8; Comments of AT&T, Inc. at p. 7; Comments of Rural Cellular Association at p. 4-7; SunCom Comments at p. 2; Comments of United States Cellular Corporation at p.2; Comments of Corr Wireless Communications LLC at p. 2; Comments of Nsighttel Wireless LLC at p. 2; Comments of Intrado, Inc. at p. 2.

³⁰ Comments of Qualcomm, Inc., at 4: “AGPS cannot today, nor in the foreseeable future, meet the E911 Phase II accuracy requirements in each and every PSAP on a PSAP-by-PSAP basis.”; Comments of Motorola at 14.

³¹ Comments of TruePosition, Inc., at p. 5.

³² Indeed, Sprint Nextel already provides this level of accuracy in the “vast majority of cases.”

³³ *Order* at ¶18.

upon a filing made by APCO International, on September 7, 2007, four days before the Commission announced its decision and the last day before the sunshine period prohibiting further ex parte filings began.³⁴ Thus, the parties to the proceeding had little or no opportunity to be aware of the proposal, much less provide a rational assessment of this new rule.

The interim benchmarks are arbitrary and capricious. The new rule assumes, without any record evidence, that a new technology will become available that will allow carriers to increase accuracy gradually over time. As discussed below, there is no known technology that will increase the accuracy of GPS location to the standard adopted by the Commission, much less one that could do so on an incremental basis within the specific timeframes the Commission adopted.³⁵ The Commission indicated that carriers could improve location accuracy if they were “willing to invest appropriate resources.”³⁶ The Commission fails to explain, however, what expenditure of additional funds would increase the ability of a handset to “see” additional satellites. Indeed, outside of a non-technical letter from APCO, the Commission cites no evidence whatsoever for its new benchmarks.

Moreover, the interim benchmarks threaten to affirmatively harm the public interest and impose irreparable injury to Sprint Nextel. The new rules require carriers to conduct testing of each Economic Area (EA) within the United States within the next nine months.³⁷ Although this testing will do nothing to change the actual operational characteristics of GPS handset technology, it will impose significant cost and require

³⁴ *Order* at ¶18, nt. 39.

³⁵ Declaration of Jay P. Pabley at ¶14.

³⁶ *Order* at ¶11.

³⁷ *Order* at ¶18.

Sprint Nextel to divert resources from improving coverage to conducting testing.³⁸

Based upon quotes received from vendors, this testing is estimated to cost in excess of XXXX XXX for the first benchmark alone, a significant amount of money that could otherwise be used for network construction.³⁹

This diversion of funds away from network infrastructure and into an unproductive testing protocol will undermine the safety of the public. The most critical aspect of 911 is the ability to reach a Public Safety Answering Point in the first place. Without robust coverage, a 911 call cannot be placed. Enhancements to the 911 information available on that call become meaningless without this important first step. The Commission, however, failed to even consider this potential impact on public safety as it imposed this new technical impossibility.

In addition, because “AGPS cannot today, nor in the foreseeable future, meet the E911 Phase II accuracy requirements in each and every PSAP on a PSAP-by-PSAP basis,”⁴⁰ Sprint Nextel will be in non-compliance with the Commission’s rule, thus causing irreparable harm to its reputation and good will. A perceived failure to comply with a public safety obligation, even one that is impossible to meet, will have multiple adverse ramifications, ranging from damage to good will to the inability to bid on specific government contracts.

More importantly, the FCC will create unnecessary confusion and concern for consumers. Contrary to the Commission’s unsupported statements to the contrary, the current testing methodology does not leave large areas of the public without reliable 911

³⁸ Declaration of Jay P. Pabley at ¶¶12-19.

³⁹ *Id.*

⁴⁰ Comments of Qualcomm at p. 4.

service.⁴¹ GPS technology provides accurate information on the vast majority of 911 calls. By creating a situation in which carriers are “out of compliance,” however, the FCC risks confusion among consumers and unnecessary concern regarding the performance of wireless handsets.

Wireless carriers have invested billions of dollars developing and deploying location systems that have proven to be remarkably effective given the nature of radio wave transmission and the diversity of circumstances within which a wireless 911 call can be made. These systems are able to meet the FCC’s accuracy standard when measured as an average of all topologies. Each of these systems, however, has inherent shortcomings that limit their effectiveness in various circumstances.⁴² The Commission’s ruling does not eliminate these shortcomings nor does it identify how carriers are to address them. The Commission is legally obligated to base its decisions on the facts presented – even when those facts do not support the Commission’s desired outcome. Because it failed to do so in this case, the *Order* is illegal and should be stayed pending appeal.

DISCUSSION

In determining whether to stay the effectiveness of one of its orders, the Commission applies the four factor test established in *Virginia Petroleum Jobbers Association v. FPC*,⁴³ as modified in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*⁴⁴ Under this test, the Commission must consider whether: (1) the petitioner has made a strong showing that it is likely to prevail on the

⁴¹ Sprint Nextel Comments at p. 11-12; Comments of Verizon Wireless at p. 4-6.

⁴² Declaration of Jay P. Pabley at ¶10.

⁴³ 259 F.2d 921 (DC Cir. 1958)

⁴⁴ 559 F.2d 841 (DC Cir. 1977)

merits of its appeal; (2) the petitioner has shown that without such relief, it will be irreparably injured; (3) the issuance of a stay would harm other parties interested in the proceeding; and (4) the stay is in the public interest.⁴⁵ As demonstrated below, each of these factors weighs in favor of Sprint Nextel’s request.

I. SPRINT NEXTEL IS LIKELY TO PREVAIL ON THE MERITS

The Order is likely to be overturned on appeal. There is no record evidence to support the Commission’s conclusions. Indeed, the record evidence overwhelming contradicts the Commission’s actions, as noted by Commissioner McDowell during the September 11 open meeting.⁴⁶ In addition, the Commission failed to provide any notice of the proposed implementation schedule it adopted in violation of the APA. Finally, the Commission violated its own procedural rules in deciding an issue before the comment period had closed.

A. PSAP Level Compliance is Not Technically Feasible within Five Years.

The Commission cannot impose a goal that it admits is impossible to accomplish.⁴⁷ “Impossible requirements imposed by an agency are perforce unreasonable.”⁴⁸ In this case, the FCC articulates its desired goal of PSAP level accuracy, but ignores the uncontroverted record evidence that current technology cannot meet this standard. Indeed, the arguments in support of the new standard are simply conclusory statements that will not withstand appellate review.

⁴⁵ *Washington Area Transit Commission*, 559 F.2d at 843. See also, Order, *In the Matter of Regulation of Prepaid Calling Card Services*, WC Docket 05-68, 22 FCC Rcd 5652, 5654, ¶ 7 (March 29, 2007).

⁴⁶ “...[A] broad array of entities – wireless service providers, technology vendors and public safety groups – have told us that [they] are not yet in a position to devise a plan for rolling out a system of improved wireless E911 location accuracy.” Comments of Commission McDowell at the September 11, 2007 open meeting.

⁴⁷ *AT&T Corporation v. FCC*, 323 F.3d 1081, 1087 (DC Cir. 2003).

⁴⁸ *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

No Commenter provided evidence that Sprint Nextel could meet the current accuracy standard of 50 meters for 67% of calls and 150 meters for 95% of calls within every PSAP boundary. On the contrary, the comments of the vendors that have developed the systems used by Sprint Nextel, other operators using handset based location technology, and vendors offering potential new hybrid systems for the future, expressly acknowledged that PSAP level accuracy is not possible in all circumstances.⁴⁹ Carriers submitted the affidavits of engineering experts, provided technical explanations of the physics associated with triangulation of wireless devices, and were supported by vendors of existing technology.⁵⁰

Nowhere in its *Order* does the FCC attempt to address this overwhelming technical evidence. Instead the Commission makes three logically flawed arguments that provide no support for the agency’s decision. First, the Commission argues that if Carriers can meet the standard in small states, then they must be capable of meeting the standard in each of the six thousand or more PSAPs nationwide.⁵¹ Second, that the setting of a five year implementation period (ignoring the fact that the Commission also set interim benchmarks), will make the new standard achievable. Third, that compliance is possible “in many cases” if carriers simply spent enough money. Even articulating the Commission’s arguments demonstrates the weakness of its position.

The fact that NRIC VII adopted a recommendation that carriers measure compliance based upon state boundaries does not mean that compliance can be achieved

⁴⁹ Indeed, the Commission itself implicitly acknowledges this point when it states that compliance will be possible in “many instances.” *Order* at ¶16.

⁵⁰ Comments of Verizon Wireless at p.10-14; Comments of T-Mobile at p. 5-10; Comments of Qualcomm at p. 4-7; Comments of Motorola, Inc. and Nokia at p. 8; Comments of AT&T, Inc. at p. 7; Comments of Rural Cellular Association at p. 4-7; SunCom Comments at p. 2; Comments of United States Cellular Corporation at p.2; Comments of Corr Wireless Communications LLC at p. 2; Comments of Nsighttel Wireless LLC at p. 2; Comments of Intrado, Inc. at p. 2.

⁵¹ *Order* at ¶ 11.

at the radically smaller and more diverse PSAP level. One of the smallest states in the Union is Rhode Island, but even Rhode Island has 72 PSAPs within its borders. Indeed, as discussed at length in the comments, PSAPs can be as small as several city blocks or the width of a state highway. Indeed, PSAP boundaries vary over time and do not remain constant. At a minimum, State boundaries are first and foremost, known. Moreover, they are constant and include a wide array of topologies and population density. As discussed at length in Sprint Nextel’s Comments, PSAP boundaries provide no meaningful measuring stick by which a technology can be judged.⁵² More importantly, however, the Commission has no authority to simply assume what technology can or cannot accomplish in the future, particularly when those conclusions are wholly at odds with the facts presented in the record.

Likewise, simply setting a distant goal does not make that goal achievable. The Commission states that it is not “requiring carriers to implement new location technologies.” Specifically, “carriers that currently employ a network-based location solution need not incorporate handset-based location technologies into their networks to comply with our ruling in this Order, or vice-versa.”⁵³ But the Commission fails to identify any means by which this goal could be achieved and the record indicates that it cannot be achieved, even in five years.⁵⁴

Finally, the FCC provides no citation to support its conclusion that a carrier using handset based GPS technology could meet the Commission’s new accuracy standard if it simply spent more money. The fundamental weakness of a handset based location system is that there are not always sufficient satellite signals available to the device to

⁵² Sprint Nextel Comments at p. 3-6.

⁵³ *Order* at ¶ 13.

⁵⁴ Qualcomm Comments at 4; Motorola Comments at 14.

calculate location.⁵⁵ No expenditure of funds will increase the number of satellites at any given location or moment in time, or remove all obstructions (e.g., buildings, trees) to the sky, much less change performance in an incremental manner over one, three and five year periods.

The lack of evidence supporting the decision is reflected in the individual statements of the Commissioners. Commissioner Copps acknowledged that the Commission adopted the item without evidence from the Office of Engineering and Technology that could have “put this process on a sound technical footing” and that the decision involved “legal risk.”⁵⁶ Commissioner Adelstein noted the decision “is fraught with highly dubious legal and policy maneuvering that bypasses a still developing record on what should be the reasonable and appropriate implementation details.”⁵⁷ Commissioner McDowell noted that “I would have preferred that the Commission complete its own in-house testing and verification prior to our implementing benchmarks that may be unachievable at best, or inefficient.”⁵⁸

These statements belie the claim that the Commission acted based upon its “experience.” Indeed, it is apparent that the Commissioners did not even consult with the engineering offices that could have shed light on these issues. Such actions are the definition of arbitrary and capricious and cannot be upheld on appeal.

B. The Deadlines Imposed Violate the APA and the Commission’s own Procedures.

“Instead of working with all stakeholders, the Commission today simply adopts on Tuesday a proposal filed on Friday. Offering no opportunity for deliberation or

⁵⁵ Declaration of Jay P. Pabley at ¶¶10 -11.

⁵⁶ Statement of Commissioner Copps, p. 30.

⁵⁷ Statement of Commissioner Adelstein, p. 32.

⁵⁸ Statement of Commissioner McDowell, p. 35.

participation by so many stakeholders does not benefit an expert agency.”⁵⁹ Indeed, such action by an agency is illegal and must be overturned on appeal. In this particular circumstance, however, the action is doubly flawed. Not only did the Commission adopt a timetable without notice or opportunity to comment, it did so despite the fact that the period within which compliance with the new rule should be achieved was explicitly reserved for the second half of this proceeding, a proceeding in which the comment period had not even closed.⁶⁰

The APA requires the Commission to “give interested persons an opportunity to participate in the rule making through submission of written data, views or arguments with or without opportunity for oral presentation.”⁶¹ Likewise, the Commission’s own rules require that “[a] reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking.”⁶² The Commission has violated both of these provisions and a reviewing court is likely to vacate the *Order* for failure to comply with these requirements.

As noted by Commissioner Adelstein, the benchmarks adopted by the Commission were proposed on Friday, September 7, 2007,⁶³ the same day the sunshine period for submitting ex parte communications related to this Order began. The decision was adopted on September 11, 2007. It is unlikely that most parties to the proceeding were even aware that the proposal had been made. They certainly did not have the opportunity to provide “written data, views or arguments” to the Commission before its decision was adopted.

⁵⁹ Statement of Commissioner Adelstein, p. 32-33.

⁶⁰ See *NPRM* at ¶¶ 5-7; *NPRM* at ¶¶ 8-19.

⁶¹ 5 U.S.C. §553(c).

⁶² 47 C.F.R. §1.415(c).

⁶³ Letter from APCO, *In the Matter of Wireless E911 Location Accuracy Requirements*, (Sep. 7, 2007).

Moreover, the issue of timeframes and benchmarks had been expressly reserved for “*Part B*” of this rulemaking. According to the bifurcated comment schedule adopted by the Commission in the *NPRM*, the issues of “what reasonable amount of time should we permit carriers to achieve compliance at the PSAP level” and “should benchmarks be established” were the subject of a second comment cycle.⁶⁴ This comment cycle, however, did not close until September 18, 2007. Issuing a decision before the close of the comment cycle is a violation of both the APA and the Commission’s own rules.

C. The New Rule Is Too Vague and Ambiguous to Be Enforceable

The Commission’s decision presumes that a PSAP geographic boundary is a meaningful standard by which a given technology can be measured. As discussed in Sprint Nextel’s comments, however, the term “PSAP” has no consistent definition or meaning.⁶⁵ A PSAP is either a “point” or “facility” used to answer emergency calls and dispatch emergency services, it is not a defined geographic area. These facilities are not static, nor are the geographic areas they serve. Indeed, no one can state definitively how many PSAPs exist in the United States.

As noted by Sprint Nextel in its Comments, a “PSAP” can be as small as one or two cell sectors or as large as an entire state, with radically different topologies and population densities. Moreover, “PSAPs” can change geographic coverage areas, vary in shape, or cease to exist altogether. Adding such an ambiguous and amorphous concept to a technical standard would result in no standard at all.⁶⁶ The Commission never

⁶⁴ *NPRM* at ¶8.

⁶⁵ The FCC rules contain at least two different definitions of the term PSAP. *Compare* 47 C.F.R. §20.3, 47 C.F.R. §64.601(11), 47 C.F.R. §64.3000(c).

⁶⁶ Sprint Nextel Comments at p. 3-6.

responded to this argument, noting only that “we recognize that geographical variations in service areas can present challenges to the provision of E911 service.”⁶⁷

The issue, however, is not whether these changing and non-uniform geographic areas present challenges, that fact has already been well established. The issue is whether this term provides *any standard at all*. A requirement that requires carriers to provide a particular level of accuracy, regardless of the size of the area, effectively means carriers must meet a specific accuracy standard on every call, a literal impossibility.

II. SPRINT NEXTEL WILL BE IRREPARABLY HARMED IF THE ORDER IS NOT STAYED

The Order not only imposes an obligation which is not technically feasible, it also imposes a testing regime and deadlines that require immediate action. Specifically, the Commission has mandated that, by September 11th of this year, current location technologies must be “tested and measured” for each Economic Area (“EA”) within which a carrier operates.⁶⁸ Sprint Nextel currently operates within 171 EAs of the United States. Compliance with this directive will require Sprint Nextel to immediately begin the development and implementation of EA specific testing protocols to have any hope of completing this task prior to September 11th.⁶⁹ Accordingly, without a stay, Sprint Nextel will be required to divert substantial engineering resources and network development funds while this appeal is pending, causing irreparable harm to its network and the provision of 911 services generally.⁷⁰ Moreover, because *Part B* of this proceeding remains outstanding, carriers do not even know what standards will be

⁶⁷ *Order* at ¶13, nt. 23.

⁶⁸ *Order* at Appendix B, Final Rules.

⁶⁹ Declaration of Jay P. Pabley at ¶¶12-19.

⁷⁰ *Id.*

applied to this new testing regime, potentially making any testing done now a wasted expenditure of funds.

A. The Commission’s Testing Schedule will Divert Millions of Dollars from Network Construction and Access to 911.

In anticipation of the issuance of this *Order* (which has not yet been published in the Federal Register), Sprint Nextel sought information from the vendors that currently conduct testing for Sprint Nextel’s 911 operations. According to these vendors, an OET 71 compliance test within an EA would, on average, cost approximately XXXXXX dollars and would take 12 months.⁷¹ Given the number of EAs (171), and the limited time within which it must act, Sprint Nextel will need to retain additional personnel to conduct simultaneous testing of multiple regions. A test protocol for each coverage area will need to be established (applying the random selection process described by the OET) and individual testers would need to be dispatched to some 45 locations within each of the 171 EAs within which Sprint Nextel operates.⁷² Testers would be required to make 750 to 1,000 calls, along with an independently calculated ground truth, from each EA in order to establish a statistically valid sample.⁷³

The total cost of such a project would exceed XXXXXX dollars and would divert hundreds of man hours from other network operations.⁷⁴ The result of such testing, however, will not be an improvement of 911 operations. No amount of testing will increase the number of satellites in the sky or their visibility from the ground. Indeed, to the contrary, resources will be diverted from network infrastructure and improved coverage that could support a 911 call in the first place. Thus, this testing will impose

⁷¹ Declaration of Jay P. Pabley at ¶16.

⁷² *Id.* at ¶17.

⁷³ *Id.*

⁷⁴ *Id.* at ¶¶16-18.

irreparable harm on Sprint Nextel’s network and pose a threat to public safety by diverting resources from other network investment.

B. Sprint Nextel’s Goodwill and Reputation will be Damaged.

At this point, it cannot be known whether Sprint Nextel will meet the EA compliance standard. While Sprint Nextel expects to achieve this standard in the vast majority of EAs, it must be noted that this performance measure applies to every EA “in which that carrier operates.” The fact that a carrier operates within an EA, however, does not mean that its coverage is coextensive with the EA. Sprint anticipates that there will be several EAs within which Sprint Nextel may have very limited geographic coverage.⁷⁵ In these areas, it is entirely possible that Sprint Nextel will be found to be out of compliance with the new standard.⁷⁶ Non-compliance with an FCC public safety mandate can have serious consequences for Sprint Nextel’s goodwill and reputation.

Damage to reputation and loss of customer goodwill constitutes irreparable harm.⁷⁷ This is particularly true for wireless telephone services, which rely heavily upon their brand image and goodwill for purposes of sales. In such an environment, an announcement that a competitor has violated safety regulations can have a “disastrous impact.”⁷⁸ A Commission finding that Sprint Nextel has violated safety regulations, despite the fact that compliance is literally impossible, will irreparably harm Sprint Nextel’s public standing and, worse, undermine public confidence in a 911 system that in fact provides significant benefits to the public. Indeed, such a finding would

⁷⁵ Declaration of Jay P. Pabley at ¶15.

⁷⁶ *Id.*

⁷⁷ *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994).

⁷⁸ *Gardner v. Toilet Goods Ass’n*, 387 U.S. 167, 172-73 (1967)

inappropriately reduce public confidence in a 911 location system that provides useful information on the vast majority of 911 calls.

III. A STAY WILL NOT HARM OTHER PARTIES TO THE PROCEEDING AND IS IN THE PUBLIC INTEREST

A stay of the *Order* during appeal will not harm any other party to the proceeding or result in any diminution of public safety. As noted above, the immediate impact of the FCC's *Order* is to require Sprint Nextel to conduct extensive testing that will have no added public safety benefit, but in fact could be detrimental to public safety as Sprint is forced to divert resources away from the actual provision of service. This testing will not change the operational realities of GPS handset technologies nor will it move Sprint Nextel toward some incremental improvement in accuracy performance.⁷⁹ Given that any substantial change in accuracy levels can only come with the development and deployment of an entirely new technology, it is technically impossible that any such change could occur in the network within nine months. Indeed, it will be difficult to even complete the testing required within the time permitted. Because the FCC's *Order* has no public safety benefit, there is no harm in staying the decision during the appellate process.

On the contrary, a stay will benefit the public interest by preventing the needless and wasteful diversion of millions of dollars into a testing protocol that serves no purpose. These dollars would otherwise be used for network management and enhanced coverage. A more robust network increases the ability of the public to reach 911 in the first place. While the Commission's goal of achieving the most accurate location information possible is admirable, it has lost sight of the fact that the ability to reach the

⁷⁹ Declaration of Jay P. Pabley at ¶18.

PSAP is the most critical aspect of 911. Imposing extensive, expensive, and irrelevant testing obligations undermines this basic tenet.

The Commission’s action also threatens to create customer confusion and undermine public confidence in the existing 911 system. The FCC provided no support for its conclusion that current testing methodologies will lead to “entire states” in which PSAPs would receive “meaningless location information.”⁸⁰ On the contrary, the record evidence confirmed that accurate location information is provided on the vast majority of 911 calls.⁸¹ By setting unrealistic expectations regarding the capability of existing technologies, however, the Commission risks creating customer confusion and discourages PSAP deployment of the current beneficial Phase II technology.

CONCLUSION

For the foregoing reasons, the Commission should stay the effective date of the Order and delay the effectiveness of the interim benchmarks pending judicial review of the *Order*.

Respectfully submitted,

SPRINT NEXTEL CORPORATION

/s/ Laura H. Carter

Laura H. Carter
Vice President, Government Affairs

Charles W. McKee
Director, Government Affairs

Sprint Nextel Corporation
2001 Edmund Halley Drive
Reston, VA 20191
703-433-3786

⁸⁰ *Order* at ¶9.

⁸¹ Sprint Nextel Comments at p. 11-12; Comments of Verizon Wireless at p. 4-6.

CONFIDENTIAL VERSION – NOT FOR PUBLIC INPSECTION

Exhibit A
Declaration of Jay P. Pabley