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

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 E911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Association of Public Safety Communications Officials-International, Inc. Request for Declaratory Ruling)	
)	
E911 Requirements for IP-Enabled Service Providers)	WC Docket No. 05-196
)	

To: The Commission

**MOTION FOR STAY PENDENTE LITE AND
COMMENTS IN SUPPORT OF APPLICATION FOR STAY**

RUSSELL D. LUKAS
DAVID L. NACE

LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8678

*Attorneys for
Rural Cellular Association*

January 28, 2008

TABLE OF CONTENTS

	<u>Page</u>
SUMMARY.....	ii
BACKGROUND AND INTRODUCTION.....	2
A. The 911 Act.....	2
B. The <i>Order</i>	4
ARGUMENT.....	8
I. THE COMMISSION FAILED TO MAKE THE REQUISITE DUE PROCESS FINDING THAT CARRIERS CAN COMPLY WITH NEW RULE § 20.18(h).....	10
II. THE COMMISSION’S CONCLUSORY STATEMENT THAT PSAP-LEVEL COMPLIANCE IS POSSIBLE IS CONTRADICTED BY RECORD EVIDENCE.....	11
III. THE COMMISSION FAILED TO CONSIDER THE COSTS THAT ITS PSAP-LEVEL COMPLIANCE BENCHMARKS IMPOSE ON CARRIERS.....	14
IV. THE COMMISSION FAILED TO COMPLY WITH THE NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS OF THE APA.....	17
A. The Amendment Of Rule § 20.18 Was Fully Subject To The Notice-And-Comment Requirements Of The APA.....	17
B. The Commission Provided No Notice Or Opportunity To Comment Prior To Promulgating The Interim Benchmarks.....	19
C. The Commission Did Not Respond To Significant Comments Presenting Contrary Arguments Resting On Solid Data.....	20
CONCLUSION.....	23

SUMMARY

Rural Cellular Association (“RCA”) fully supports the Commission’s goal of ensuring that public safety answering points (“PSAPs”) receive location information that is as accurate as possible for all wireless E911 calls. However, the Commission’s radically new location accuracy standards will force many rural wireless carriers to attempt the impossible. Principles of administrative and constitutional law preclude the Commission from imposing requirements that are enforceable by sanction absent a finding that compliance is possible. The Commission could not, and did not, find that all wireless carriers are capable of meeting its September 11, 2012 PSAP-level compliance deadline, much less its interim compliance “benchmarks.” Primarily because the new rule threatens to subject carriers to sanction for failing to comply with location accuracy requirements that they are incapable of meeting, RCA will seek judicial review of the Commission’s Report and Order (“*Order*”) in the D.C. Circuit.

Twenty weeks have now passed since the *Order* was adopted and the Commission has not produced a summary of its action for publication in the Federal Register. By the time the Commission allows the *Order* to become final and reviewable, there will be insufficient time for the case to be decided by the D.C. Circuit prior to the September 11, 2008 benchmark. In order to prevent its members from having to comply with Commission’s location accuracy requirements at the Economic Area level while those requirements are undergoing judicial review, RCA asks the Commission to stay its *Order* pendente lite.

In all likelihood, RCA will prevail on the merits of its appeal. Several “danger signals” will be apparent to the D.C. Circuit that suggest that the Commission did not engage in reasoned decision-making. First, the specific benchmarks adopted by the Commission were proposed by the Association of Public-Safety Communications-International, Inc. (“APCO”) in a telephone

conversation with a Commission official during the Sunshine Agenda period, which indicates the presentation was invited by the Commission. The benchmarks were adopted verbatim by the Commission, and announced publicly, two business days after they were first put in writing. These facts suggest that the Commission played a hand in the filing of what turned out to be the only paper in the record that it could cite in support of its interim benchmarks.

The Commission violated the notice-and-comment requirements of the Administrative Procedure Act (“APA”) by failing either to give notice that it was considering APCO’s proposal or to afford parties the opportunity to comment on the interim benchmarks. That is but one of several APA violations that are likely to prompt the D.C. Circuit to vacate the *Order*.

It its rush to announce its new wireless E911 accuracy standards on the sixth anniversary of the September 11th attacks, the Commission lost sight of its mandate under the Wireless Communications and Public Safety Act of 1999 (“911 Act”) to encourage the continued involvement of all the key stakeholders in the development of wireless E911 service, while not imposing obligations and costs on any stakeholders. The Commission simply ignored the comments of wireless carriers who provided overwhelming technical evidence, based on the sworn statements of engineering experts, that they cannot achieve PSAP-level compliance by the Commission’s deadlines. The Commission even ignored the recommendation of the Network Reliability and Interoperability Council VII, the collaborative body of stakeholders it commissioned to make recommendations as to requirements for wireless location accuracy.

The 911 Act makes the costs attendant to PSAP-level compliance a factor the Commission must consider. Nevertheless, the Commission did it quantify compliance costs so it could balance those costs against the incremental public safety benefits that compliance will achieve. Consequently, the D.C. Circuit will be unable to discern a rational connection between

the Commission's findings of fact and its decision that the imposition of the compliance costs is justified by public safety benefits.

Wireless carriers are not licensed primarily to serve as a public safety arm of government. Therefore, it was incumbent on the Commission to consider whether the public safety obligations it was thrusting upon wireless carriers could impair their ability to perform their primary function of providing wireless telecommunications services at reasonable charges. Commenters argued that the new public safety requirements could have the perverse consequence of endangering public safety by reducing service availability and thus access to E911 services. Because the Commission turned a blind eye to such comments, the D.C. Circuit can easily find that the Commission engaged in arbitrary and capricious decision-making by either failing to consider an important aspect of the problem or to respond to significant, contrary arguments.

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

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 E911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Association of Public Safety Communications Officials-International, Inc. Request for Declaratory Ruling)	
)	
E911 Requirements for IP-Enabled Service Providers)	WC Docket No. 05-196
)	

To: The Commission

**MOTION FOR STAY PENDENTE LITE AND
COMMENTS IN SUPPORT OF APPLICATION FOR STAY**

Rural Cellular Association (“RCA”)¹, by its attorneys and pursuant to §§ 1.41 and 1.43 of the Commission’s Rules (“Rules”), hereby requests the Commission to stay the effectiveness of its Report and Order in the above-captioned rulemaking proceeding, *see Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 20105 (2007) (“*Order*”), pending judicial review of the *Order* in the D.C. Circuit. In addition, RCA submits its comments in support of the application for an expedited stay filed in this proceeding by T-Mobile U.S.A., Inc. (“T-Mobile”).² In support of its request for a stay pendente lite and T-Mobile’s Application, RCA respectfully submits the following:

¹ RCA is an association representing the interests of nearly 100 small and rural wireless licensees providing commercial services to subscribers throughout the nation. Its member companies provide service in more than 135 rural and small metropolitan markets where approximately 14.6 million people reside. RCA was formed in 1993 to address the distinctive issues facing wireless service providers.

² *See* T-Mobile, Application for Expedited Stay Pending Judicial Review (Jan. 28, 2008) (“Application”).

BACKGROUND AND INTRODUCTION

A. The 911 Act

Congress did not explicitly empower the Commission to promulgate rules for enhanced wireless 911 service. Only the Wireless Communications and Public Safety Act of 1999 (“911 Act”)³ addressed the role the Commission was to play in the deployment of wireless E911 service. And the legislation explicitly limited the Commission to a supporting role.

Congress only empowered the Commission to “encourage and support efforts by States to deploy comprehensive end-to-end emergency infrastructure and programs, based on coordinated statewide plans, including seamless, ubiquitous, reliable wireless telecommunications networks and enhanced 9-1-1 service.” 47 U.S.C. § 615. The 911 Act requires the Commission to consult and cooperate with, *inter alia*, state and local officials responsible for emergency services and public safety and the telecommunications industry, “specifically including the cellular and other wireless telecommunications service providers.” *Id.* It also includes both a jurisdictional limitation and a rule of statutory construction by providing, “Nothing in this subsection shall be construed to authorize or require the Commission to impose obligations or costs on any person.”

Id.

It could be argued that the 911 Act left the Commission without jurisdiction to impose E911 obligations and costs on wireless telecommunications service providers.⁴ Regardless, the

³ Pub. L. No. 106-81, 113 Stat. 1286 (1999). The 911 Act enacted 47 U.S.C. §§ 615, 615a and 615b. It also amended §§ 222 and 251 of the Communications Act of 1934, as amended (“Act”). *See* 47 U.S.C. §§ 222(f) & (h)(4)-(7) and 251(e)(3). However, the 911 Act was not enacted as part of the Act. *See id.* § 615, note.

⁴ When it enacted the 911 Act, Congress was aware of the Commission’s regulation of wireless E911 service pursuant to its authority under § 1 of the Act to promote “safety of life and property” through the use of radio. 47 U.S.C. § 151. *See, e.g., Revision of the Rules to Ensure Compatibility with E911 Emergency Calling Systems*, 11 FCC Rcd 18676, 18681 (1996). Nevertheless, Congress decided to specify the Commission’s authority over wireless E911. First, § 3(a) of the 911 Act expanded the Commission’s exclusive jurisdiction over numbering administration to authorize it to designate 911 as the

statute clearly expressed the intent of Congress *vis-à-vis* the Commission’s role in the deployment of wireless E911 infrastructure. The Commission understood that “in our role of encouraging and supporting such deployment, the Commission is not authorized to ‘impose obligations or costs on any person.’” *Implementation of 911 Act*, 15 FCC Rcd 17079, 17088 (2000) (quoting 911 Act § 3(b)).

As both the statutory language of the 911 Act and its legislative history make perfectly clear, Congress intended that the deployment of wireless E911 service would be a collaborative process requiring “significant cooperation amongst the stakeholder parties, and significant leadership by all levels of government, both Federal, State and local.”⁵ One congressional committee reported:

[T]he legislation is intended to encourage the Commission and the States to develop and implement coordinated State plans to upgrade E911 systems — and to do so with all the affected parties involved in the process.

* * * *

The Committee believes that the best way to enhance public safety by deploying these new technologies is to involve all the key stakeholders in overall planning and keep them involved as the technologies are implemented.⁶

“universal emergency telephone number” for wireline and wireless service, and to provide “appropriate transition periods” for areas in which 911 was not in use. 47 U.S.C. § 251(e). The Commission’s authority over the deployment of wireless E911 service was specifically addressed in § 3(b) of the 911 Act. If it intended that the Commission continue to exercise its discretion to regulate the deployment of wireless E911 under § 1 of the Act, Congress would not have enacted § 3(b) of the 911 Act. Moreover, if it intended to allow the Commission to impose enormous costs on the wireless telecommunications industry to deploy advanced E911 technologies, Congress would not have prohibited the Commission from imposing costs on the wireless industry, one of the “key stakeholders” identified in § 3(b). H.R. Rep. No. 106-25, at 8 (1999) (“House Report”). One could argue that the enactment of the specific provisions of § 3(b) of the 911 Act trumped the general provisions of § 1 of the Act. *See Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (“Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one”).

⁵ House Report, at 7.

⁶ *Id.*, at 8.

When exercising its authority over the deployment of wireless E911 service, the Commission is required to consider public safety by the 911 Act as well as by § 1 of the Act. *See Nuvio Corp. v. FCC*, 473 F.3d 302, 307-08 (D.C. Cir. 2007). Unlike § 1 of the Act, the 911 Act sets forth the relevant countervailing factors that the Commission must consider before regulating wireless E911 service in the interests of public safety. The Commission’s regulations must: (1) encourage the continued involvement of all the key stakeholders in the development and implementation of plans to deploy wireless E911 service; and (2) not impose obligations and costs on any stakeholders. *See* 47 U.S.C. § 615. The Commission gave no serious consideration to either one of these factors when it promulgated its new wireless E911 location accuracy requirements.

B. The Order

The process that produced the Commission’s new location accuracy requirements, as well as the deadlines for the deployment of E911 service that meets those requirements, was a far cry from the collaborative effort of key stakeholders that Congress envisioned. Throughout the process, the Commission ignored the report of the Network Reliability and Interoperability Council VII (“NRIC VII”), the collaborative body that the Commission itself chartered to make recommendations as to requirements for wireless location accuracy.⁷ At the end, the request by RCA and others that an industry forum or advisory council be convened to assess improving E911 location accuracy⁸ was summarily rejected as “without merit” by the Commission. *Order*,

⁷ *See* NRIC VII Focus Group 1A, *Near Term Issues for Emergency/E9-1-1 Services Final Report*, at 2 (Dec. 2005) (“NRIC VII Report”). The NRIC VII Report was not mentioned in the Commission’s Notice of Proposed Rulemaking, *see Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 10609 (2007) (“NPRM”), or in its *Order*. *See* 22 FCC Rcd at 20105-14. It was mentioned only by Commissioner Adelstein in his dissent. *See id.* at 20137 n.5.

⁸ *See, e.g.*, Comments of RCA, at 8-10 (July 3, 2008) (“RCA Comments”).

22 FCC Rcd at 20110 (¶ 12).⁹

It appears that the proceeding amounted to a hastily-conducted, Commission-orchestrated ratification of its tentative conclusions. The Commission actually persisted in claiming that no rulemaking was necessary to reach its major conclusion: that wireless carriers must satisfy the location accuracy requirements of § 20.18(h) of the Rules at a geographic level defined by the coverage area of a Public Safety Answering Point (“PSAP”). *See NPRM*, 22 FCC Rcd at 10612 (¶ 6); *Order*, 22 FCC Rcd at 20109 n.16. It was unsurprising then that the Commission found that the record supported its tentative conclusion that PSAP-level accuracy is necessary, especially since it found that support exclusively in the comments of public safety organizations. *See id.*, 22 FCC Rcd at 20109 (¶ 10). The Commission proceeded to reinforce the impression that its decision had been a foregone conclusion by issuing a news release characterizing its action as a mere clarification.¹⁰

The Commission only deviated from its tentative conclusions by unexpectedly announcing that carriers must meet interim, annual benchmarks until achieving PSAP-level compliance by a five-year deadline. *See id.*, at 20112-13 (¶ 18). Those benchmarks emerged from an ex parte presentation made by the Association of Public-Safety Communications-International, Inc. (“APCO”) and the National Emergency Number Association (“NENA”) at a meeting with the Commission’s Chairman on Thursday, September 6, 2007.¹¹ The specific

⁹ The rationale for the Commission’s unexplained decision was subsequently called into question by its announcement that it will host a “summit” on February 6, 2008, during which representatives of the public safety community, government, and the communications industry will discuss issues relating to the deployment of “next generation” E911 technologies. *See FCC to Host Summit on 911 and Enhanced 911 Services on February 6, 2008* (Jan. 4, 2008).

¹⁰ *See FCC Clarifies Geographic Area Over Which Carriers Must Meet E911 Location Accuracy Requirements*, 2007 WL 2668541, at *1 (Sept. 11, 2007).

¹¹ *See* Letter from Robert M. Gurss to Marlene Dortch, PS Docket No. 07-114, at 1 (Sept. 7, 2007) (“APCO/NENA Letter”).

benchmarks were proposed by APCO in a follow-up telephone conversation with a Commission official on Friday, September 7, 2007.¹² The Commission adopted APCO's proposal the following Tuesday, September 11, 2007.¹³ On the surface, it appeared as though the Commission simply adopted "on Tuesday a proposal filed on Friday."¹⁴

The circumstances suggest that the Commission did more than adopt "an eleventh hour proposal at the stroke of Sunshine's end."¹⁵ The very fact that the benchmarks were proposed in an ex parte presentation during the Sunshine Agenda period indicates that the Commission invited APCO to make the presentation.¹⁶ Moreover, the benchmarks were adopted verbatim by the Commission, and announced publicly, two business days after they were put in writing by APCO.¹⁷ These facts suggest that the Commission played a hand in the filing of the only paper in the record that it could cite in support of its interim benchmarks. *See Order*, 22 FCC Rcd at 20113 n.39.

In its haste to announce its new E911 mandates on the sixth anniversary of the September 11th attacks, the Commission was not deterred by the slightest compunction in imposing substantial obligations and costs on wireless carriers. It trivialized such considerations by claiming:

[T]he record indicates that in many cases, PSAP-level compliance is technologically feasible today and would require only the investment of additional financial resources. In this regard, we note that while it is obviously in carriers' financial interests to argue that any meaningful requirement will not be possible to

¹² *See* APCO/NENA Letter, at 1.

¹³ *See Order*, 22 FCC Rcd at 20112-13 (¶ 18).

¹⁴ *Id.*, at 20137 (Commissioner Adelstein, dissenting).

¹⁵ *Id.*

¹⁶ *See* 47 C.F.R. §§ 1.1203(a)(1), 1.1204(a)(10) (ex parte presentations during Sunshine period permitted if requested by the Commission or staff).

¹⁷ *Compare* APCO/NENA Letter, at 1 *with Order*, 22 FCC Rcd at 20112-13 (¶ 18).

meet, carriers too often blur the distinctions between that which is infeasible and that which simply requires the expenditure of additional resources. * * * While we acknowledge that meeting the deadline and benchmarks may require the investment of significant resources by certain carriers, we believe such expenditures are more than justified by the accompanying public safety benefits.¹⁸

The Commission's rush to announce its new requirements on September 11, 2007 also speaks volumes as to its priorities when compared to the pace of the Commission's proceedings before and after its announcement. APCO's request for a declaratory ruling mandating PSAP-level compliance languished before the Commission for two-and-one-half years before it began this proceeding.¹⁹ While it managed to announce its action on the day of its adoption, the Commission took ten weeks to release its *Order* to the public. It appears that the *Order* was prematurely adopted for the political and symbolic purpose of announcing a September 11, 2012 deadline for PSAP-level compliance, and a succession of September 11 benchmarks, on September 11, 2007. However, the Commission achieved its political and symbolic goal at the expense of issuing a reasoned decision and adopting achievable E911 location accuracy requirements.

Ten weeks have now passed since the *Order* was released and the Commission has not produced a summary of its action for publication in the Federal Register. Consequently, carriers will have to comply with the Commission's one-year benchmark less than six months after the benchmark goes into effect. Moreover, by delaying Federal Register publication, the Commission is forestalling judicial review.²⁰ By the time the Commission allows the *Order* to

¹⁸ *Order*, 22 FCC Rcd at 20111 (¶ 14) (footnote omitted).

¹⁹ *See Order*, 22 FCC Rcd at 20107 (¶ 6).

²⁰ Petitions for review of *Order* will be filed pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2344, the latter of which "imposes a jurisdictional bar to judicial consideration of petitions filed prior to entry of the agency orders to which they pertain." *Western Union Tel. Co. v. FCC*, 773 F.2d 375, 378 (D.C. Cir. 1985). Entry of the *Order* will occur on the date the Commission gives public notice of its action. *See Small Business in Telecommunications v. FCC*, 251 F.3d 1015, 1024 (D.C. Cir. 2001). The date of public

become final and reviewable, there will be insufficient time for the case to be heard and decided by an appeals court prior to the September 11, 2008 deadline. Having decided to seek judicial review of the *Order* in the D.C. Circuit, and to prevent its members from having to comply with Commission's location accuracy requirements at the Economic Area ("EA") level while those requirements are undergoing judicial review, RCA asks the Commission to stay its *Order* *pendente lite*.

ARGUMENT

Following *Virginia Petroleum Jobbers v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) and *Washington Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977), the Commission generally considers four factors when considering requests for a stay *pendente lite*: (1) the likelihood that the party seeking the stay will prevail in its appeal; (2) whether the party will incur irreparable injury in the absence of a stay; (3) the likelihood that granting a stay would be harmful to other parties; and (4) how granting a stay would affect the public interest. *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15739, 15748 (1997). The first of these factors may be more liberally construed if the requesting party makes a substantial case of the merits and the other three factors strongly favor interim relief. *Comark Cable Fund III v. Northwestern Indiana Telephone Co., Inc.*, 104 FCC 2d 451, 456 (1985).

RCA has reviewed T-Mobile's Application and concurs with the legal and policy arguments that T-Mobile makes in support of its Application. RCA fully supports the Application. In order to avoid repeating arguments forcefully made by T-Mobile, RCA

notice will be the date the *Order* is published in the Federal Register. *See* 47 C.F.R. §§ 1.4(b)(1), 1.103(b). A petition for judicial review filed prior to the date the *Order* is published in the Federal Register will be dismissed as "incurably premature." *E.g., Small Business in Telecommunications*, 251 F.3d at 1024.

incorporates by reference T-Mobile's discussion of the last three *Virginia Petroleum Jobbers* factors. *See* Application, at 35-40. RCA will confine its arguments to demonstrating the likelihood that it will prevail before the D.C. Circuit. In doing so, RCA will focus on matters that are of particular importance to its membership and/or were not emphasized by T-Mobile.

The issues that RCA will raise will call for the D.C. Circuit to determine whether the *Order* is arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See* 5 U.S.C. § 706(2)(A). Because the *Order* is the product of a rulemaking, the court will apply the standard of review set forth by the Supreme Court in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29 (1983). *See, e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 734-35 (D.C. Cir. 2001). Normally, under the *State Farm* standard, a rule would be arbitrary and capricious if the Commission: (1) has relied on factors which Congress has not intended it to consider; (2) entirely failed to consider an important aspect of the problem; or (3) offered an explanation for its decision that either runs counter to the evidence before it or is so implausible that it could not be ascribed to a difference in view or the product of its expertise. *See* 463 U.S. at 43.

RCA submits that the D.C. Circuit is likely to find the *Order* to be merely a "collection of conclusory comments."²¹ Accordingly, there is a substantial likelihood that the Court will hold that the Commission failed to engage in reasoned decision-making. In particular, the Court is likely to agree that the Commission failed to consider relevant statutory and constitutional factors and that its conclusions run counter to uncontested evidence in the record. In all probability, the *Order* will be vacated considering the Commission's obvious violations of the notice-and-comment requirements of the Administrative Procedure Act ("APA").

²¹ *West Michigan Telecasters, Inc. v. FCC*, 396 F.2d 688, 691 (D.C. Cir. 1968).

I. THE COMMISSION FAILED TO MAKE THE REQUISITE DUE PROCESS FINDING THAT CARRIERS CAN COMPLY WITH NEW RULE § 20.18(h)

Impossible requirements imposed by an agency are perforce unreasonable. *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991). Moreover, nonperformance cannot be made unlawful where performance is impossible. *See* 21 Am. Jur. 2d *Criminal Law* §157 (2007); Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.2(c) (2d ed. Supp. 2007). Due process bars the imposition of a penalty for noncompliance with a requirement when compliance is impossible. *See United States v. Dalton*, 960 F.2d 121, 124 (10th Cir. 1992). The foregoing principles of administrative and constitutional law preclude the Commission from imposing requirements that are enforceable by sanction absent a finding that compliance is possible.

The Commission's new location accuracy rules are stated in mandatory terms.²² They provide that subject licensees "shall comply" with the Commission's location accuracy and reliability standards by September 11, 2012. *Order*, 22 FCC Rcd at 20117 (new 47 C.F.R. § 20.18(h)(1)). Moreover, licensees "must satisfy" the Commission's interim requirements. *Id.* (new 47 C.F.R. § 20.18(h)(2)). By promulgating those rules, the Commission subjected licensees to forfeiture penalties of up to \$390,000 for failing to meet its standards for PSAP-level compliance on the 7th, 9th, and 11th anniversaries of the September 11, 2001 attacks. *See* 47 U.S.C. § 503(b)(2)(B); 47 C.F.R. § 1.80(b)(2). But the Commission did not, and could not, make the requisite finding of fact that it is possible for all licensees to be in compliance on the three deadlines.

²² "The word 'shall' generally indicates a command that admits of no discretion on the part of the person instructed to carry out the directive." *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2532 (2007) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Haynes & Lerach*, 523 U.S. 26, 35 (1998)).

RCA has scoured the *Order* and found nothing resembling findings that carriers can meet the two interim requirements set forth in § 20.18(h) much less the September 11, 2012 deadline to be PSAP-level compliant. The Commission merely stated two general conclusions. First, the Commission claimed that the record contained “encouraging evidence that location technology providers have developed and are developing technologies that can achieve PSAP-level compliance.” *Order*, 22 FCC Rcd at 20112 (¶ 16). Second, it stated that “PSAP-level compliance is possible *in many instances* through the deployment of existing resources and technologies presently available to carriers.” *Id.* (emphasis added). Neither claim amounts to the requisite finding and neither finds support in the record.

It offends due process, if not the 911 Act, for the Commission to subject carriers to sanction for failing to comply with location accuracy requirements when compliance is impossible. And it is no answer for the Commission to promise not to penalize carriers that are making “good faith” efforts to achieve the unachievable. *See id.*, at 20112 (¶ 16). Carriers will be harmed by being required to make efforts to comply that demonstrate compliance was impossible. The D.C. Circuit surely will find that it was arbitrary and capricious for the Commission to put carriers into noncompliance with a public safety requirement with which they cannot comply.

II. THE COMMISSION’S CONCLUSORY STATEMENT THAT PSAP-LEVEL COMPLIANCE IS POSSIBLE IS CONTRADICTED BY RECORD EVIDENCE

As Commissioner Adelstein correctly noted, the record reflects “overwhelming concern regarding technical feasibility and compliance deadlines.” *Id.* at 20136. Indeed, CMRS carriers and technology providers agreed on the record that existing resources and technologies will not

enable carriers to meet the Commission's accuracy standards in every PSAP.²³ As one subject matter expert declared under penalty of perjury:

I affirm that to my knowledge, now and in the foreseeable future, none of the currently available position location technologies will enable a wireless carrier to meet the FCC's accuracy rules in every PSAP. There will always be some PSAP regions where conditions are particularly disadvantageous and far different from most of the country. Thus compliance on a PSAP-by-PSAP basis across all of the nation's various PSAPs is not possible.²⁴

By claiming only "the record indicates that *in many cases*, PSAP-level compliance is technologically feasible today," the Commission effectively concedes that compliance is not possible in every PSAP. *Order*, 22 FCC Rcd at 20111 (¶ 14). In support of that qualified finding, the Commission relies exclusively on the comments of TruePosition, Inc. ("TruePosition"). *See id.*, at 20111 n.30. However, after reviewing the comments filed in the first phase of this proceeding, TruePosition stated that it was "undoubtedly" true that "no existing or anticipated technology would achieve the Commission's accuracy standards in *every* case."²⁵

Given that the record contains no evidence that PSAP-level compliance is possible within five years, it is unsurprising that there is no evidence that PSAP-level compliance will be possible by September 11, 2008 in every EA served by a carrier. Although EAs are larger than PSAPs, many wireless carriers, especially rural carriers, serve only a small portion of an EA and

²³ *See, e.g.*, Letter from David L. Nace & John T. Scott III to Marlene H. Dortch, PS Docket No. 07-114, at 1 (Aug. 31, 2007) ("RCA/Verizon Letter") (the record "unequivocally demonstrates that PSAP-level compliance is not technically feasible today or in the foreseeable future").

²⁴ Declaration of James DeLoach, PS Docket No. 07-114, at 2 (¶ 6) (filed Sept. 4, 2007). *See also* Declaration of John F. Pottle and Ryan N. Jensen, PS Docket No. 07-114, at 4 (¶ 7) (filed Sept. 7, 2007) ("Pottle & Jensen"); Declaration of Richard A. Craig, PS Docket No. 07-114, at 1 (¶ 2) (filed Aug. 31, 2007); Declaration of Jeff M. McDougall, PS Docket No. 07-114, at 1 (¶ 2) (filed Aug. 31, 2007).

²⁵ Comments of TruePosition, Inc., PS Docket No. 07-114, at 2 (Aug. 20, 2007)(emphasis in original). Although submitted in the second phase of this proceeding, TruePosition's comments provided the basis for the summary statements in its phase one comments. *See* Comments of TruePosition, Inc., PS Docket No. 07-114, at 2 (Jul. 5, 2007). The Commission relied on TruePosition's initial, summary statements.

may only serve a single PSAP in an EA.²⁶ Consequently, EA-level compliance presents these carriers with many of the same technical difficulties as PSAP-level compliance.²⁷ They will have to achieve PSAP-level compliance in some EAs within the nine months remaining until the September 11, 2008 deadline. Even TruePosition agrees that compliance with that milestone is simply “not feasible” for some operators.²⁸

The Commission did state its “judgment,” based on the record and its experience implementing other “aggressive benchmarks,” that “carriers will be able to meet the compliance deadline and interim benchmarks.” *Order*, 22 FCC Rcd at 20111 (¶ 14). RCA recognizes that the D.C. Circuit normally defers to the Commission’s predictive judgments. *See, e.g., WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001). But the Commission’s adoption of its first interim benchmark did not constitute a predictive judgment.

Because the Commission dallied ten weeks before releasing the *Order*, carriers will have to comply with the EA-level benchmark ten months after they were first able to read the text of the requirements with which they must comply. In order for carriers to meet that deadline, currently deployable technology must be capable of meeting the Commission’s location accuracy standards. Whether such technology exists is a factual determination, not a predictive judgment. And the uncontested, substantial record evidence is that there is no technology available today that will allow all carriers to satisfy the EA-level compliance benchmark.

The absence of record evidence that a technical solution is available distinguishes the Commission’s ten-month deadline for wireless EA-level compliance from the 120-day deadline for VoIP E911 compliance that was upheld by the D.C. Circuit in *Nuvio*. The Court found that

²⁶ *See* Letter from John T. Nakahata to Marlene H. Dortch, PS Docket No. 07-114, at 2 (Sept. 10, 2007).

²⁷ *See id.*

²⁸ Letter from Daniel K. Alvarez to Marlene Dortch, PS Docket No. 07-114 (Nov. 8, 2007).

the Commission's 120-day deadline was not the product of arbitrary and capricious decision-making, because it was based on substantial record evidence that a specific "technical solution to meet the deadline" was available to VoIP providers. *Nuvio*, 473 F.3d at 306. The court also found that the Commission had relied on two separate tests that "demonstrated that VoIP E911 access was in fact possible." *Id.*, at 307. No such findings are possible in this case. Therefore, it is telling that the Commission was unable to identify a single "technical solution" that will allow carriers to meet its aggressive deadlines.

III. THE COMMISSION FAILED TO CONSIDER THE COSTS THAT ITS PSAP-LEVEL COMPLIANCE BENCHMARKS IMPOSE ON CARRIERS

Fundamental principles of administrative law require that agency action be "based on a consideration of the relevant factors." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). The 911 Act made the cost of PSAP-level compliance a relevant factor to be considered by the Commission before it imposed its compliance requirements on wireless carriers. *See* 47 U.S.C. § 615. Thus, the Commission was required to balance its § 1 mandate to promote safety of life and property through the deployment of wireless E911 services "with its Congressional directive not to impose obligations or costs on any person." *Implementation of 911 Act*, 15 FCC Rcd at 17103.

The Commission acknowledged that PSAP-level compliance will require wireless carriers to invest "additional financial resources" and, in some cases, to invest "significant resources." *Order*, 22 FCC Rcd at 20111 (¶ 14). However, it did not address its authority under the 911 Act to require carriers to invest their financial resources in meeting its interim benchmarks and finally achieving PSAP-level compliance. Assuming it has that authority notwithstanding the 911 Act, the Commission failed to quantify the compliance costs that it is imposing on carriers as the prerequisite to balancing those costs against the incremental public

safety benefits that compliance will achieve.

The Commission assumes that carriers can achieve compliance if they invest “appropriate resources.” *Order*, 22 FCC Rcd at 20110 (¶ 11). In fact, the investment necessary for carriers to *attempt* compliance will be “monumental.” *Application*, at 34. Nevertheless, the Commission expressed its belief that “such expenditures are more than justified by the accompanying public safety benefits.” *Order*, 22 FCC Rcd at 20111 (¶ 14). Faced only with that naked assertion, the D.C. Circuit’s likely response will be to ask, “But why?” *United States Telecom Ass’n v. FCC*, 227 F.3d 450, 461 (D.C. Cir. 2000). The record compiled by the Commission will provide no answer.

Because the costs of compliance is a relevant factor, the D.C. Circuit must be able to discern a rational connection between the facts found (on the basis of relevant data in the record) and the Commission’s decision that the imposition of such costs is justified by public safety benefits. *See id.*, at 461-62. Unable to find that connection, the Court is likely to conclude that the adoption of the Commission’s location accuracy requirements is another “classic case of arbitrary and capricious agency action.” *Id.*, at 461.

The Commission failed to consider another obviously relevant factor. The Commission’s primary mandate under § 1 of the Act is to “make available, so far as possible, to all the people of the United States ... a rapid, efficient ... radio communication service with adequate facilities at reasonable charges.” 47 U.S.C. § 151. The Commission auctions CMRS licenses for the primary purpose of putting spectrum to use for the provision of wireless telecommunications services to the public for profit. Wireless carriers are not licensed primarily to serve as a public safety arm of state or local governments. Therefore, it was incumbent on the Commission to consider whether the public safety obligations it was thrusting upon wireless carriers could

impair their ability to perform their primary function of operating facilities adequate to make efficient wireless telecommunications services available to the public at reasonable charges.

The Commission's PSAP-level compliance requirements can create the anomaly of having carriers building additional cell site facilities not to provide telecommunications service to their customers, but to meet location accuracy requirements. Nearly half of RCA's members use GSM technology in their rural market systems and rely upon network-based triangulation from cell sites to provide location information to PSAPs.²⁹ Many of these carriers will have to construct cell sites in remote locations "solely to create additional time of arrival monitoring points" to achieve the triangulation necessary to comply with the PSAP-level location accuracy requirements.³⁰ Thus, carriers will operate facilities in one area simply to locate customers in another. Such operations are hardly conducive to the provision of efficient service to the public at reasonable charges.

RCA was among the commenters who warned that the Commission's new location accuracy requirements will divert carrier resources from expanding their network coverage and may lead some carriers to reduce coverage.³¹ RCA and others argued that the new public safety requirements could have the perverse consequence of endangering public safety by reducing service availability and thus access to E911 services.³² Because the Commission turned a blind eye to such comments, the D.C. Circuit can easily find that the Commission engaged in arbitrary and capricious decision-making by either failing to consider an important aspect of the problem,

²⁹ See RCA Comments, at 6.

³⁰ Pottle & Jensen, at 6 (¶ 10).

³¹ See RCA Comments, at 6; Reply Comments of RCA, PS Docket No. 07-114, at 4 (July 11, 2007) ("RCA Reply"); Reply Comments of SouthernLINK Wireless, PS Docket No. 07-114, at 4 & n.2 (July 11, 2007).

³² See RCA Reply, at 4; Pottle & Jensen, at 6 (¶ 10).

see *State Farm*, 463 U.S. at 43, or to respond to “contrary arguments.” *Illinois Public Telecommunications Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997).

IV. THE COMMISSION FAILED TO COMPLY WITH THE NOTICE-AND-COMMENT RULEMAKING REQUIREMENTS OF THE APA

A. The Amendment Of Rule § 20.18 Was Fully Subject To The Notice-And-Comment Requirements Of The APA

The APA provides that when an agency proposes to promulgate a legislative (or substantive) rule, it must give notice to interested parties and allow them an opportunity to comment on the proposed rule. See 5 U.S.C. § 553(b)-(c).³³ The APA further provides that after considering the comments filed, an agency “shall incorporate in the rules adopted a concise general statement of their basis and purpose.” *Id.* § 553(c). Failure to follow the notice-and-comment procedures of the APA is grounds for invalidating the rule. See *National Organization of Veterans’ Advocates v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1375 (Fed. Cir. 2001).

Perhaps recognizing that it did not adhere to the APA in the process of amending § 20.18(h) of its Rules, the Commission claimed that its *Order* simply clarified that § 20.18(h) required compliance at the PSAP level. See 22 FCC Rcd at 20109 n.16. If that is the case, new § 20.18(h) would be an interpretive rule, and the notice-and-comment rulemaking requirements of the APA do not apply to interpretive rules. See 5 U.S.C. § 553(b)(A). It is clear, however, that new § 20.18(h) is a legislative rule.

Under the “effective amendment” test, a rule that “effectively amends a prior legislative rule” is “a legislative, not an interpretative rule.” See *United States Telecom Ass’n v. FCC*, 400

³³ “[A] substantive rule modifies or adds to a legal norm based on the agency’s own authority. That authority flows from a congressional delegation to promulgate substantive rules, to engage in supplementary lawmaking. And, it is because the agency is engaged in lawmaking that the APA requires it to comply with notice and comment.” *Syncor International Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997).

F.3d 29, 34-35 (D.C. Cir. 2005) (quoting *American Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993)). In other words, “new rules that work substantive changes in prior regulations are subject to the APA’s procedures.” *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003). See *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 100 (1995) (if an agency adopts “a new position inconsistent with any . . . existing regulation,” or affects “a substantive change in the regulation,” APA notice and comment are required).

The *Order* works a sea change in the substance of § 20.18(h). Prior to its amendment, the rule did not specify the geographic area over which wireless carriers must meet its location accuracy and reliability standards.³⁴ Although the Office of Engineering and Technology (“OET”) had issued an unpublished bulletin to clarify the Commission’s expectations with respect to the § 20.18(h) standards,³⁵ the OET’s guidelines were ambiguous and legally unenforceable.³⁶ As currently amended, the rule specifies for the first time that location accuracy must be “tested and measured at the PSAP service area geographic level.”³⁷ And, for the first time, the rule sets out legally enforceable interim benchmarks and a September 11, 2012 compliance deadline. Because it both works a substantive change in § 20.18(h), see *Sprint*, 315 F.3d at 374, and creates new law and duties, see *SBC Inc. v. FCC*, 414 F.3d 486, 497 (3d Cir. 2005), the amendment was clearly subject to APA notice and comment.

³⁴ See *Order*, 22 FCC Rcd at 20106 (¶ 4).

³⁵ See OET Bulletin No. 71, *Guidelines for Testing and Verifying the Accuracy of Wireless E911 Location Systems*, 2000 WL 343017 (2000) (“OET Bulletin”).

³⁶ The OET Bulletin was not published in the Federal Register, the FCC Record, FCC Reports, or Pike and Fischer Radio Regulation. Therefore, the OET’s guidelines could not be enforced except against persons who had actual notice of the OET Bulletin. See 47 C.F.R. § 0.445(e). In any event, the OET expressly stated that its guidelines were not mandatory. See OET Bulletin, 2000 WL 343017, at *1. See also *Order*, 22 FCC Rcd at 20107 (¶ 5).

³⁷ *Order*, 22 FCC Rcd at 20117 (new 47 C.F.R. § 20.18(h)(1)).

Amended § 20.18(h) is also a legislative rule under the “maxim of administrative law” that “an amendment to a legislative rule must itself be legislative.” *Sprint*, 315 F.3d at 374 (quoting *National Family Planning & Reproductive Health Ass’n v. Sullivan*, 979 F.2d 227, 235 (D.C. Cir. 1992)). Because it was adopted in a notice-and-comment rulemaking,³⁸ old § 20.18(h) was a legislative rule. Therefore, under the maxim, the Commission’s amendment of § 20.18(h) constituted a legislative rule subject to the notice-and-comment requirements of the APA.

B. The Commission Provided No Notice Or Opportunity To Comment Prior To Promulgating The Interim Benchmarks

Both APA § 553(b) and § 1.412(a) of the Rules require that notice of a proposed amendment to a rule be given by publication in the Federal Register. *See* 5 U.S.C. § 553(b); 47 C.F.R. § 1.412(a)(1). A summary of the *NPRM* was published in the Federal Register.³⁹ That publication provided notice that comments on the geographic scope of the Commission’s location accuracy requirements and the question of deferring enforcement of § 20.18(h) of the Rules at the PSAP level would be due July 5, 2007, while comments on all other questions raised in the *NPRM* would be due on August 20, 2007.⁴⁰ No notice was given that the Commission would entertain comments on the adoption of interim benchmarks and a final deadline for achieving PSAP-level compliance when it considered the first round of comments that were to be filed on July 5, 2007.

The circumstances surrounding the “eleventh hour” ex parte proposal of the interim benchmarks and the five-year deadline have been addressed. *See supra* pp. 5-6. RCA has

³⁸ Section 20.18 was added to the Rules in 1996 pursuant to a notice-and-comment rulemaking. *See Revision of the Rules to Ensure Compatibility with Enhanced E911 Emergency Calling Systems*, 11 FCC Rcd 18676, 18767-68 (1996). Prior to the *Order*, the rule was last amended in 1999 pursuant to a notice-and-comment proceeding. *See Revision of the Rules to Ensure Compatibility with Enhanced E911 Emergency Calling Systems*, 14 FCC Rcd 17388, 17435-37 (1999).

³⁹ *See Wireless E911 Location Accuracy Requirements*, 72 Fed. Reg. 33948 (2007).

⁴⁰ *See id.*, 72 Fed. Reg. at 33948.

learned that certain carriers were notified informally of the substance of the APCO/NENA Letter and were given the opportunity to respond.⁴¹ RCA was not among the parties notified.⁴² Prior to the adoption of the *Order*, no notice was given to the public that the Commission was considering interim benchmarks and a five-year PSAP-level compliance deadline.

The Commission had to issue a new notice of proposed rulemaking before it could adopt the interim benchmarks and the September 11, 2012 compliance deadline unless those new requirements could be considered a “logical outgrowth” of a rule change proposed in the *NPRM*. *E.g., Sprint*, 315 F.3d at 375-76. However, there can be no “logical outgrowth” of a proposal of which the Commission did not afford proper notice. *Id.*, at 376. Such was the case here where the *NPRM* gave notice that comments on the issues of how and when compliance should be required were to be filed by August 20, 2007 in the “Section III.B” portion of the bifurcated proceeding. *See* 72 Fed. Reg. at 33948-49. That certainly did not constitute proper notice that the issues would be considered in the preceding “Section III.A” stage of the rulemaking. *See id.*

The facts show that the *NPRM* did not put interested parties on notice that, if they had anything to say about whether or not interim benchmarks and a date-certain compliance deadline should be imposed, they should say it in comments during the § III.A phase of the proceeding. As was the case in *Sprint*, the comments filed in the § III.A phase demonstrate that parties did not know that the Commission was contemplating the need for a date-certain compliance deadline. *See* 315 F.3d at 376. Proof of the inadequate notice lies with the fact that “commenters understandably filed no comments on this point.” *Sprint*, 315 F.3d at 376. They

⁴¹ *See* Letter from John T. Nakahata to Marlene H. Dortch, PS Docket No. 07-114, at 1 (Sept. 10, 2007); Application, at 24-25.

⁴² RCA learned from the trade press that the Commission was considering the adoption of a date-certain, PSAP-level compliance deadline. *See* RCA/Verizon Letter, at 1. It did not learn that the Commission was also considering interim benchmarks.

were relying on the Commission to abide by its announced procedures and consider comments on the need for a compliance deadline in the § III.B proceeding. And such reliance was both reasonable and a matter of right. *See Gardner v. FCC*, 530 F.2d 1086, 1089-90 (D.C. Cir. 1976) (parties entitled to rely on publicly-announced procedures that the Commission was bound to obey).

It was only after the § III.A comment period ended that APCO and NENA came forward and made an ex parte pitch that interim benchmarks and a five-year compliance deadline should be adopted in the § III.A order.⁴³ Only then were a few commenters notified and given the opportunity to make ex parte presentations on the issues. RCA, and presumably others, would have thoroughly presented its views on the interim benchmarks had it been notified that the Commission might impose those benchmarks in its *Order*.

Considering the circumstances surrounding the eleventh hour adoption of the APCO/NENA proposal, the D.C. Circuit most likely will see that the adoption of the proposal involved an “utter failure” by the Commission to afford proper APA notice and comment. *Sprint*, 315 F.3d at 377. The Court will not be able to excuse that failure as harmless error since RCA will be able to make a “colorable claim” that it was prejudiced by the lack of notice. *Id.* In all likelihood, the Court will vacate § 20.18(h) and remand the case to the Commission. *See id.*

C. The Commission Did Not Respond To Significant Comments Presenting Contrary Arguments Resting On Solid Data

APA § 553(c) and Rule § 1.415(a) give interested parties the right to file comments on a proposed legislative rule. *See* 5 U.S.C. § 553(c); 47 C.F.R. § 1.415(a). Subsumed in the right to comment is the expectation that the comment will be considered by the Commission. *See*

⁴³ *See* Letter from Robert M. Gurs to Marlene Dortch, PS Docket No. 07-114 (Sept. 6, 2007); APCO/NENA Letter, at 1-2.

Charles H. Koch, Jr., *Administrative Law and Practice* § 4.41[3] (2d ed. 1997). A reasoned response is the best evidence that the Commission has considered a comment. *See* Koch, at § 4.41[3]. Although it need not respond to every comment, the Commission must respond in “a reasoned manner to significant matters.” *United States Satellite Broadcasting Co., Inc.*, 740 F.2d 1177, 1188 (D.C. Cir. 1984). A significant comment is one which, if true, would require a change in the proposed rule. *See, e.g., Louisiana Federal Land Bank Ass’n, FLCA v. Farm Credit Adm.*, 336 F.3d 1075, 1080 (D.C. Cir. 2003). The Commission failed to respond to most of the adverse comments submitted in this proceeding and many of them were very significant.

As a participant in the NRIC Focus Group 1A,⁴⁴ RCA urged the Commission to consider the NRIC VII Report and its conclusion that location accuracy compliance should be measured at the state level.⁴⁵ The report was undeniably relevant and appropriately addressed considering the Commission asked NRIC for its recommendations. Moreover, the NRIC VII Report was the result of the collaborative efforts of stakeholders. Failure to acknowledge and address their work would flout the intent of the 911 Act that stakeholders play a major role in the deployment of wireless E911 service. *See supra* pp. 2-4. Nevertheless, the Commission ignored the NRIC VII Report and did so over Commissioner Adelstein’s objection. *See Order*, 22 FCC Rcd at 20137.

If it had agreed with the facts which supported NRIC’s conclusions and accepted the recommendation set forth in the NRIC VII Report, the Commission would have adopted a state-level compliance requirement. Accordingly, the NRIC’s recommendation was significant for the purposes of the APA’s notice-and-comment requirements. RCA’s request that the Commission address the NRIC VII Report was sufficient to make its comments equally significant. As such, RCA’s comments “deserv[ed] an answer.” *Louisiana Federal*, 336 F.3d at 1081. RCA never

⁴⁴ RCA was represented on the FocusGroup 1A by Art Prest. *See* NRIC VII Report, at 11.

⁴⁵ *See* RCA Comments, at 2-3; RCA/Verizon Letter, at 2, 11.

got one.

The requirements of reasoned decision-making dictate that the Commission “respond to contrary arguments resting on solid data.” *Illinois Public Telecommunications*, 117 F.3d at 564. The Commission’s silence in the face of the NRIC VII Report is only one of many instances in which it declined to acknowledge opposing arguments, many of which rested on solid data presented in detail via sworn statements of engineering experts.⁴⁶ The Commission’s deafening silence in these circumstances is equivalent to announcing an “*ipse dixit* conclusion,” which “epitomizes arbitrary and capricious decision-making.” *Id.* Considering the collaborative process involving key stakeholders envisioned by the 911 Act, the Commission’s failure to address the opposing views of key stakeholders — and especially the NRIC VII Report that it commissioned — will not be well received by the D.C. Circuit. *See generally United States Tel. Ass’n v. FCC*, 227 F.3d 450, 460-61 (D.C. Cir. 2000) (to uphold Commission’s inadequate reasoning would weaken the major role Congress expected industry to play in formulating CALEA standards).

CONCLUSION

The Commission’s rather obvious disregard of the notice-and-comment requirements of the APA is enough to make vacatur the D.C. Circuit’s likely remedy. *See Sprint*, 315 F.3d at 377 (rule vacated for the Commission’s failure to proper notice and opportunity to comment); *Syncor*, 127 F.3d at 96 (case remanded with instructions to vacate rule adopted without notice and comment); *United States Tel. Ass’n v. FCC*, 28 F.3d 1232, 1236 (D.C. Cir. 1994) (rule set aside for violating notice-and-comment requirements). However, several other “danger signals” will be apparent to the D.C. Circuit that suggest that the Commission did not engage in reasoned

⁴⁶ *See supra* note 24.

decision-making. *ITT World Communications, Inc. v. FCC*, 699 F.2d 1219, 1247 (D.C. Cir. 1983). In light of those signals, the best the Commission can expect from the Court is to have the *Order* remanded. Moreover, the Commission has sent at least one danger signal that calls for an administrative or judicial stay.

After rushing to adopt its entirely conclusory *Order* on September 11, 2007, the Commission has interminably delayed — twenty weeks and counting — the Federal Register publication necessary to allow its new PSAP-level compliance requirements to eventually (60 days after publication) go into effect. That delay suggests that the Commission does not view the effectiveness of its new requirements as a public interest imperative. It can also be viewed as evidence that the Commission lacks confidence that its *Order* can withstand judicial scrutiny and is forestalling an appeal. In either case, the Commission should grant a stay *pendente lite* to allow RCA and others to exhaust their legal remedies. *See Comark Cable*, 104 FCC 2d at 104.

For all the foregoing reasons, and for the reasons set forth by T-Mobile in its Application, RCA respectfully requests that the Commission stay the effectiveness of its *Order* pending its judicial review in the D.C. Circuit.

Respectfully submitted,

/s/ Russell D. Lukas

Russell D. Lukas
David L. Nace

LUKAS, NACE, GUTIERREZ & SACHS, CHARTERED
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8678

*Attorneys for
Rural Cellular Association*

January 28, 2008