

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

In the Matter of)
)
The Commercial Mobile Alert System) **PS Docket No. 07-287**
)

To: The Commission

COMMENTS OF RURAL CELLULAR ASSOCIATION

Rural Cellular Association (“RCA”)¹, by its attorneys, respectfully submits these Comments in connection with the Commission’s obligation to adopt rules to enable commercial mobile service alerting capability for providers that elect to transmit emergency alerts.² RCA supports the Commission in its effort to establish rules for a Commercial Mobile Alert System (“CMAS”), under which Commercial Mobile Service (“CMS”) providers may elect to transmit emergency alerts to the public, in conformance with the Warning Alert and Response Network (“WARN”) Act, §602(a), directing the Commission to adopt rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system.³

I. Recommendations of the Expert Advisory Committee Should be Adopted Without Change

In moving forward to carry out its obligations RCA urges the Commission to adopt in full and without change the recommendations of the Commercial Mobile Service Alert Advisory

1 RCA was formed in 1993 to address the distinctive issues facing wireless service providers serving rural and small market areas. RCA is an association representing the interests of approximately 100 small and rural wireless licensees providing commercial services.

2 *Notice of Proposed Rulemaking*, PS Docket No. 07-287, FCC 07-214, released December 14, 2007 (“NPRM”).

3 This rulemaking is conducted under authority of the WARN Act to fulfill the Commission’s obligations stated in the WARN Act.

Committee (“CMSAAC” or “Advisory Committee”), as voted on and approved by the entire CMSAAC on October 3, 2007 and submitted to the Commission on October 12, 2007.⁴ The Advisory Committee’s work was performed over the better part of a year, during which time it conducted an exhaustive review of the issues and developed a comprehensive set of recommendations. All members of the Advisory Committee were provided opportunities to submit proposals and to propose changes to draft Advisory Committee recommendations. Virtually all of the issues contained in the *NPRM* were considered and fully vetted by the Advisory Committee,⁵ and the very few that were not should not be given consideration by the Commission at this time as it develops rules to implement CMAS.⁶ It is especially notable that the workings of the Advisory Committee included an opportunity in the last few weeks of the process for any member to submit amendments to the proposed recommendations. Each amendment presented was discussed and voted on by the full committee on October 3, 2007.

The Commission’s focused task at this time is to fulfill its responsibilities under the WARN

4 As required by the WARN Act, Section 603, the Advisory Committee was appointed by FCC Chairman Kevin J. Martin and was comprised of state and local government representatives, tribal governments, subject matter experts and qualified representatives of other stakeholders and interested parties. Arthur L. Prest represented RCA and its carrier members’ interests on the Advisory Committee.

5 Examples of issues raised in the *NPRM* that were fully vetted, with conclusions reached, include the use of point-to-point Short Message Service (“SMS”), the precision of geographical targeting, funneling messages through an aggregator, the use of a Common Alerting Protocol (“CAP”), whether alerts should contain telephone numbers or Uniform Resource Locators (“URLs”), the technical limitations of the number of characters that can be transmitted, the transmission in languages other than English, among others.

6 An example of a question in the *NPRM* that was never fully vetted by the Advisory Committee is contained in a question in paragraph 10: “Could radio data systems like the Radio Broadcast Data System (RBDS), which do not require significant service provider infrastructure, nonetheless meet our goals for efficient delivery of alerts over the CMAS?” RBDS was never fully vetted by the CMSAAC because it is not considered part of the CMAS since service providers of RBDS do not hold commercial mobile service licenses. Thus it, and other issues likewise not presented for detailed analysis by the Communications Technology Group, should be rejected outright on process grounds.

Act which, at Section 602(a) states:

COMMERCIAL MOBILE SERVICE ALERT REGULATIONS. -- Within 180 days after the date on which the Commercial Mobile Service Alert Advisory Committee, established pursuant to section 603(a), transmits recommendations to the Federal Communications

Commission, the *Commission shall complete a proceeding to adopt relevant technical standards, protocols, procedures, and other technical requirements based on the recommendations of such Advisory Committee necessary to enable commercial mobile service alerting capability for commercial mobile service providers that voluntarily elect to transmit emergency alerts.* The Commission shall consult with the National Institute of Standards and Technology regarding the adoption of technical standards under this subsection [emphasis added].

Thus, the WARN Act establishes a limited role for the Commission in facilitating CMAS, and that role is defined in mandatory terms.⁷ Rules to be adopted are to be based on the Advisory Committee's recommendations, after consultation with the National Institute of Standards and Technology. In fulfilling its obligations the Commission is not to entertain proposals at this time that were not vetted by the Advisory Committee and included in its recommendations.

The intent of Congress to limit the Commission's rulemaking authority in this area is confirmed by WARN Act, Section 602(d):

The Federal Communications Commission may enforce compliance with this title but shall have no rulemaking authority under this title, except as provided in subsections (a), (b), (c) and (f).

None of the referenced subsections of Section 602(d) expands the Commission's rulemaking

⁷ "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)). Note that the use of the word "shall" in standards work also indicates a requirement for which there is no discretion on the part of the entity that is to carry out the requirement. In other areas of commerce "shall" implies legal obligations versus "will." "Shall" expresses the meaning of must as in an obligation versus "will" which implies a sense of promise.

authority in a manner that would allow the Commission to adopt rules that contradict the Advisory Committee's recommendations.

The *NPRM*, at paragraph 42, seeks comment on "...how the CMSAAC's proposals for a CMAS relate to the directives contained in [the President's June 2006] Executive Order." The direct answer to this question is that there is no need for a relationship between the CMSAAC's proposals and the directives in the Executive Order in connection with the Commission's current task of adopting rules to fulfill the Commission's obligations under the WARN Act. The question indicates a misinterpretation of the purpose of the Advisory Committee and the Commission's rulemaking authority under the WARN Act, by which the Commission is to adopt rules for CMAS that are "based on the recommendations of... the Advisory Committee necessary to enable commercial mobile service alerting capability for commercial mobile service providers that voluntarily elect to transmit emergency alerts."⁸ Moreover, there is no reference in the Executive Order to the transmission of alerts and warnings by CMS providers in particular. The Executive Order contemplates the transmission of alerts and warnings by "communications systems" and only to the extent "as provided by law."⁹ Other than the WARN Act, there is no law that provides for transmission of emergency alerts by CMS providers.

The Commission appears to have overlooked the statutory limitation on its rulemaking authority insofar as the *NPRM* specifically invites public comments on "alternatives to the CMSAAC's recommendations."¹⁰ As these comments have observed, the Commission was not

8 WARN Act at Section 602(a).

9 Executive Order at §3(b)(iii).

10 See, for example, *NPRM* at para. 6 where it is stated: "We further seek comment on any alternatives to the CMSAAC's recommendations. Comments that suggest alternatives to the CMSAAC's recommendations should address

granted discretion by Congress to adopt rules that incorporate alternatives to the CMSAAC's recommendations. Section 602 of the WARN Act precludes adoption of any rule that incorporates technical standards, protocols, procedures or other requirements that were not included among the Advisory Committee's recommendations.

II. RCA Comments on WARN Act Section 602(b) -- CMAS Election Rulemaking

RCA's foregoing comments that concern the Commission's limited authority in this rulemaking are offered with the public spirited hope that the Commission will adopt rules that are both consistent with the Advisory Committee's recommendations and that allow rural wireless carriers that are members of RCA to elect to participate in transmission of CMAS alerts without unacceptable economic or administrative burdens. RCA supports flexibility in procedures by which a CMS provider will notify new and existing subscribers of its election and inform the Commission of its election and the method of its transmittal of alerts, and procedures for a CMS provider to withdraw its election and afford existing subscribers to discontinue service upon notification of that withdrawal.

Notice at Point of Sale – RCA supports the recommendation of CMSAAC that CMS providers have discretion to determine how to provide this notice. The textual notice recommended by CMSAAC is sufficient and satisfies WARN Act Section 602(b)(1)(B).

Notifications to Existing Subscribers – RCA supports the recommendation of CMSAAC that CMS providers have discretion to determine how to provide this notice. RCA opposes any requirement that CMS providers demonstrate to the FCC that they have met the requirement, or

with sufficient detail how their proposed alternative would promote an effective CMAS as envisioned by the WARN Act.”

maintain records of subscriber acknowledgment. Such requirements exceed the authority granted the Commission by the WARN Act to require only the provision of the notice.

Related Filings and Other Requirements – RCA supports the CMSAAC’s recommendations for the timeline of CMS provider elections, and for provision by electing providers of explicit commitment to support the development and deployment of technology for the following: the “C” reference point, the CMS provider Gateway, the CMS provider infrastructure, and the mobile device with CMAS functionality. Electronic filing will be efficient and will afford public access. Like CMSAAC, RCA believes CMS providers should have complete flexibility to determine how to provide notice to subscribers of the option not to receive alerts, except for alerts issued by the President, and of the option to discontinue service if the CMS provider withdraws its election to provide or discontinues provision of emergency alerts.

Paragraph 38 of the *NPRM* questions whether a wireless carrier should be allowed to charge more for a phone that offers CMAS capability. The CMSAAC observed that “...mobile devices that support CMAS may incur additional development and manufacturing costs and these costs may be passed on to the subscriber.”¹¹ RCA agrees with this recommendation in that it does not require a subscriber to pay the cost of receiving an alert or warning if the subscriber desires to own equipment that is capable of receiving the alert or warning. Moreover, a subscriber is accustomed to paying more for equipment that includes desired features such as a camera or a Personal Digital Assistant (“PDA”).

11 CMSAAC report at Section X.A.

III. Summary and Conclusion

A key measure of success of the CMAS program will be the extent to which carriers voluntarily elect to participate. There are nearly 100 carrier members in RCA, and all serve rural areas of the United States. Their independent decisions to participate or not participate in the CMAS program will be determined largely by the extent of economic and administrative burdens that are associated with the program.

If the Commission recognizes the statutory limitations on its authority under Section 602 of the WARN Act, and adopts rules that incorporate the Advisory Committee's recommendations, RCA expects that the vast majority of its members will elect to participate in the CMAS program. The WARN Act specifies that the carrier election process must be complete in September 2008. RCA respectfully urges the Commission to move forward quickly with rules that reflect the Advisory Committee's extensive study of the issues in a manner that facilitates carrier participation and ubiquitous alert and warning capabilities for the public benefit.

Respectfully submitted,

RURAL CELLULAR ASSOCIATION

[filed electronically]

David L. Nace
Pamela L. Gist
Its Attorneys

Lukas, Nace, Gutierrez & Sachs, Chartered
1650 Tysons Boulevard, Suite 1500
McLean, Virginia 22102
(703) 584-8678
February 4, 2008