

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

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

COMMENTS OF CTIA – THE WIRELESS ASSOCIATION®

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February 4, 2008

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I. INTRODUCTION AND SUMMARY.

CTIA – The Wireless Association® (“CTIA”)¹ hereby submits these comments in response to the Federal Communications Commission’s (“FCC” or “Commission”) *Notice of Proposed Rulemaking* in the above-captioned proceeding.² CTIA urges the Commission to expeditiously adopt the Commercial Mobile Service Alert Advisory Committee’s (“CMSAAC”) recommendations regarding the establishment of a Commercial Mobile Alert Service (“CMAS”). As intended by Congress, thousands of hours, through multiple meetings of the CMSAAC working groups involving representatives from federal and state government, wireless carriers and manufacturers, broadcasters and other constituent groups, resulted in a solid recommendation to the FCC. The Commission should adopt several of the CMSAAC’s specific proposals including, among others, limiting geo-targeting to the county level and delaying consideration of the incorporation of multiple languages into the CMAS until technology has

¹ CTIA is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the association covers all Commercial Mobile Radio Service (“CMRS”) providers and manufacturers, including cellular, broadband PCS, ESMR, as well as providers and manufacturers of wireless data services and products.

² *The Commercial Mobile Alert System*, Notice of Proposed Rulemaking, FCC 07-214 (Dec. 14, 2007) (“NPRM”).

further evolved. Moreover, the Commission should abide by the WARN Act's³ directive that wireless provider participation in the CMAS should remain voluntary. CTIA believes that Commission adoption of the CMSAAC recommendations as submitted will encourage the highest level of carrier participation. CTIA applauds the Commission for initiating this comprehensive rulemaking to establish a CMAS and urges the Commission to adopt the CMSAAC Report as submitted.

The development and implementation of a CMAS will help ensure that all consumers are able to receive timely and accurate emergency alerts. In the WARN Act, Congress developed a unique procedure to address the problem of emergency alerting by securing the participation of all interested parties in the development and deployment of a CMAS. Congress' plan worked exactly as anticipated and the result is unprecedented. Within one year of enactment, the CMSAAC was formed, issues and concerns from all stakeholders were considered and studied, and a thorough, workable plan for the deployment of CMAS was developed. This consensus plan meets every statutory requirement and the FCC's requests. The proposal represents a significant step forward for the industry, and CTIA is pleased to be a part of this innovative and highly-successful process.

While CTIA believes the Commission should adopt the CMSAAC recommendations in their entirety, CTIA emphasizes the importance of several of the Advisory Committee's conclusions. These issues were thoroughly considered by the Committee. First, as recommended by the Committee, the Commission should not require geo-targeting beyond the county level. Second, the Commission should defer consideration of any requirement regarding the incorporation of multiple languages into the CMAS until technology has further evolved and

³ Warning, Alert, and Response Network (WARN) Act, Title VI of the Security and Accountability For Every Port Act ("SAFE Port Act"), Pub. L. 109-347, 120 Stat. 1884 (2006).

the issue can be studied further. Third, the Commission should allow wireless providers to recover the costs they incur in implementing the CMAS. Fourth, wireless providers should be given adequate flexibility to determine the form and content of customer notifications regarding the CMAS. Fifth, the Commission should not overly regulate the process through which subscribers may terminate service based on CMAS participation. Sixth, the Commission should expeditiously adopt the CMSAAC's recommendations to ensure that wireless providers have adequate time to opt-in or opt-out of the CMAS.

Finally, in enacting the WARN Act, Congress made clear that wireless provider participation in any commercial mobile alert system is to be strictly voluntary. Thus, any attempt to impose Emergency Alert System ("EAS") or Federal Emergency Management Agency ("FEMA") system requirements on wireless providers would violate Congress's express intent that participation remains voluntary. Similarly, any attempt to mandate participation through alternative authority, such as the 2006 Executive Order, would violate this express intent.

II. THE FCC SHOULD ADOPT THE CMSAAC'S RECOMMENDATIONS.

The CMSAAC recommendations are the result of a lengthy process during which all stakeholders carefully crafted an alerting service to meet the needs of communities and the goals of Congress and the Commission. Specifically, the CMSAAC Report provides a detailed, carefully-considered plan to effectively deploy a commercial mobile alert system capable of notifying consumers of emergencies in a technically feasible manner. Accordingly, the Commission should adopt the CMSAAC recommendations expeditiously without modification, as any significant changes could undermine efforts for an expedited development and deployment of the service.

The 110-page CMSAAC Report represents an unprecedented and highly successful

process of deliberation, discussion, and negotiation⁴ involving a wide variety of stakeholders, as required by the WARN Act.⁵ The Committee consisted of 42 individuals representing federal, state, local, and tribal government; communications service providers; vendors, developers, and manufacturers; third party service bureaus; broadcasters; representatives of certain groups of consumers; and individuals with technical expertise, among others. Though it worked expeditiously to comply with the statutory schedule, the CMSAAC spent the requisite time to understand every individual viewpoint and considered how each could be addressed in the final recommendations for CMAS. To ensure that every voice was heard, in addition to the countless working group meetings, the CMSAAC held six public meetings to discuss its progress and allowed for public comment on its work.⁶

The Committee examined all relevant issues during its more than 11 months of developing and refining recommendations in order to formulate the most comprehensive and workable plan for CMAS. The CMSAAC developed five major working groups: the User Needs Group, Communications Technology Group, the Alerting Gateway Group, the Alerting Interface Group, and the Program Management Group. Each group had clearly-defined goals to address

⁴ Chairman Martin himself said, “I think that it was as difficult an expectation as I’ve seen as far as an expedited timeframe on a set of recommendations, and I think that it’s a testament to how well you all have worked on this issue and how well you all have worked together that you’ve been able to come forward in this manner. I think it also is a good example of an epitome one of the public/private partnerships that can try to achieve these kind of consensus on issues that can be very highly technical.” Transcript of Proceedings: Federal Communications Commission Commercial Mobile Services Alert Advisory Committee Meeting (Sept. 19, 2007) at 12, <http://www.fcc.gov/pshs/docs/advisory/cmsaac/pdf/meeting-transcript091907.pdf> (last visited Jan. 29, 2008).

⁵ See SAFE Port Act, Pub. L. 109-347, Title VI-Commercial Mobile Service Alerts, §603(b) (2006) (“WARN Act”).

⁶ See Commercial Mobile Service Alert Advisory Committee, <http://www.fcc.gov/pshs/advisory/cmsaac/> (last visited Jan. 29, 2008) (providing links to copies of public releases providing notice for each of the open CMSAAC meetings).

on its own, and the separate groups communicated their progress to each other to ensure development of a seamless solution. The committees and their subcommittees enhanced their expertise in the field as they studied the relevant issues, generated and reviewed more than 600 numbered documents, consulted experts, and conducted numerous meetings to discuss in detail each carefully considered point.

As a result, the CMSAAC Report provides a detailed, well-balanced approach to developing and deploying a commercial mobile alert service that can effectively notify consumers of emergencies. The detailed Report addresses each deliverable requested by the FCC and specified in the WARN Act by providing recommendations on:

- (1) Protocols, technical capabilities, and technical procedures wireless providers can use to receive, verify, and transmit alerts to subscribers;
- (2) Establishment of technical standards for priority transmission of alerts;
- (3) Relevant technical standard for devices and equipment for alert transmission;
- (4) Technical capability to transmit alerts in languages other than English;
- (5) Ability to offer subscribers the option to prevent receipt of alerts on their device other than presidential-level alerts;
- (6) A process to transmit alerts if not all devices are capable of receiving alerts or the provider cannot offer alerts to its entire service area;
- (7) As otherwise necessary to transmit alerts to subscribers.⁷

The Report sets out a specific timeline with achievable goals. And while the system can be enhanced in the future, as CMSAAC itself recommends,⁸ the Report provides a clear roadmap for implementing Congress's vision.

Accordingly, the Commission should adopt the CMSAAC's recommendations as proposed.⁹ Any significant changes to the underlying recommendations could undermine efforts

⁷ WARN Act at § 603(c).

⁸ See, e.g., *NPRM* at App. B: Commercial Mobile Alert Service Architecture and Requirements (Oct. 12, 2007) at 58 (§ 5.7). (“CMSAAC Report”)

⁹ See *NPRM* at ¶ 6 (seeking comment generally on the CMSAAC recommendations).

to implement CMAS in an expedited fashion. A substantial amount of technological development must take place before the CMAS becomes a reality.¹⁰ For example, standards must be developed; equipment and infrastructure must be designed, manufactured, and tested; and handsets must be upgraded or deployed. The multi-vendor environment, which requires deployment alignment and interoperability testing, also represents a key element in CMAS deployment. To meet the timeline established by the WARN Act, the industry has already begun standardization efforts.¹¹ Any modification to the CMSAAC's recommendations, however, could render these standardization efforts moot, requiring industry to reinitiate standards development and extending the timeframe within which deployment may be possible.

III. THE COMMISSION SHOULD ADOPT CERTAIN CRITICAL RECOMMENDATIONS OF THE CMSAAC TO ENSURE THE EFFECTIVE DEPLOYMENT OF A COMMERCIAL MOBILE ALERT SYSTEM.

CTIA urges the Commission to adopt the CMSAAC Report and wishes to highlight several portions of the CMSAAC Report that are critical to encouraging the effective and timely deployment of the CMAS. As discussed in more detail below, the Commission should not require geo-targeting beyond the county level. The Commission should defer consideration of any requirement regarding the incorporation of multiple languages into the CMAS until technology has further evolved and the issue can be studied further. The Commission should allow wireless providers to recover the costs they incur in implementing the CMAS. Wireless providers should be given adequate flexibility to determine the form and content of customer

¹⁰ It is for this reason that the CMSAAC states that filing an election with the intent to transmit alerts is a “commitment to support the development and deployment of technology for [the] “C” reference point, CMSP Gateway, CMSP Infrastructure, and mobile device with CMAS functionality and support of the CMSP selected technology.” CMSAAC Report at 108 (§ 12.2.1).

¹¹ CMSAAC Report at 109 (§ 12.2.1).

notifications regarding the CMAS. In addition, the Commission should not overly regulate the process for subscribers to terminate service based on CMAS participation. Finally, the Commission should expeditiously adopt the CMSAAC's recommendations to ensure that wireless providers have adequate time to opt-in or opt-out of the CMAS.

A. Geographically Targeted Commercial Mobile Alerts.

The Commission should adopt the CMSAAC's recommendations regarding geographically targeted commercial mobile alerts.¹² Specifically, as the Report recommends, the Commission should require emergency alerts that *specify a geocode, circle or polygon to be transmitted to an area not larger than the wireless provider's approximation of coverage (i.e., by cell site) for the county or counties with which that geocode, circle, or polygon intersects.*¹³ Wireless providers also should have the flexibility to deliver emergency alerts on a more granular level. In addition, the Commission, the Department of Homeland Security, and the industry should continue to study and evaluate the feasibility of implementing geo-targeting on a more granular level.

In fashioning these recommendations, the CMSAAC appropriately balanced competing requirements between technological limitations and system effectiveness. Wireless providers want to ensure that all individuals who might be affected by an emergency situation receive the alerts. Technological feasibility, therefore, was clearly a concern. The working groups, however, also wanted to get to the lowest level of granularity that was possible.

As the CMSAAC noted, emergency situations do not occur within neat geographic boundaries. Indeed, dangerous situations such as tornadoes, other weather situations, and

¹² See *NPRM* at ¶¶ 21-22 (seeking comment on the CMSAAC geo-targeting recommendations).

¹³ See CMSAAC Report at 52 (§ 5.4).

environmental hazards can travel across several different areas. This makes it difficult for wireless providers to pinpoint those customers that should receive an advisory using the architecture and technology of today's wireless industry. Although the initial alert advisory will contain specific area codes, predefined sets of cell sites will not always suffice to cover the necessary areas.¹⁴ The problem is further complicated by the fact that customers are continuously moving, crossing geographic boundaries, switching cell phone towers and, at times, moving into areas affected by the event. Accordingly, because of mobility, an alert would be targeted specifically to those individuals directly affected and those in the immediately surrounding areas as a situation progresses so individuals may react accordingly. Wireless technology that is broadly available in the near term is capable of alerting to the county level.

The CMSAAC's recommendations recognize this need to notify all affected persons while also ensuring that such geo-targeting is technologically feasible. The CMSAAC's recommendation that emergency messages be broadcast on a county-by-county basis, with the option to deliver messages on a more granular basis, represents the most sensible approach to encouraging expeditious and effective roll-out of this service. The recommendation provides enough flexibility for technologies, such as pagers, that may have greater difficulty in pinpointing geographic areas, and it acknowledges limitations of networks that use multi-county cell sites.¹⁵ At the same time, it leaves room for wireless providers to distinguish themselves by providing emergency alerts on a more granular basis if possible. As technology improves, individual wireless providers may choose to transmit alerts to smaller areas using "GNIS codes, polygon, or circle information to identify a predefined list of cell sites / paging transceivers

¹⁴ *See id.*

¹⁵ *See* September CMSAAC Transcript at 20.

within the alert area.”¹⁶ In time, the ability to narrow the intended audience for alerts will likely advance with the development of dynamic targeting capabilities.

Going forward, the CMSAAC recommends that the Commission, Department of Homeland Security, and the wireless industry should make more precise targeting a priority.¹⁷ As an initial matter, and as the CMSAAC recommends, the wireless industry and the Alert Gateway operator should work together to develop a list of areas that should be viewed as priorities for geo-targeting by August 2008.¹⁸ More specificity most likely may be necessary in large urban areas like New York City and Los Angeles where millions of people would potentially receive each of these alerts. The wireless industry then can work to develop more precise geo-targeting for these areas. As the Committee recommends, the Commission should continue to review these efforts as part of a biennial review process.¹⁹

B. Multi-Language Alerting Capabilities.

The Commission should not require wireless providers to transmit emergency alerts in multiple languages at this time.²⁰ As the CMSAAC notes, there are inherent complexities and limitations in the provision of emergency alerts in languages other than English.²¹ For example, wireless providers’ existing air interfaces may not be capable of handling multiple languages.

¹⁶ See CMSAAC Report at 52 (§ 5.4).

¹⁷ *Id.* (“[T]he CMSAAC recommends that certain urban areas with populations exceeding 1,000,000 inhabitants or with other specialized alerting needs be identified for priority consideration regarding implementation of more precise geo-targeting.”)

¹⁸ *Id.*

¹⁹ See CMSAAC Report at 53 (§ 5.4).

²⁰ See *NPRM* at ¶ 24.

²¹ CMSAAC Report at 58 (§ 5.7).

Similarly, wireless handsets may not be capable of receiving emergency alerts in languages other than English that utilize different character sets. In addition, the delivery of emergency alerts in multiple languages could significantly impact the ability of wireless providers to transmit emergency alerts at all because of the increased amount of data being sent. The Alert Gateway also needs to be capable of generating emergency alerts in multiple languages. These are a few of the difficult issues that arise when considering whether to transmit alerts in multiple languages. Thus, as the CMSAAC notes, “[a]t the present time, . . . there are fundamental technical problems to reliably implement any languages in addition to English.”²²

The wireless industry and the Commission, however, should continue to study the feasibility of providing emergency alerts in languages other than English. The provision of emergency alerts to non-English speakers is very important. As technologies evolve, the difficulties associated with providing emergency alerts in multiple languages may diminish. Indeed, the development of multi-language alerting capabilities will be a priority for the wireless industry. As the Committee recommends, the Commission should revisit this issue in its biennial review.

C. Cost recovery.

Carriers should be allowed to recover the costs they incur in implementing CMAS.²³ The implementation of CMAS by a wireless provider will require substantial financial investment. New software will need to be developed, infrastructure and handsets developed and deployed, and all elements of the CMAS tested. Although the WARN Act prohibits carriers from imposing a separate or additional charge on the "transmission" of an alert, this provision does not prohibit

²² *Id.*

²³ *See NPRM* at ¶ 38 (seeking comment on whether the WARN Act precludes any and all forms of cost recovery with respect to the provision of alerts).

wireless providers from recovering the costs associated with the implementation of CMAS generally should they choose to offer this service to customers. Indeed, this interpretation is counterintuitive and does not serve the public interest. If this interpretation were adopted, wireless providers participating in the provision of mobile alerts would have no means of recovering this investment, even through general service fees. As a result, wireless providers that elect to participate in the CMAS could be placed at a significant competitive disadvantage to those that do not. Clearly, Congress did not intend such a result. Instead, the goal should be to encourage participation by as many wireless providers as possible. This can only occur, however, if carriers are allowed to recover the costs they incur in implementation.

D. Notice at Point of Sale and to Existing Subscribers.

The Commission should allow wireless providers the flexibility to determine the best means of notifying customers regarding CMAS participation.²⁴ CTIA and the wireless industry recognize that notifying consumers regarding what carriers and handsets will be able to receive alerts is essential to successfully deploying the CMAS. Thus, disclosure of plans to provide or not provide emergency alerts to current and potential subscribers is critical. Wireless providers, however, are best positioned to determine the means in which this notification is made. The combination of a business incentive and the statutory requirement to notify consumers ensures that the public will receive ample notice. It is unnecessary for the Commission to adopt strict regulations specifying exactly how a wireless provider must deliver notices about a wireless provider's choice to opt-out of the alert service either at points of sale or with existing customers.

Regulatory flexibility will enable wireless providers to tailor the notice more

²⁴ See *NPRM* at ¶ 26-30 (seeking comment on the CMSAAC recommendations focused on providing notice at point of sale and to existing customers).

appropriately to the situation and to its wireless customers. As an initial matter, a single type of notice is not appropriate in all situations. Different points of sale and business circumstances lend themselves more readily to particular notice solutions. For example, the type of notice effective for Internet purchases would not necessarily work for a “bricks-and-mortar” store. In addition, wireless providers are very knowledgeable about the different types of points of sale and the most appropriate ways to convey information to potential and existing subscribers. Therefore, they are best positioned to determine the level of detail needed in the notice.²⁵ CTIA has already assisted the CMSAAC in drafting model language for use by the wireless providers to notify subscribers of their alert system decision.²⁶ This model satisfies the requirement and purposes of the statute.²⁷ Finally, wireless providers already are bound by statute to provide some point of sale notice. The Commission should encourage wireless providers to furnish customers with the information they need to make an informed decision rather than focusing on the mechanics of how that message is delivered.

Flexibility in notification requirements is particularly important for those carriers that will roll-out the emergency alert service on a market-by-market basis. In addition to the points raised above, the Commission must consider that a singular, regulated notice to all subscribers of a wireless provider may not adequately educate the subscriber base. A standardized message

²⁵ Allowing regulatory flexibility also gives wireless providers the freedom to provide customers with context for the business decision, should the wireless provider choose. As CMSAAC explained, several factors go into the decision of whether to participate in the development of the CMAS. For example, a wireless provider may be forced into not electing to transmit alerts because of a close relationship with a vendor that chooses not to develop the technology. CMSAAC Report at 109 (§ 12.2.1).

²⁶ *CMSAAC Report* at 25-26 (§ 3.4.2).

²⁷ *See NPRM* at ¶ 28 (seeking comment on whether the suggested text drafted by CMSAAC satisfies the WARN Act).

may lead to confusion and dissatisfaction. Further, greater flexibility with regard to wireless providers that plan a market-by-market roll-out would likely provide a greater incentive to participate in the CMAS. In a strict regulatory regime, wireless providers could very well trigger costly and confusing notification requirements simply by running into unforeseen problems with roll-out. An onerous regulatory scheme may cause some providers to forego roll-out of the service altogether, rather than risk running afoul of FCC regulations.

E. Customer Termination of Subscriber Agreement.

Similarly, the Commission should only regulate sparingly in the area of customer terminations of subscriber agreements in the event that a wireless provider withdraws its election to participate in CMAS.²⁸ Heavy-handed regulation and oversight both consumes Commission resources and adds cost to the overall provision of service (and, in turn, adds to subscriber cost). An ability to employ individual solutions would minimize cost and maximize efficiency and ease of integration into wireless carriers' business procedures. Further, adopting a procedure that fits with a company's other procedures and policies will make the option more user-friendly for the customer familiar with the wireless provider. To the extent possible, the Commission generally attempts to minimize its involvement in the terms and maintenance of private contractual relationships.²⁹ It should practice the same restraint in this situation.

²⁸ See *NPRM* at ¶ 35 (requesting comment on procedures needed to allow a subscriber to terminate service upon a service provider's withdrawal of its election to provide emergency alerts).

²⁹ See, e.g., *Implementation of Sections 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services*, Second Report and Order, 9 FCC Rcd 1411, ¶ 15 (1994) ("establishing, as a principal objective, the goal of ensuring that unwarranted regulatory burdens are not imposed upon any mobile radio licensees"); *Vodafone AirTouch, PLC, and Bell Atlantic Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 16507, n.37 (WTB, IB 2000) (noting that "[t]he Commission has consistently refused to interject itself into private matters").

F. Timeline for Implementation.

The Commission should act quickly to ensure the expeditious deployment of the CMAS.³⁰ The industry standardization recommended by the CMSAAC is already moving forward. Continued progress, however, depends upon the Commission acting quickly and efficiently to adopt CMAS requirements in the rulemakings mandated by the WARN Act.³¹ The standardization process cannot be finalized before firm rules are set in place. Moreover, the next phases of the effort (*e.g.*, design, development, and deployment) cannot begin without clear guidance from the Commission. Accordingly, CTIA urges the Commission to adopt final rules so that wireless providers can be informed well in advance of the statutory deadline by which they must elect to participate in the CMAS.

IV. THE FCC'S AUTHORITY TO DEVELOP A COMMERCIAL MOBILE ALERT SYSTEM RESTS SOLELY IN THE WARN ACT.

In the NPRM, the Commission seeks comment on how the proposed CMAS relates to the Commission's activities in connection with the EAS and the "national alert system" to be developed and coordinated by FEMA under the June 2006 Executive Order. Specifically, the Commission seeks comment on whether the CMAS should be included in these other systems and on "what additional statutory authority, independent of the WARN Act," the Commission has to implement a mobile alert system.³²

The FCC's authority to develop a CMAS lies exclusively within the WARN Act. Congress made clear in the WARN Act that wireless provider participation in any commercial mobile alert system is to be strictly voluntary. Thus, any attempt to impose the mandatory EAS

³⁰ See *NPRM* at ¶ 31 (seeking comment on the timeline proposed by CMSAAC).

³¹ WARN Act § 602(a).

³² *NPRM* at ¶ 42.

or FEMA system requirements on wireless providers would violate Congress's express intent that CMAS participation be voluntary. Similarly, any attempt to mandate participation through alternative authority, such as the 2006 Executive Order, would violate this express intent. Further, the 2006 Executive Order specifically directs the Commission, "as provided by law," to move forward. The "law" in this case is the WARN Act.

A. The WARN Act exclusively governs any wireless provider participation in an alert system and prescribes that any such participation be voluntary.

Congress directed the Commission in the WARN Act to implement the CMAS, but explicitly stated that wireless providers' participation must be on a voluntary basis and that the Commission's rulemaking authority for such a system is limited to the provisions in the Act. Thus, Congress carefully drafted the Act to ensure that participation not be mandated and that no further requirements be imposed on wireless providers. Section 602(a) of the Act instructs the Commission to adopt standards and procedures only for those wireless providers "that *voluntarily elect* to transmit emergency alerts." Subsection (b) then details the various procedures for making such an election. In subsection (d), Congress effectively precluded the imposition of mandatory participation or other requirements, stating that the Commission "shall have no rulemaking authority under this title, except as provided in subsections (a), (b), (c), and (f)." The Act is clear. In fact, subsection (c) demonstrates that Congress differentiates between voluntary and mandatory participation when it states that "the Commission shall complete a proceeding to *require* licensees and permittees of *noncommercial* educational . . . or public broadcast stations" to provide necessary equipment for the distribution of emergency alerts.

The Commission has no authority to impose any EAS or FEMA alert system requirements on wireless providers beyond those in the WARN Act. Doing so would violate Congress's express statement that the WARN Act is the exclusive source of rulemaking

authority in this area, thus definitively ruling out any exercise of ancillary or related authority in this area, and because doing so would violate clear congressional intent to keep CMAS participation voluntary. As the Supreme Court has stated, “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”³³

In addition to the unambiguous statutory language, the legislative history of the WARN Act likewise reveals Congress’s intent that wireless provider participation be voluntary. In considering commercial mobile alert legislation, Congress discerned that the best chance for a successful system lay in garnering firm support from wireless providers. Senator DeMint, the bill’s sponsor, made a point in presenting the bill to the Senate to affirm that “[w]ireless networks have enthusiastically endorsed the WARN Act and look forward to competing with each other to create the best system,”³⁴ and the Senate later passed the bill unanimously.³⁵ This endorsement from the industry hinged on the provision that participation would be kept strictly voluntary.³⁶ Aware of this fact, Congress was careful to maintain narrow limits on this new grant of regulatory authority. For instance, after Senator DeMint’s remarks, Senator Inouye pointed out that under the Act, “no new regulatory authority is granted to the FCC, other than to

³³ *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

³⁴ 152 Cong. Rec. S9288 (2006) (statement of Sen. DeMint).

³⁵ *See Senate Passes WARN Act 95-0*, Comm. Daily (Sept. 13, 2006).

³⁶ Cheryl A. Tritt, *Telecommunications Future*, 25th Annual Institute on Telecommunications Policy & Regulation, Practising Law Institute, PLI Order No. 10946 (December 2007) (“The wireless industry generally has supported the [WARN Act] because, unlike other legislation and FCC proposals, participation in the WARN is voluntary for carriers.”).

regulate compliance with its provisions.”³⁷ In addition to floor debate, the committee report accompanying the bill emphasized that “commercial mobile service providers . . . can voluntarily elect to transmit emergency alerts” and repeatedly distinguished between providers “who elect to transmit such alerts” and those who elect not to.³⁸

B. The June 2006 Executive Order does not provide the Commission with any additional authority.

While the June 2006 Executive Order raised by the Commission in the NPRM³⁹ may inform the Commission of the Administration’s—and, in particular, FEMA’s—goals and plans for emergency alerting,⁴⁰ it does not and indeed cannot convey any authority beyond that granted in the WARN Act. As an initial matter, the plain text of the Executive Order itself does not provide the Commission with any authority to compel wireless providers to participate in an alert system. With respect to the FCC, the Order states only that the “Commission shall, as provided by law, 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.” At most, this statement makes a broad policy assertion that communications systems should be able to transmit alerts. It does not grant the FCC authority to mandate participation by all service providers. Such policy statements fit well into the context of an executive order. As several commentators have noted, “the President may communicate his own policy views, or those of his chosen subordinates, to agencies and may expect these views to be honored within the limits of

³⁷ 152 Cong. Rec. S9289 (2006).

³⁸ H.R. Rep. No. 109-711, at 105 (2006) (Conf. Rep.).

³⁹ See *NPRM* at ¶ 42.

⁴⁰ Public Alert and Warning System, Exec. Order No. 13,407, 71 Fed. Reg. 36,975-77 (June 26, 2006).

discretion conferred by statute.”⁴¹ The Order is accordingly careful not to overstep statutory limits on regulatory authority, allowing only for Commission action “as provided by law.” In this case, the “law” is the WARN Act.

Indeed, the Executive Order could not grant the Commission authority to mandate wireless provider participation or to impose requirements not contained in the WARN Act because doing so would transgress the limited authority granted by Congress. As a general principle, “[agency] authority comes from a delegation by the legislative branch or from a delegation by the executive to perform some duty assigned to it by the legislature and hence agencies have only such authority as is delegated by the legislature.”⁴² The Supreme Court has made this clear. As the Court stated in *Youngstown Sheet & Tube Co. v. Sawyer*, “[t]he President’s power, if any, to issue [an] order must stem either from an act of Congress or from the Constitution itself.”⁴³ Essentially, this means that “the President must conform to legislation. In issuing directives to govern the agencies, the President may not . . . require or permit agencies to transgress boundaries set by Congress.”⁴⁴ Reading the Executive Order as granting authority beyond that granted in the WARN Act would therefore violate this fundamental precept.

⁴¹ Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 Geo. Wash. L. Rev. 533, 539 (1989); see also Charles H. Koch, Jr., 2 *Administrative Law and Practice* § 7.33 (2d ed.) (“The power of the President to influence rulemaking is largely dependent on the statutory command given by Congress. Generally, Presidents [have] the power to give their own policy view to the agency heads and expect that they will follow those views to the extent authorized by statute.”).

⁴² Charles H. Koch, Jr., 3 *Administrative Law and Practice* § 12.13 (2d ed.) (citing *Railway Labor Executives’ Ass’n v. National Mediation Bd.*, 29 F.3d 655, 670 (D.C. Cir. 1994), amended 38 F.3d 1224 (D.C. Cir. 1994).

⁴³ 343 U.S. 579, 585 (1952).

⁴⁴ Charles H. Koch, Jr., 2 *Administrative Law and Practice* § 7.33 (2d ed.).

V. **CONCLUSION**

For these reasons, the Commission should expeditiously adopt the CMSAAC recommendations as proposed.

Respectfully submitted,

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Dated: February 4, 2007