

October 10, 2008

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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: **WC Docket No. 08-171**
Implementation of the NET 911 Improvement Act of 2008

Dear Ms. Dortch:

On October 8, 2008, Tom Sugrue, Kathleen O'Brien Ham, and Sara Leibman of T-Mobile USA, Inc. ("T-Mobile") and I, on behalf of T-Mobile, met with Matthew Berry, David Horowitz, Ajit Pai, and Andrea Kearney of the General Counsel's Office, to discuss legal issues relating to the above-referenced proceeding.

Specifically, T-Mobile noted that there are serious legal flaws in the Commission's proposal to adopt rules in the *Net 911 Act* proceeding that would govern out-of-region 911 roaming calls made over dual mode CMRS offerings that combine traditional wireless and IP transport. To begin with, the record does not demonstrate that there is any problem with respect to the delivery of 911 calls from such dual-mode phones. In fact, the sole record evidence illustrates that (1) in a recent seven-month study period, there were *no* out-of-region WiFi-based 911 calls; and (2) even if a few such calls are eventually placed, they will be handled by a call center, which would answer the call, ask the caller for his or her location and conduct a "warm" transfer to the appropriate PSAP – in the same way that Mobile Satellite Service calls are handled.

To be sure, the Net 911 Improvement Act indicates that this issue is worthy of further study, suggesting that the E911 Implementation Office should consider future VoIP autolocation technologies. But it would be arbitrary and capricious for the Commission to rush ahead and act now to adopt rules that impose significant costs on the industry – all to solve a problem that has not yet been shown to exist in the real world. *See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) ("*State Farm*") (finding that agency decisionmaking is arbitrary where agency fails to articulate a rational connection between its decisions and demonstrated facts). Even the Commission's predictive judgment must be based on concrete evidence, which is absent here. *See Time Warner Entertainment Co., LP v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) (while court "must give appropriate deference to predictive judgments," the agency may not "simply posit the existence

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of the disease to be cured,” particularly where it “has put forth no evidence at all” regarding the problem to be solved).

Moreover, the record contains no evidence that the potential number of out-of-region Wi-Fi-based 911 calls from dual-mode CMRS handsets will ever exceed the level of MSS 911 calls for which the Commission previously found that a call center was an adequate solution. At the time it adopted its E911 rules for MSS, the Commission found that each of the two MSS providers were each handling approximately 10-12 911 calls *per month* through the call center.^{1/} There is no rational basis for the Commission to explain why routing, over a seven-month period, 140-168 MSS-based 911 calls^{2/} through a call center should be permissible, but the potential, over the same period, for routing less than 1 in 400,000 911 calls from dual-mode handsets to a call center requires creation of a wholly unproven and likely infeasible system for sharing last known cell site information among wireless carriers. “[A]n agency changing its course must supply a reasoned analysis” *State Farm*, 463 U.S at 57.

Furthermore, precipitous action on this issue now would be incompatible with the Net 911 Improvement Act itself and Congress’s clear intent: The Act sets a deadline of 90 days for the Commission to issue rules implementing the *existing* duties of VoIP providers; it does *not* require the issuance of new dual-mode-phone autolocation rules during that period. To the contrary, as noted above, the Act directs the E911 Implementation Office to evaluate and report on VoIP autolocation technologies. The Commission’s proposal to simply adopt a subset of what are, essentially, VoIP autolocation rules, outside of that process, conflicts with Congressional intent and would necessarily produce an arbitrary and capricious result that fails to consider the larger picture.

Please contact me if you have any questions.

Sincerely,

/s/ Lynn R. Charytan

Lynn R. Charytan
Counsel to T-Mobile USA, Inc.

^{1/} See Report and Order and Second Further Notice of Proposed Rulemaking, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25349 ¶ 24 & n.69 (2003).

^{2/} 10-12 MSS 911 calls per carrier per month times 2 carriers times seven months is 140-168 MSS 911 calls.

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