

December 10, 2008

EX PARTE

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

Re: *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114

Dear Ms. Dortch:

On December 9, 2008, Thomas Sugrue, Vice President – Government Affairs, Kathleen O’Brien Ham, Vice President – Federal Regulatory Affairs, and Jim Nixon, Director – Government Affairs of T-Mobile USA Inc. (“T-Mobile”) and I, on behalf of T-Mobile, met with Bruce Gottlieb, Wireless Legal Advisor to Commissioner Copps, to discuss the proposed order on E911 accuracy tentatively scheduled for consideration on the Commission’s December 18, 2008 open meeting. During this meeting, the T-Mobile participants made the following points:

- T-Mobile does not take issue with the ultimate goal for location performance under the AT&T proposal – accuracy measurements within 100m for 67% of calls in 100% of counties, and within 300m for 90% of calls in 85% of counties – measured at the county level.
- Nevertheless, the FCC may not adopt the specific timetable and benchmarks in the AT&T proposal without some evidence that they are technically and economically feasible for carriers other than AT&T; any other result would be arbitrary and

capricious.¹ And any such conclusion must be based on support in the record: “the FCC’s ‘conclusory statements cannot substitute for reasoning that is wanting in [the] decision.’”²

- However, the record demonstrates overwhelmingly that the AT&T-proposed intermediate benchmarks and the timetable for achieving full compliance are *not* technically and economically feasible for T-Mobile or for any other carriers using network-based 911 solutions today, other than AT&T. The FCC cannot disregard the record. Several network-based carriers other than AT&T filed comments stating that AT&T’s proposed intermediate benchmarks and timetable are not achievable. And notably, the sole carrier that asserted that those benchmarks and timetable are technically feasible for all carriers is AT&T itself – with no analytical support or explanation other than the assertion that its intermediate benchmarks have “flexibility” to permit the use of “a variety of means and . . . technologies.”³ AT&T provides no explanation of *how* other carriers’ “means and technologies” could achieve the benchmarks, nor does it in any way refute the detailed evidence other carriers put forth to the contrary. And AT&T does not even *assert* that its benchmarks are *economically feasible* for other carriers.
- Nor can the Commission seek deference for a so-called “predictive judgment” that carriers utilizing network-based 911 solutions today can meet AT&T’s proposed intermediate benchmarks or its timetable for compliance with the ultimate accuracy requirements. AT&T acknowledged that the proposed benchmarks “cannot be met solely in reliance on technology that is available today,” and that its proposal “reflect[s] an optimistic assessment of the speed with which carriers will be able to develop and deploy new technologies.”⁴ Neither AT&T nor any other source in the record provided any basis

¹ See *Nuvio v. FCC*, 473 F.3d 302, 303 (2006) (recognizing that inquiries into “technical and economic feasibility” are “made necessary by the bar on arbitrary and capricious decision-making”); *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991) (“impossible requirements imposed by an agency are perforce unreasonable”); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (“an agency rule would be arbitrary and capricious if the agency has . . . entirely failed to consider an important aspect of the problem, offered an explanation . . . that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”); *CBS Corp v. FCC*, 535 F.3d 167174 (3d Cir. 2008); *Advocates for Highway & Auto Safety v. Fed. Motor Carriers Safety Admin.*, 429 F.3d 1136, 1145-1147 (D.C. Cir. 2005).

² *AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001), quoting *Arco Oil & Gas Co. v. FERC*, 932 F.2d 1501, 1504 (D.C. Cir. 1991).

³ Reply Comments of AT&T, Inc., PS Docket No. 07-114, at 2 (filed October 14, 2008).

⁴ Comments of AT&T Inc., PS Docket No. 07-114, at 3 (filed October 6, 2008).

for or explanation of this “optimistic assessment.” A prediction based on the absence of any substantiated record evidence would be arbitrary and capricious.⁵

- In order to avoid acting arbitrarily and capriciously, the Commission must address the record evidence concerning the infeasibility of the AT&T benchmarks and timetable. And it also must conduct an inquiry into whether the “the relative harm . . . exceeded the relative benefits.”⁶ Ignoring relative harm would be “fail[ure] to consider an important aspect of the problem,” and thus would be arbitrary and capricious.⁷ If forced to attempt to meet county level requirements in rural areas on the basis of its network-based U-TDOA technology, T-Mobile would likely have to turn off – or not deploy – service in many locations where the standards could not be met.⁸ The Commission’s new rules could have an unintended consequence of less coverage, less competition, and less ability to use mobile 911 and E911 in rural areas. There is no basis in the record for concluding that the net harms of AT&T’s proposed intermediate benchmarks and timetable for ultimate compliance will not exceed the net benefits.
- In evaluating whether AT&T’s proposed intermediate benchmarks and timetable for ultimate compliance are technically and economically feasible for other carriers utilizing network-based 911 technologies, the Commission must consider the following facts, among others:
 - Both Verizon and Sprint are utilizing handset-based, not network-based, E911 location technologies. Their ability to meet their proposed E911 accuracy requirements has no bearing upon network-based carriers’ ability to meet the intermediate requirements of the AT&T Proposal – the only proposal applicable to network-based carriers. Verizon and Sprint cannot be considered as part of any purported “consensus” as to the appropriate technical and economic feasible transition schedule to county-level accuracy requirements for network-based carriers.
 - Implementation and deployment of A-GPS for GSM is tied directly to the implementation and deployment of 3G handsets and services, and AT&T is at least 2-3 years ahead of all other GSM carriers in the deployment of those services. There is no basis in the record for concluding that other GSM carriers can reasonably expect to be able to deploy 3G services and handsets to “catch-up” with AT&T and achieve the same levels of A-GPS capable handset penetration as

⁵ *BellSouth Telecoms., Inc. v. FCC*, 469 F.3d 1052, 1060 (2006) (“We cannot overlook the absence of record evidence . . . simply because the Commission cast its analysis as a prediction of future trends.”)

⁶ *See id.* at 1060.

⁷ *State Farm*, 463 U.S. at 43.

⁸ Declaration of John F. Pottle and Ryan N. Jensen, PS Docket No. 07-114 at 8-9 (filed December 8, 2008).

AT&T by AT&T's proposed intermediate benchmarks. T-Mobile and RCA thus proposed to defer AT&T's proposed intermediate benchmarks and ultimate compliance date for two years beyond the dates proposed by AT&T.

- AT&T's proposal to include counties that cannot be terrestrially triangulated during the period carriers will be relying on terrestrially-based location technologies is arbitrary and capricious. AT&T's proposal defies basic physics and engineering. It is mathematically impossible to triangulate a unique location based on fewer than three measurement points, and it is also mathematically impossible to triangulate a location based on three or more measurement points that are located in a line. Even when the three points are not in a line, it is not possible to terrestrially triangulate a location with the required precision if there is not sufficient angular separation – the error range is too high and cannot be reduced. The Commission cannot ignore these basic mathematical and engineering realities. T-Mobile and RCA thus proposed to exclude counties with only one or two cell sites until a carrier could comply using only handset-based measurements (which, using A-GPS, would be satellite-triangulated, not terrestrially triangulated).

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These rules have already been through the courts once because the Commission rushed to adopt rules that could not be accomplished in practice and were not justified on the basis of the record before the Commission. The bar on arbitrary and capricious rulemaking requires the Commission not just to consider what outcomes are *desirable*, but what outcomes are *technically and economically feasible*. If the Commission adopts the AT&T proposal substantially as-is, it will once again be eschewing the technically and economically feasible in order to impose rules based on wishful thinking.

Sincerely,



John T. Nakahata

Counsel to T-Mobile USA, Inc.

cc: Bruce Gottlieb