

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN ABERNATHY

In re: Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Request for Waiver by Cingular Wireless LLC, Sprint Spectrum L.P. d/b/a Spring PCS, Verizon Wireless, AT&T Wireless Services, Inc., Nextel Communications, Inc. (adopted Oct. 2, 2001)

Today's orders are another positive, albeit complex and difficult, step towards the world's first wireless E911 location-based public safety network. That journey began in 1996 when the national wireless and public safety trade associations reached a hard-fought consensus agreement on a deployment plan for E911. That solution was to be network-based, rolled out in a multiyear deployment beginning in 2001, and achieve accuracy requirements of 125 meters – about 67% of the time. Remarkably, Sprint sold its first E911 capable handset on Monday – a solution not even contemplated by the Commission's first order back in 1996 – with better than twice the level of accuracy thought possible in our original order. The waiver and enforcement referrals we take today should not cloud the fact that we have made tremendous progress on E911. There is no doubt that our collective sensitivity to public safety and individual security were greatly heightened by the events of September 11, 2001. Indeed, the terrorist attacks only served to drive home the importance of wireless communications to our national communications infrastructure and our everyday lives. Today we validate that significance by becoming the only nation in the world that has harnessed the power of location-based wireless cellphone technologies to assist public safety in performing their vital work. The Commission working with Congress, the public safety community, and the carriers should be proud of this accomplishment, but also must continue to be diligent in finishing the task.

I believe that the parties and the Commission staff have worked together in good faith to craft the best available solutions to serve the American people – and I support that result. If I had dissented from some or all of today's orders, I could have claimed that the Commission was not “tough enough” on the carriers and cast myself in the more politically beneficial role as defender of public safety. Although these issues are extremely difficult, I rejected that approach. I have spent extensive time with members of Congress, the carriers, manufacturers, consumers and the public safety community to better understand the challenges faced by each of the parties. Would I prefer that carriers, particularly those in rural areas, roll out E911 more quickly? Of course. Would I prefer that manufacturers provide the necessary equipment on a timely basis to ensure compliance? Yes. Would I prefer that every PSAP have adequate funds to upgrade their facilities immediately to be ready to utilize location-based information? Absolutely. Would I prefer that we had ruled on these waivers long before today and sent clear signals to all the parties about our expectations regarding deployment and our emphasis on enforcement? Beyond a doubt, yes. But none of those things happened and all of us are responsible.

The Context of Today's Decisions

Our E911 regime was a government-led effort to speed the development and deployment of a new technology prior to a commercial demand for that product. It was not based on any statutory mandate; nor was it based on any tangible technological showing. It was a tremendous undertaking, full of uncertainty about the technology, the timing, and the costs for all parties.

Each step forward in this process has been engendered by a constructive dialogue amongst all of the parties based on an evolving knowledge base – not by carriers pointing at manufacturers, PSAPs pointing at carriers, or manufacturers pointing at the Commission. For example, our adoption of the handset-based alternative evolved from concerns that permitting only a network-based solution was technologically discriminatory and greater accuracy could be achieved through handset solutions. In that instance, we recognized our initial network-only decision as only a first step based on the best information available. With the active support of many in the public safety community, we modified our policy; as a result, consumers and public safety entities will soon be able to locate handset-based consumers twice as accurately as network-based.¹ It was the right decision then, and it remains the right decision today. We owe it to the parties, and the American people to engage beyond the sound bites, by continually assessing our policy approaches while striving to achieve the maximum good for the maximum number in the shortest time frame.

The Commission's critical date for E911 Phase II deployment is December 31, 2005 when 95% of all handsets must be E911 Phase II compatible and achieve our accuracy requirements.² Significantly, none of the waiver requests we act on today sought modification of our full deployment deadlines or the ultimate accuracy requirements. Therefore these waivers only request modifications of interim steps on the way to compliance. Despite the Commission's efforts to adopt a plan developed through a consensus process with all interested parties, those interim predictions on the pace of technology simply missed their mark.

In light of these circumstances, today we grant a number of waivers based on specific showing by each carrier of a clear path to compliance. These waivers permitted each carrier to develop and implement their own compliance schedule, while maintaining the overall integrity of our E911 policy goals. However, absent specific showings of their compliance efforts, carriers received clear signals that their waivers would be rejected. In two cases, carriers withdrew their waivers amidst mounting questions about the efficacy of their proposed solutions. These carriers are now engaged in discussions with Enforcement Bureau staff concerning possible consent decrees to resolve these

¹ See, e.g., Reply Comments of APCO, CC Docket No. 94-102 (filed July 2, 1999) (stating that "facilitating handset-based technologies as an option may actually speed delivery of Phase II capability").

² For handsets, this accuracy level is 50 meters – 67% of the time and 150 meters – 95% of the time. Alternatively for those carriers who chose a network-based solution, the key date is full deployment 18 months after a Public Safety request or October 2002, whichever is later. The accuracy requirements for the network-based solution are 100 meters – 67% of the time and 300 meters – 95% of the time.

issues. It is my hope and expectation that these proceedings will yield concrete and verifiable plans to achieve full compliance. Moreover, I trust that treating these compliance issues in the enforcement context will send a clear signal to those that might have been tempted to take these obligations lightly.

It is also important to recognize that some of the carriers' requests actually speed deployment of certain aspects of E911. For example, Sprint and Verizon plan to deploy all of their Phase II switch upgrades regardless of whether a PSAP has made the request that would trigger the obligation for such deployment. Verizon also plans to install a network-based technology to 100% of two counties (St. Clair County, IL, and Lake County, IN) by December 31, 2001 and 100% deployment of a network-based solution in three additional markets - Cook County, IL (Chicago), St. Louis County, MO (St. Louis), and Harris County, TX (Houston), by April 1, 2002 -- all in advance of our requirement to reach 100% of these coverage areas by Oct. 1, 2002. In addition, AT&T plans to deploy a GSM network that will be location-capable its inception -- regardless of whether there is a valid PSAP request for deployment.

Why Approval of the Nextel and Verizon Waivers and Our Enforcement Approach is Appropriate

Although some disagree, I believe approval of the Nextel and Verizon waivers and the enforcement approach we adopt today best serves American consumers. While I am disappointed that we are addressing these pleadings at the 13th hour, I am not at all convinced that denial would advance the public interest. Denial would not lead to the miraculous introduction of equipment by manufacturers or any other silver bullet solution. Instead, denial would mean more revised plans, more changed technologies, and potentially more delay. It also could mean that some carriers walk away from E911 and challenge the Commission's E911 mandate in court with the potential for even greater delays. As discussed above, the E911 deadlines and performance requirements were largely aspirational and the public safety and wireless communities have worked hard together to make this possible; a court challenge prompted by unrealistic policies could jeopardize the entire program. I am seriously concerned about the impact of delay, litigation costs, uncertainty, and the risk of litigation on the actual deployment of E911 to the American people.

A denial of the waiver requests based on comparisons between carriers compliance plans is also inconsistent with the technical reality of America's wireless networks. To their considerable credit, American wireless regulators permitted wireless carriers to adopt a broad range of technical standards. This policy reflected a fundamental trust in the powers of free markets to drive licensees to the best service offerings for the public. That approach yielded, among other things, the technical interface that forms the foundation for third generation wireless networks. It also yielded distinct technological networks for each licensee. Therefore one cannot readily impose a technical solution or timeline on Verizon just because it works for Sprint. Verizon operates 800 MHz analog, 800 MHz digital and 1900 MHz PCS, and for many of its most popular regional and national plans, it uses a tri-mode phone available from a more

limited number of vendors - whereas Sprint operates solely a PCS network at 1900 MHz and uses digital-only phones. Similarly, Verizon has roughly three times as many subscribers to which it must get ALI-compliant handsets than Sprint. While Sprint has been a leader in E911 and should be given credit for their commitments, imposing their path to compliance on other licensees does not withstand vigorous scrutiny. Nextel is also uniquely situated. It has exactly one vendor to supply their equipment; while that arrangement has yielded significant advantages to Nextel and its customers in other contexts, it does impact their ability to respond to the E911 mandate. It should also be noted that the public safety community offered qualified support for Nextel's approach.³ Therefore one cannot compare Verizon's network with Sprint's or Nextel's to Cingular's and adopt a cookie cutter approach to their paths to compliance. Unique networks require unique E911 solutions.

I appreciate the frustration of my colleague regarding the Commission's lack of control over manufacturers and vendors. Whenever the Commission mandates various technological capabilities by licensees, it runs into the very real limits imposed by manufacturing capabilities and timelines. But it is a mistake to equate manufacturer conduct with carrier conduct and to punish one for the acts and omissions of the other. I do believe that carriers are obligated to use their best efforts to obtain compliant equipment in a timely fashion. However, it is unreasonable for the Commission automatically to "begin an enforcement action" against a carrier because a vendor "fails to make equipment . . . available on time" based on the carriers' "significant control over their vendors." First, as someone who worked in the wireless industry, I believe this assertion is inconsistent with the global marketplace and the multiple business factors which affect manufacturing decisions, especially in light of the fact that the U.S. is the only country mandating this E911 equipment. Wireless manufacturing is a global industry with thousands of carriers around the world seeking products. And each of the national carriers here has only a fraction of that market. These carriers generally do not have the equipment market power to exercise "significant control." Second, creating carrier liability based on manufacturer conduct is essentially a back door effort to expand the Commission's jurisdiction so as to reach manufacturers. The FCC's jurisdiction is limited by Congress through the statute and only Congress can expand that jurisdiction. Third, there is significant evidence that carriers cannot predict with complete accuracy (which is what our initial rules required) when products will be available and how they will perform when initially deployed – regardless of the commercial or other incentives to do so. One needs look no further than the extended delays in rolling out 3G handsets and performance issues with 2.5G for a dramatic illustration of this fact.⁴

I also have serious concerns about prejudging any future carrier filings regarding E911. The Commission has an obligation to judge each licensee's filing on the merits at the time they are filed. I do not believe adjudicatory filings, such as waiver requests,

³ See Comments of APCO, CC Docket No. 94-102, 3 (filed Jan. 5, 2001); Comments of NENA, CC Docket No. 94-102, 4 (filed Jan. 5, 2001).

⁴ See, e.g., Elisa Batista, *3G Stands for 3-Year Glitch*, Wired News at <http://www.wired.com/news/wireless/0,1382,44029,00.html> (May 23, 2001).

should be prejudged as “suspicious” any more than they should be prejudged as “sympathetic.”

Finally I feel compelled to clarify a few facts about our Order. Today’s Order does not create a dramatic extension of the handset phase-in schedule that the prior Commission rejected a year ago. The extension referenced in the Fourth Report and Order called for a blanket delay for 100% of new activations until 4/1/05 with no specific requirement to ever reach the 95% overall penetration level. Even the lengthiest extension in today’s Orders, granted to Nextel, beats that schedule for new activations by four months and maintains the integrity of the 95% penetration requirement. The other carriers, Verizon (15 months), Sprint (more than two years), AT&T/GSM (more than three years), Cingular/GSM (more than two and a half years) dramatically exceed that proposal and maintain the 95% penetration threshold for 2005. In addition I want to point out that the Commission’s approval in 1999 of a handset-based E911 solution did not represent a “delayed schedule” for E911 deployment. The handset-based E911 deployment option was new, so there was nothing to delay. Although it is true the initial roll out date was later than the network-based solution schedule, this change was supported by many in the public safety community because a handset solution doubled the accuracy of the location information – a vital and lifesaving improvement over our initial plan.

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The final chapters of E911 deployment, like the first, must have many authors – public safety, carriers, manufacturers, technology vendors, incumbent local exchange carriers, Congress and the Commission. In this regard, I specifically wish to thank the public safety community for their tireless efforts in this docket. As the events of September 11 reminded each of us, the men and women of the public safety community are dedicated public servants who risk their lives to ensure our safety. They are truly American heroes. Remarkably, some of these heroes go beyond even those substantial responsibilities to volunteer their time as advocates for public safety policy issues at the Commission. The Commission and the public greatly benefit from their unique contributions to the decision-making process. I also wish to thank Congressman Upton, Congressman Markey, Congressman Rush, Congresswoman Eshoo, Senator Hollings, Senator McCain, and Senator Burns for their continued attention and constructive engagement on this difficult issue. It is unquestionable that American consumers will benefit from E911 deployment, and the bipartisan leadership of these members has sharpened our resolve, generated a meaningful public dialogue, and helped to shape the approach we adopt today. Finally I wish to recognize the tremendous effort of the Bureau staff on this docket. These issues are extremely difficult, complex, and changing. They have required innumerable long nights and lengthy redrafts. Your hard work and dedication are greatly appreciated. Going forward, this important work will require all of us to continue this difficult work together to deliver the benefits of enhanced 911 services to the American people.

