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Rural Cellular Association (“RCA”), Sprint Nextel Corporation (“Sprint Nextel”), T-Mobile U.S.A., Inc. (“T-Mobile”), and Verizon Wireless (collectively, “Movants”) respectfully request the Court to grant a stay of the Federal Communication Commission’s *Wireless E911 Location Accuracy Requirements* Report and Order (“*Part A Order*” or “*Order*”)<sup>1/</sup> pending judicial review. The *Order* imposes new requirements for measuring how accurately wireless telephone carriers, like Movants, must locate the geographic origin of a wireless 911 call and includes a series of compliance benchmarks, the first of which is September 11, 2008. The *Order* is legally deficient because the FCC disregarded the Administrative Procedure Act and imposed impossible requirements that have no support in the administrative record. With the *Order*’s first compliance deadline now less than seven months away, it is critical that the Court stay the effectiveness of the *Order* to enable Movants to obtain judicial review before being irreparably harmed by their inability to comply with unlawful and infeasible requirements. Movants respectfully request expedited consideration of this stay motion, without which they will be irreparably harmed by having to make costly, unrecoverable investments in the very near future to attempt to comply with the *Order*.<sup>2/</sup>

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<sup>1/</sup> Report and Order, *Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 20105 (2007) (attached as Ex. 1).

<sup>2/</sup> Respondents have indicated they will respond to this stay motion within 8 business days and will not seek an extension of time. *See* Fed. R. App. Pro. 27(a)(3)(A).

Movants are likely to prevail on the merits of their appeal, and thus satisfy the first criterion for a stay, for several reasons. *First*, the FCC adopted critical parts of the *Order* (the interim benchmarks) in clear violation of the APA's notice and comment requirements. It based them on an ex parte suggestion made by a commenter in a telephone conversation the Friday before the FCC announced its decision on a Tuesday. In addition, the FCC adopted compliance benchmarks in the *Part A Order*, even though it had expressly reserved that issue and others decided in the *Order* for "Part B" rulemaking – on which the comment period had not yet closed. *Second*, the rules the FCC adopted are arbitrary and capricious, because the record contains no support for the feasibility of complying with the requirements the FCC imposed. To the contrary, the record evidence uniformly indicates that compliance is *impossible* using available technology. *Third*, the FCC's *Order* is arbitrary and capricious because the agency decided inextricably related Part A and Part B issues in isolation from one another. Carriers cannot comply with the *Order* without knowing how the agency will decide important Part B issues that have not yet been resolved.

Making the procedural irregularities even worse, the FCC failed to publish the *Order* in the Federal Register for over five months after adopting it. During this time of legal limbo, the *Order* was not legally effective and thus unappealable to this Court, but the time available for Movants to meet the deadlines in the *Order*

was rapidly slipping away. The Commission thus made it impossible for Movants to obtain judicial review before the Order's first September 11, 2008 benchmark.

If the *Order* is not stayed, Movants will ultimately find themselves in violation of FCC rules and thus will suffer irreparable harm to their goodwill. Moreover, the *Order* will require Movants to spend vast sums to implement short-term fixes even to try to come into compliance with the near-term benchmarks – fixes that will not be useful in complying with the *Order*'s ultimate standard.

Granting a stay will not harm any other party and will benefit the public interest. Wireless users cannot be harmed by staying impossible requirements that carriers cannot meet. And a stay will ensure that carriers are not forced to cut back on service in areas in which compliance is impossible, the one step that may help them avoid violating the *Order*. Without a stay, the *Order* would actually reduce 911 service for the public, rather than improving 911 autolocation capability.

### **BACKGROUND**

Wireless phones have contributed greatly to public safety. By untethering 911 calling capability from the landline telephone network, they enable users to make emergency calls from ground zero of an accident or other emergency. Further, carriers have spent hundreds of millions of dollars to deploy nationwide wireless enhanced 911 (“E911”) services, which automatically inform public safety authorities of the 911 caller's location. Since 1996, FCC rules have required

carriers to provide such information to local public safety answering points (“PSAPs”) that request it.<sup>3/</sup>

Locating mobile 911 callers poses a technical challenge, which carriers have met by implementing two types of technologies. Both rely on triangulation – one among cell towers (a “network-based” approach), and one among GPS satellites (a “handset-based” approach). T-Mobile, AT&T, and many members of RCA use a network-based solution; Sprint Nextel and Verizon Wireless use handset-based GPS technology. FCC rules prescribe how accurate the location information must be for each technology.<sup>4/</sup> Prior to the *Order*, the FCC generally had permitted wireless carriers to measure compliance on a network-wide basis.<sup>5/</sup>

On June 1, 2007, the FCC began a bifurcated rulemaking on issues relating to the accuracy of E911 services.<sup>6/</sup> In the *first* stage, the FCC sought comments on the appropriate geographic area for measuring carrier compliance with location

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<sup>3/</sup> Report and Order and Further Notice of Proposed Rulemaking, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676 (1996).

<sup>4/</sup> Carriers using network-based technology must locate callers within 100 meters for 67 percent of calls, and within 300 meters for 95 percent of calls. Carriers using handset-based technology must locate callers within 50 meters for 67 percent of calls and within 150 meters for 95 percent of calls. *See* Third Report and Order, *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 FCC Rcd 17388 ¶ 12 (1999).

<sup>5/</sup> For example, the FCC authorized T-Mobile and Cingular to measure compliance nationwide, *See, e.g., Order, T-Mobile USA, Inc.*, 18 FCC Rcd 15123 ¶ 2 n.11 (2003) (authorizing nationwide compliance).

<sup>6/</sup> Notice of Proposed Rulemaking, *Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 10609 (2007) (“*E911 NPRM*”) (attached as Ex. 2).

accuracy standards (tentatively concluding that PSAP-level compliance<sup>7/</sup> should be required) and whether to defer enforcement of this new requirement to give carriers time to comply (Part A of the NPRM). In the *second* stage, the FCC sought comments on a broader range of issues relating to future improvements in E911 service – including *how long* carriers should have to comply with any new geographic-level mandate and whether to establish interim “benchmarks” (Part B of the NPRM).<sup>8/</sup> The FCC established separate comment cycles for Parts A and B of the proceeding.

The FCC adopted the *Part A Order* on September 11, 2007, before the Part B comment period had closed. Rather than releasing the text of the *Order*, it announced by News Release that carriers would be required to satisfy location accuracy requirements at the level of each PSAP to which they provide information.<sup>9/</sup> The News Release also announced the FCC’s decisions on a number of issues the agency had reserved for Part B of the proceeding, and on which it was

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<sup>7/</sup> “PSAPs can be as small as several city blocks or the width of a state highway,” their “boundaries vary over time and do not remain constant.” Sprint Nextel FCC Petition for Stay at 13 (filed Jan. 28, 2008). “At best, they are estimated to number from 5,000 to over 8,000.” Sprint Nextel Comments at 4 (filed Jul. 5, 2007) (attached as Ex. 3).

<sup>8/</sup> *E911 NPRM* ¶ 1. Part A comments and reply comments were due by July 5 and July 11, 2007, respectively, and Part B comments and reply comments were due by August 20 and September 18, 2007, respectively.

<sup>9/</sup> *FCC Clarifies Geographic Area Over Which Wireless Carriers Must Meet Enhanced 911 Location Accuracy Requirements*, News Release (rel. Sept. 11, 2007) (“9/11 News Release”) (attached as Ex. 4).

still receiving comments – including the key issues of the timeframe for compliance and interim benchmarks. The FCC set a 5-year deadline for compliance with the PSAP-level mandate, and it imposed 1-year and 3-year benchmarks requiring compliance at the Economic Area (“EA”) level and at the Metropolitan Statistical Area (“MSA”) or Rural Service Area (“RSA”) level, respectively – geographic areas that are wholly unrelated to the areas served by PSAPs.<sup>10/</sup> In addition, at three years a carrier must comply at the PSAP level in at least 75% of the areas served by PSAPs in which the carrier provides service.<sup>11/</sup>

Interim benchmarks were not discussed in the Part A comments, since the FCC had reserved that issue for Part B of the proceeding. Instead, the benchmarks the agency adopted were proposed for the first time by public safety organizations APCO and NENA in a telephone conversation with FCC personnel on September 7, 2007,<sup>12/</sup> more than three months after the NPRM was released and only hours before the beginning of the Sunshine period – the time period during which presentations to an agency may not be made without invitation.<sup>13/</sup> The Commission

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<sup>10/</sup> *Id.* at 1. The FCC awards radio licenses by geographic areas, including EAs, MSAs, and RSAs. Nationwide there are 172 EAs, which are generally larger than MSAs and RSAs. All are unrelated to the geographic areas served by PSAPs.

<sup>11/</sup> *Id.*

<sup>12/</sup> APCO/NENA Ex Parte (Sept. 7, 2007) (attached as Ex. 5) (proposing exactly the benchmarks the FCC adopted two business days later).

<sup>13/</sup> *See FCC to Hold Open Commission Meeting Tuesday, September 11, 2007*, Commission Meeting Agenda, Item No. 1 (rel. Sept. 4, 2007) (beginning Sunshine period at 5:30 p.m. on September 7, 2007) (attached as Ex. 6).

nonetheless adopted the proposal on September 11, 2007, a mere two business days later. No party received more than minimal notice of the APCO/NENA proposal, and most parties were likely wholly unaware of the benchmark proposal.

Notwithstanding the FCC's haste to adopt new rules, it did not release the text of its decision until more than two months later, on November 20, 2007. By then, the first benchmark was already less than ten months away. Moreover, the *Order* imposes a requirement that the FCC did not mention at its September 11 open meeting or in its News Release: an additional 3-year requirement that wireless carriers meet 150% of the applicable accuracy standard in every area served by a PSAP.<sup>14/</sup> Meanwhile, the FCC still has not yet adopted an order addressing the remaining Part B issues.

RCA, T-Mobile, and Sprint Nextel each asked the FCC on January 28, 2008 to stay the *Order* pending judicial review, and Verizon Wireless did so on February 8, 2008.<sup>15/</sup> T-Mobile sought expedited action on its stay request in light

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<sup>14/</sup> *Part A Order* ¶ 18 (although the *Order* states that compliance is required in all PSAPs "within at least 50% of the applicable location standard," the example given by the FCC makes clear that it meant 150%). APCO/NENA also proposed this benchmark. *See* APCO/NENA Ex Parte (Sept. 7, 2007).

<sup>15/</sup> Attached as Exs. 7-10. *See also* Alltel Corp. Response in Support of Motions for Stay (filed Feb. 4, 2008) (attached as Ex. 11); APCO Opposition to Stay (filed Feb. 7, 2008) (attached as Ex. 12).

of the fast-approaching first compliance deadline.<sup>16/</sup> The FCC has effectively denied these applications by failing to take any action on them.<sup>17/</sup>

The FCC delayed publication of the *Order* in the Federal Register until February 14, 2008, more than five months after adopting the *Order*.<sup>18/</sup> RCA and T-Mobile filed a joint petition for review of the *Order* on February 20, 2008; Verizon Wireless and Sprint Nextel filed petitions for review on February 21 and 25, 2008, respectively. The Court subsequently consolidated these cases.<sup>19/</sup> Since the deadlines in the *Order* continued running despite the publication delay, carriers now have less than seven months to comply with the *Order*'s first benchmark.

## **ARGUMENT**

A stay is warranted here because (1) Movants are likely to prevail on the merits; (2) Movants will suffer irreparable harm if a stay is not granted; (3) other interested parties will not be harmed if the stay is granted; and (4) the public interest favors granting a stay.<sup>20/</sup>

### **I. MOVANTS ARE LIKELY TO SUCCEED ON THE MERITS.**

#### **A. The FCC Flouted the APA's Notice And Comment Requirements.**

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<sup>16/</sup> T-Mobile FCC Stay Application at 1, (filed Jan. 28, 2008).

<sup>17/</sup> See Fed. R. App. P. 18(a).

<sup>18/</sup> The APA requires agencies to publish rule amendments "currently" in the Federal Register. See 5 U.S.C. § 552(a).

<sup>19/</sup> The Court consolidated these cases also with No. 08-1075, filed by AT&T Inc. AT&T filed a stay motion with this Court on February 29, 2008.

<sup>20/</sup> See, e.g., *Washington Area Metro. Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841 (D.C. Cir. 1977); Fed. R. App. P. 18; Cir. R. 18(a)(1).

The FCC's last-minute inclusion of benchmarks in the *Part A Order* – after having reserved the benchmark issue for Part B of the proceeding – blatantly violated the APA's mandate that agencies “give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments”<sup>21/</sup> Not surprisingly, the Part A comments do not discuss interim benchmarks, and the record is devoid of evidence to support them. Indeed, as noted, the only discussion of interim benchmarks in the Part A proceeding arose in APCO/NENA's ex parte telephone conversation with FCC personnel just four days before the *Order* was adopted and only hours before the Sunshine period began.<sup>22/</sup> That ex parte conversation was no substitute for the requisite notice.

As a practical matter, most parties got *no notice at all* of the APCO/NENA proposal before the Sunshine period began. Though the Sunshine rules allow parties to make presentations if requested by the agency,<sup>23/</sup> the FCC solicited comments from only a small handful of interested parties – entirely precluding the roughly 40 other parties who had previously filed Part A comments, including

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<sup>21/</sup> 5 U.S.C. § 553(c); *see also Federal Express Corp. v. Mineta*, 373 F.3d 112, 120 (D.C. Cir. 2004).

<sup>22/</sup> APCO/NENA Ex Parte, (Sept. 7, 2007).

<sup>23/</sup> *See* 47 C.F.R. § 1.1203 (prohibiting presentations regarding matters listed on the Sunshine Agenda); *FCC to Hold Open FCC Meeting Tuesday, September 11, 2007*, FCC Meeting Agenda, Item No. 1 (Sept. 4, 2007).

RCA and Sprint Nextel, from commenting on the benchmark proposal.<sup>24/</sup> As Commissioner Adelstein observed in dissent,

Adopting in whole cloth an eleventh hour proposal at the stroke of Sunshine's end is not the way to promote an atmosphere of progress. Instead of working with all stakeholders, the FCC today simply adopts on a Tuesday a proposal filed on Friday. Offering no opportunity for deliberation or participation by so many stakeholders does not befit an expert agency.<sup>25/</sup>

The *Order* thus violates the APA, which requires a second round of comments before adoption of a rule that is not a "logical outgrowth" of the proposed rule.<sup>26/</sup>

The FCC likewise violated the APA notice and comment requirement by deciding in its *Part A Order* other key issues that it explicitly reserved for the Part B proceeding, including how long carriers should have to comply (5 years); and whether the amount of time should vary based on certain factors (no).<sup>27/</sup> As Commissioner Adelstein pointed out, the *Order*

is fraught with highly dubious legal and policy maneuvering that bypasses a still developing record on what should be the reasonable and appropriate implementation of details. Instead of giving the public safety community, industry and this FCC the benefit of a

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<sup>24/</sup> All three parties that *were* asked by the FCC to comment on the benchmark proposal strongly opposed it. *See* T-Mobile Ex Parte, (Sept. 10, 2007) (attached as Ex. 13); Verizon Wireless Ex Parte (Sept. 11, 2007) (attached as Ex. 14); CTIA Ex Parte (Sept. 10, 2007) (attached as Ex. 15).

<sup>25/</sup> Stmt. of Comm'r Adelstein at 2, attached to *9/11 News Release*.

<sup>26/</sup> *See, e.g., Omnipoint Corp. v. FCC*, 78 F.3d 620, 631-32(D.C. Cir. 1996); *Connecticut Light & Power Co. v. NRC*, 673 F.2d 525, 533 (D.C. Cir. 1982) (final rule is not a logical outgrowth of proposed rule when "the changes are so major that the original notice did not adequately frame the subjects for discussion").

<sup>27/</sup> *See E911 NPRM*.

decision based on a full record, the majority plows forward with details on benchmarks and compliance determinations – *findings that are the very subject of the III.B. portion of this [] proceeding.*<sup>28/</sup>

By unexpectedly resolving these Part B issues before the comment period closed, the FCC failed to collect, let alone examine, the relevant data, as the APA requires. It was a similar failure to provide proper notice under the APA of issues to be decided that supported this Court’s recent decision to stay an FCC order concerning back-up power at cell sites, and the same result should apply here.<sup>29/</sup>

**B. The *Part A Order* Is Arbitrary and Capricious Because the Evidence Uniformly Demonstrates That the Geographic-Level Mandates Imposed by the *Order* Are Infeasible.**

The record demonstrates that the *Order*’s geographic-level mandates are not possible using any existing or reasonably foreseeable technology. Commissioner Adelstein rightly expressed “grave concerns about the Commission’s [] decision to put in place benchmarks and compliance deadlines for achieving greater E911 location accuracy without first assessing how we can actually achieve those goals.”<sup>30/</sup> As discussed below, the key passages in the *Order* cite either no evidence at all, or plainly unresponsive evidence, to justify the infeasible mandates.

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<sup>28/</sup> Stmt. of Comm’r Adelstein at 1, attached to *Part A Order* (emphasis added).

<sup>29/</sup> Court Order granting stay motion, Case No. 07-1475 (rel. Feb. 28, 2008) (attached as Ex. 25).

<sup>30/</sup> Summit on 911 Call Center Operations and Next Generation Technologies, FCC, (Feb. 6, 2007) (“*911 Summit*”), archived recording available at <http://www.fcc.gov/realaudio/publicforums.html>.

The *Order* therefore fails to meet APA standards because, as this Court has held, “[i]mpossible requirements imposed by an agency are perforce unreasonable.”<sup>31/</sup>

**1. The 5-year PSAP-level compliance deadline is technically infeasible and unsupported by the record.**

The record reveals a consensus that the accuracy standards cannot be met in every area served by a PSAP in five years using *any* currently available or reasonably foreseeable technology. As Commissioner Adelstein observed, “the record reflects [ ] overwhelming concern regarding the technical feasibility and compliance deadlines . . . .”<sup>32/</sup> The FCC nevertheless ignored even its own federal advisory committee’s conclusion that “it is not technically possible today for every carrier to meet the FCC location accuracy requirement at every PSAP.”<sup>33/</sup>

The *Order* brushes this difficulty aside with the glib and mistaken observation that, if carriers could comply at the level of small states, then PSAP-level compliance is feasible.<sup>34/</sup> However, the possibility that accuracy standards

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<sup>31/</sup> *Alliance for Cannabis Therap. v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991).

<sup>32/</sup> Commissioner Adelstein Stmt. at 2 (Sept. 11, 2007); *see also* T-Mobile Ex Parte at ¶ 3; Sprint Comments at 11 (filed Jul. 5, 2007); Polaris Wireless Comments at 10 (filed Jul. 5, 2007) (attached as Ex. 16).

<sup>33/</sup> *NRIC VII, Focus Group 1A, Near Term Issues for Emergency/E9-1-1 Services, Final Report*, at 51 (Dec. 2005) (“NRIC VII Report”) (attached as Ex. 17); *see also Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>34/</sup> *Part A Order* ¶ 11; *see also id.* ¶ 11 n.23 (“We recognize that geographical variations in service areas can present challenges to the provision of E911 service, but in the interest of public safety, we cannot permit those challenges to justify diminished location accuracy.”).

could be met at the state level in no way supports a conclusion that compliance at the far smaller PSAP level is feasible. State boundaries are generally recognized as the *smallest* geopolitical boundaries that could ensure a sufficient mix of “density/geometry variables” – terrain, site density, geometry, number and type of buildings, ground clutter, and foliage – to allow a reasonable likelihood of meeting the accuracy standards with available technologies.<sup>35/</sup> The performance of a location technology varies greatly with these factors, because obstructions between a caller and the triangulation measuring points (satellites or cell towers) can prevent accurate location estimates.<sup>36/</sup> The negative impact of smaller geographic areas on the accuracy of location estimates is mitigated in smaller states like Rhode Island and Connecticut because they typically present fewer challenging density/geometry variables and have high population densities, which means many cell sites.<sup>37/</sup> The same is not true for areas served by PSAPs that are rural or contain challenging density/geometry variables.

Although the FCC claims that its *Order* “only require[s] service providers to comply with [the new PSAP-level mandate] . . . with whatever location technology they are now using,” and that carriers could improve location accuracy if they were

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<sup>35/</sup> T-Mobile FCC Stay, Pottle/Jensen Decl. ¶ 6 (Jan. 28, 2008) (“T-Mobile FCC Stay Decl.”); *NRIC VII Report* at 50.

<sup>36/</sup> *See, e.g.*, T-Mobile Ex Parte, Pottle/Jensen Decl. ¶ 6 (Sept. 7, 2007).

<sup>37/</sup> T-Mobile FCC Stay Decl. ¶ 7 (Jan. 28, 2008).

merely “willing to invest appropriate resources,”<sup>38/</sup> the record shows that carriers *cannot* meet the mandate simply by throwing resources at existing technologies. For carriers using handset-based technology, location accuracy is compromised if obstructions make insufficient satellite signals “visible” to the handset.<sup>39/</sup> No expenditure will make more satellites visible at any location or time.

Similarly, carriers using existing network-based technology cannot meet the FCC’s PSAP mandate.<sup>40/</sup> This technology calculates the caller’s location by triangulating among at least three cell sites. Location accuracy might theoretically be achieved by multiplying location measurement sites indefinitely, but that solution would be so logistically infeasible, time-consuming, and expensive that it is impossible in the time allowed.<sup>41/</sup> Instead, carriers would be forced to consider curtailing existing service and forgoing service expansion, especially in rural areas.<sup>42/</sup> Thus, “currently deployed . . . location technologies cannot practically and economically meet the [FCC’s] goal of [PSAP-level] compliance.”<sup>43/</sup>

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<sup>38/</sup> *Part A Order* ¶¶ 13, 11.

<sup>39/</sup> *See* Sprint Nextel FCC Petition for Stay at 14, Pabley Decl. at ¶¶ 10-11; Verizon Wireless FCC Request for Stay at 7 (Feb. 8, 2008) (citing Verizon Wireless Comments at 17.

<sup>40/</sup> *See* T-Mobile FCC Stay Decl. ¶¶ 8-11 (Jan. 28, 2008).

<sup>41/</sup> *See id.* ¶¶ 11-15 (Jan. 28, 2008).

<sup>42/</sup> *See id.* ¶ 17.

<sup>43/</sup> Polaris Wireless Comments at 10 (filed Jul. 5, 2007).

The Commission failed to cite any record evidence for its contrary conclusions<sup>44/</sup> or cited unsupportive comments.<sup>45/</sup> The only record evidence that supports even the potential feasibility of PSAP-level compliance relates to possible future hybrid technologies.<sup>46/</sup> The record shows that just *developing* such a new technology would take at least five years.<sup>47/</sup> Implementing the technology in carriers' networks and/or providing subscribers with the needed new handsets would take many more years.<sup>48/</sup> Even the advocates of these technologies recommended "defer[ral] [of] enforcement of the PSAP-level accuracy requirements until carriers have an opportunity to deploy hybrid networks."<sup>49/</sup>

**2. The fast-approaching 1-year and 3-year benchmarks are also technically infeasible.**

There is similarly no support in the record for the feasibility of the Commission's 1-year benchmark or its complex 3-year benchmarks. Indeed, other

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<sup>44/</sup> See, e.g., *Part A Order* ¶ 14 ("[I]t is our judgment based on the record as well as our experience regarding the implementation of similar public safety mandates that carriers will be able to meet the compliance deadline and interim benchmarks set forth in this Order.") (citing nothing).

<sup>45/</sup> E.g., the AT&T letter that the FCC cites for the assertion that carriers can meet the PSAP mandate in five years, *Part A Order* ¶ 17 & n.38, states that at least five years would be needed simply to accomplish handset change-out, *if* a new technology is developed. See AT&T Ex Parte (Sept. 6, 2007) (attached as Ex. 18).

<sup>46/</sup> See TruePosition Comments at 3-6 (filed Jul. 5, 2007) (attached as Ex. 19).

<sup>47/</sup> See T-Mobile Ex Parte at 3 (Sept. 6, 2007) (attached as Ex. 20); T-Mobile Ex Parte, Pottle/Jensen Decl. ¶¶ 7, 12 (Sept. 7, 2007) (attached as Ex. 21).

<sup>48/</sup> T-Mobile Part A Reply Comments at 7 (filed Jul. 11, 2007) (attached as Ex. 22); T-Mobile Ex Parte, Pottle/Jensen Decl. ¶ 12 (Sept. 7, 2007); AT&T Ex Parte (Sept. 6, 2007); see also Polaris Wireless Comments at 8 (filed Jul. 5, 2007).

<sup>49/</sup> Polaris Wireless Comments at 10 (filed Jul. 5, 2007).

than the APCO/NENA ex parte conversation, the only written comment on the interim benchmarks in the Part A record is T-Mobile's letter of September 10, 2007, which strongly *opposes* the benchmarks as technologically *infeasible* and an impediment to carriers' efforts to implement long-term solutions.

While the FCC asserted that interim benchmarks will "ensure that carriers are making progress toward compliance with the Commission's location accuracy requirements at the PSAP level,"<sup>50/</sup> it cites no support in the record for this claim. As the record before the FCC *would* have shown had there been a meaningful opportunity for notice and comment on this subject, attempts by carriers to comply with the infeasible interim benchmarks would actually *divert* resources from exploring the new-technology solutions that offer the only hope of achieving PSAP-level compliance. To meet these very compressed timeframes, carriers cannot rely on future technologies, but instead must race to deploy existing ones. But since these "orphan" technologies cannot achieve PSAP-level compliance, they inevitably will differ from whatever long-term solutions may be developed.<sup>51/</sup> Thus, the benchmarks will divert significant carrier resources into short-term fixes that will not meet the interim benchmarks in many instances, and will bring carriers no closer to meeting the ultimate 5-year PSAP-level requirement.<sup>52/</sup>

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<sup>50/</sup> *Part A Order* ¶ 18; *see also id.* ¶ 1.

<sup>51/</sup> *See* T-Mobile FCC Stay Decl. ¶ 18 (Jan. 28, 2008).

<sup>52/</sup> *See* Polaris Wireless Comments at 8 (filed Jul. 5, 2007).

**C. The *Part A Order* Engages In “Willful Blindness” By Considering Inextricably Related Issues “In Isolation From One Another.”**

Carriers cannot comply with the *Part A Order* without knowing how the FCC will resolve important Part B issues, which still have not been resolved. As commenters noted in opposing bifurcation,<sup>53/</sup> the Part A issue of geographic compliance levels is inextricably related to many Part B issues, such as:

- what tasks will be necessary for carriers to comply;
- whether the two technologies should remain subject to different accuracy standards or be governed by a uniform standard, and what it should be;
- if a single standard is imposed, how long carriers should have to comply with it;
- whether the standard should include added information, such as elevation; and
- what technologies are available, what can they do, and whether the FCC should mandate a particular technology.<sup>54/</sup>

Merely reading this list reveals how closely related the Part B issues are to the geographic issue raised in Part A. Commissioner Adelstein noted the irrationality of the bifurcated approach.<sup>55/</sup> The agency has ordered carriers to do “it” within five years without saying what “it” is, without finding whether

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<sup>53/</sup> See, e.g., Verizon Wireless Comments at 11-12 (filed July 5, 2007) (attached as Ex. 23); Sprint Nextel Comments at 3 (filed Jul. 5, 2007).

<sup>54/</sup> E911 NPRM ¶¶ 8-17.

<sup>55/</sup> See E911 NPRM, Concurring Stmt. of Comm’r Adelstein (“bifurcating the proceeding with the goal of setting a new accuracy compliance standard well in advance of making a determination of how we can actually achieve improved location accuracy” is “premature from both legal and policy standpoints”).

technologies to do “it” exist, and without saying whether a specific technology must be used – thus leaving open the possibility that carriers will have to change course after they have launched enormously expensive and burdensome efforts to comply with infeasible *Part A Order* mandates. The agency’s “willful blindness” in considering inextricably linked issues “in isolation from one another” is the essence of arbitrary decisionmaking.<sup>56/</sup>

## II. MOVANTS FACE IRREPARABLE HARM IF A STAY IS DENIED.

Movants will suffer irreparable harm if a stay is denied – harm that is imminent, since the first benchmark is now less than seven months away. The *Order* unfairly exposes Movants to enforcement action for failure to comply with impossible regulations. They face possible damages, injunctive relief, civil forfeitures, and even criminal liability for failure to comply with FCC rules.<sup>57/</sup> A carrier subject to rules with which it cannot comply thus faces severe legal risks that it cannot avoid through any action on its part.

A carrier also faces irreparable reputational harm from being branded a violator of public safety laws. Movants’ goodwill and customer bases would suffer as a result of this reputational damage, in addition to the loss of customers from

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<sup>56/</sup> See *MCI Telecomms. Corp. v. FCC*, 842 F.2d 1296, 1303-04 (D.C. Cir. 1988); see also *Motor Vehicle Mfrs.*, 463 U.S. at 43.

<sup>57/</sup> See 47 U.S.C. §§ 206-209, 401, 404, 407, 408, 501-504.

any reduction in service coverage necessitated by the infeasible geographic-level mandates. Such losses have been recognized as irreparable harm.<sup>58/</sup>

Compliance with the first benchmark may be possible in some areas only through massive expenditures to implement orphan technology that will be useless in meeting the *Order's* longer-term requirements. There is no mechanism by which Movants may recover such stranded investment costs if they later prevail on the merits of their appeal of the *Order*. Nor can they recover the investment necessary to attempt compliance with the infeasible MSA/RSA and PSAP-level requirements – investment that must be undertaken soon to attempt to meet the 3-year deadline. Such unrecoverable economic harm has been recognized as irreparable harm.<sup>59/</sup>

**III. OTHER PARTIES AND THE PUBLIC INTEREST WILL *BENEFIT*, AND WILL NOT BE HARMED, IF THE STAY IS GRANTED.**

The unintended consequence of the *Order* will be reduced wireless 911 service for consumers – a serious threat to public safety that the Commission failed to consider. As noted above, if the *Order* is not stayed, carriers likely will be forced to curtail existing service and forgo planned service expansion in areas where compliance is infeasible – particularly in rural and underserved areas, where providing service may already be economically challenging for carriers. The result

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<sup>58/</sup> See, e.g., *Multi-Channel TV*, 22 F.3d at 552.

<sup>59/</sup> See, e.g., *Iowa Utilities Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (holding unrecoverable economic loss caused by compliance with new FCC rule constitutes irreparable injury supporting stay of rule); *Am. Fed'n of Labor & Congress of Indust. Orgs. v. Chao*, 297 F. Supp .2d 155, 156 (D.D.C. 2003).

will be a decrease in consumers' ability to make wireless calls, including 911 calls. The Order thus creates a parallel dilemma to that created by the FCC's back-up power order, which this Court recently stayed. As Sprint Nextel explained there: "Absent a stay, many wireless carriers will face a stark choice: either violate the new [rule] . . . or shut down non-compliant cell sites and assets."<sup>60</sup>

Consumers cannot be harmed by staying new rules with which carriers cannot comply. Moreover, the FCC's new rules are not necessary for consumers to make wireless E911 calls. If a stay is granted, carriers will continue to deliver E911 calls to PSAPs, with location information that meets preexisting standards.

A stay will relieve public safety officials of the need to devote significant resources to implementing the new geographic mandates – resources that they would have no means of recovering if the mandates are overturned.<sup>61/</sup> They will be freed to devote their efforts to activities more likely to improve public safety.

## CONCLUSION

For these reasons, the Court should stay the *Order* pending judicial review, and Movants respectfully request that the Court do so as expeditiously as possible.

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<sup>60/</sup> Stay Motion of Sprint Nextel, Case No. 07-1475 (filed Dec. 19, 2007) (attached as Ex. 26).

<sup>61/</sup> See, e.g., NASNA Ex Parte Letter at 1-2 (May 23, 2007) (expressing concern about impact of PSAP-level compliance on state budgets, E911 cost recovery mechanisms) (attached as Ex. 24).

Respectively submitted,

A handwritten signature in cursive script, appearing to read "Russell D. Lukas", written over a horizontal line.

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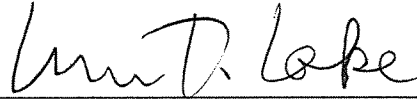
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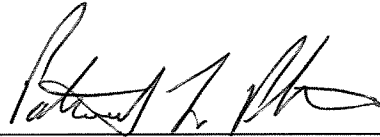
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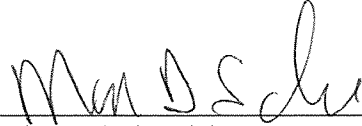
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## CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of March, 2008, I served copies of the foregoing Joint Motion for Stay Pending Judicial Appeal and for Expedited Treatment of Motion and the Exhibits by causing them to be delivered by hand to the following:

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