

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

In the Matter of)	
)	
Wireless E911 Location Accuracy)	PS Docket No. 07-114
Requirements)	
)	
Revision of the Commission's Rules to)	CC Docket No. 94-102
Ensure Compatibility with Enhanced 911)	
Emergency Calling Systems)	
)	
Association of Public-Safety)	
Communications Officials-International,)	
Inc. Request for Declaratory Ruling)	
)	
911 Requirements for IP-Enabled)	WC Docket No. 05-196
Service Providers)	
_____)	

**PETITION OF AT&T INC.
FOR EXPEDITED STAY PENDING JUDICIAL REVIEW**

Pursuant to 47 C.F.R. §§ 1.41 and 1.43, AT&T Inc. ("AT&T") requests that the Commission stay its recent Order¹ establishing requirements for compliance with the wireless Phase II Enhanced 9-1-1 ("E911") location accuracy requirements of 47 C.F.R. § 20.18(h), pending judicial review.

A stay is appropriate, first, because AT&T is likely to succeed on the merits of its forthcoming challenge to the Order. Despite the manifest importance of the public-safety concerns implicated by the Order, the Commission relies on conclusory assertions, unsupported by the record, for the Order's key finding that carriers can meet the Commission's location accuracy requirements at the Public Safety Access Point ("PSAP") level, on the timetable and

¹ Report and Order, *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, CC Docket No. 94-102 & WC Docket No. 05-196, FCC 07-166 (rel. Nov. 20, 2007) ("Order").

with the intermediate benchmarks established by the Commission. Indeed, the Order fails to identify a single technological solution that could accomplish the dramatic improvement it demands, nor does it address the numerous and cogent objections in the record to the so-called solutions identified by other parties. The Order also ignores the significant concern that an infeasible mandate may reduce wireless coverage, thereby defeating the public-safety interests the Order purports to serve. Additionally, the Order's issuance before a full record was made on the very questions it resolves is a transparent violation of the Administrative Procedure Act ("APA"), as well as of the Commission's own regulations.

A stay also is appropriate because the balance of equities favors interim relief. Most significantly, by putting in place legal requirements that are impossible to meet, the Order will cause irreparable harm to AT&T, which will suffer harm to its reputation and good name from being unfairly and erroneously branded a violator of safety regulations. Such harm is impossible to repair and independently justifies a stay. By contrast, a stay of legal requirements that cannot be met will self-evidently cause no harm to third parties. A stay will also benefit the public interest by permitting carriers to continue to work constructively on realistic solutions to the technological challenges presented by wireless E911.

For these reasons and for others set forth below, the Order should be stayed pending review by a federal court of appeals pursuant to 47 U.S.C. § 402(a). The effect of this stay should be to postpone not only the ultimate timetable for compliance under the Order, but its intermediate benchmarks, the first of which takes effect in less than seven months.

BACKGROUND

A. *Wireless Location Requirements and Technologies*

The Commission's regulations require wireless carriers to provide certain PSAPs with E911 location information — an estimate of the caller's location by longitude and latitude — when a carrier's customer calls 911. *See* 47 C.F.R. § 20.18(e). The E911 information provided by wireless carriers must meet standards of accuracy set forth in the Commission's rules. *See id.* § 20.18(h). The degree of accuracy required depends on the kind of location technology that the carrier uses. For carriers such as AT&T that use a network-based solution — *i.e.*, one that relies on technology present in the carrier's network — the carrier must provide location information that is within 100 meters of the caller's actual location for 67% of calls, and within 300 meters for 95% of calls. *See id.* § 20.18(h)(1). A carrier using a handset-based solution, which relies on a chip in the caller's handset that receives Global Positioning System ("GPS") signals from orbital satellites, must ensure that it comes within 50 meters of the caller's actual location for 67% of calls, and within 150 meters for 95% of calls. *See id.* § 20.18(h)(2). A carrier using a handset-based solution must also ensure that 95% of its subscribers have handsets containing the appropriate chip, and that 100% of its newly sold handsets contain that chip. *See id.* § 20.18(g)(1)(iv), (v).

The network-based solution currently used by AT&T is called "Uplink Time Difference of Arrival" ("U-TDOA"). U-TDOA relies on Location Measurement Units ("LMUs") that are added to a carrier's wireless sites. When a user makes a 911 call, U-TDOA generates location estimates based on the amount of time that the same signal needs to reach differently positioned LMUs. The more LMUs that are in range, the more accurate the U-TDOA estimate becomes. When a user is within range of multiple sites, as often occurs in densely populated areas, a

network-based solution can often provide an extremely accurate location estimate; but, in other situations, it cannot. Problems are most acute at the edge of a carrier's network and in lightly populated rural areas.

Handset-based solutions rely on special devices installed in a user's handset. These devices receive signals from GPS satellites. Handset-based solutions, like network-based solutions, allow accurate location calculation in many, but not all, situations. Generally speaking, when a user has a line of sight to multiple satellites, handset-based solutions allow accurate calculation of that user's location. Those solutions are much less effective when that line of sight is blocked — perhaps because the user is inside a building, or in a dense forest.

B. *History of This Proceeding*

The Commission first promulgated § 20.18(h) in 1996, and, from that time until recently, carriers have generally assessed their compliance with § 20.18(h) across their entire networks. This approach was consistent with nonbinding guidance issued by the Commission's Office of Engineering and Technology, which stated that carriers could permissibly aggregate data within "a wireless service provider's entire advertised coverage area within a metropolitan area or similar region," or could use any other procedure "based on sound engineering and statistical practice."² Indeed, a series of consent decrees in 2002 and 2003 between the Commission and AT&T Wireless Services, Inc., and between the Commission and Cingular Wireless LLC, said expressly that those carriers would calculate their compliance on a "network-wide" basis.³

² FCC, OET Bulletin No. 71, *Guidelines for Testing and Verifying the Accuracy of Wireless E911 Location Systems* at 2, 4 (Apr. 12, 2000) (emphasis omitted), available at http://www.fcc.gov/Bureaus/Engineering_Technology/Documents/bulletins/oet71/oet71.pdf.

³ Order, *Cingular Wireless LLC*, 18 FCC Rcd 11746, 11750-51 n.9 (2003); Order, *AT&T Wireless Servs., Inc.*, 17 FCC Rcd 19938, 19943 n.10 (2002); Order, *AT&T Wireless Servs., Inc.*, 17 FCC Rcd 11510, 11518 n.19 (2002); Order, *Cingular Wireless LLC*, 17 FCC Rcd 8529, 8535 n.7 (2002).

On October 6, 2004, however, the Association of Public-Safety Communications Officials-International, Inc. (“APCO”), an organization of public-safety professionals, filed a petition urging the Commission to require that carriers attain compliance measured as a percentage of calls within each individual PSAP that is capable of and has requested Phase II location accuracy information.⁴ While APCO’s petition was pending, discussion of ways to improve accuracy continued among wireless carriers and public safety professionals, including a working group of the National Reliability and Interoperability Council that recommended a requirement for compliance measured as a percentage of calls within each state.⁵

Approximately two-and-a-half years after APCO filed its petition, on June 1, 2007, the Commission issued a Notice of Proposed Rulemaking⁶ to address the appropriate geographic area by which to measure carrier compliance. In the NPRM, the Commission split its rulemaking into two parts. The first part was to consider whether “Section 20.18(h) should be clarified to require carriers to meet Phase II accuracy requirements at the PSAP service area level,” and whether the Commission “should defer enforcement of Section 20.18(h) as so defined.” NPRM ¶¶ 5, 6. The second part was to consider timing questions that would be triggered if the Commission deferred enforcement of § 20.18(h):

⁴ See Association of Public-Safety Communications Officials-International, Inc. Request for Declaratory Ruling at 1, CC Docket No. 94-102 (FCC filed Oct. 6, 2004).

⁵ See National Reliability and Interoperability Council VII, Focus Group 1A, *Near Term Issues for Emergency / E9-1-1 Services* 21 (Dec. 2005), available at http://www.nric.org/meetings/docs/meeting_20051216/FG%201A_Dec%2005_Final%20Report.pdf. The group that reached consensus on this recommendation included carrier representatives; representatives from public-safety organizations, including the National Emergency Number Association and the National Association of State 9-1-1 Administrators; and representatives from the FCC’s Office of Engineering and Technology and the National Telecommunications and Information Administration. See *id.* at 11-12. Representatives from APCO participated in the group, but did not join its final report. See *id.* at 2 n.1.

⁶ Notice of Proposed Rulemaking, *Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 10609 (2007) (“NPRM”).

[W]hat reasonable amount of time should we permit carriers to achieve compliance at the PSAP level? What specific tasks will be necessary for carriers to come into compliance with current accuracy requirements on a PSAP-level basis? Should the amount of time vary based on certain factors? What factors should be considered? Should benchmarks be established?

Id. ¶ 8. The second part was also to consider numerous other issues, some of them critical to any determination whether PSAP-level compliance was feasible in the first place. Among other things, the Commission stated that it intended to consider whether to impose “a single location accuracy requirement” applicable to both network-based and handset-based technologies, *id.* ¶ 9; to develop “a full understanding of the capabilities and limitations of existing location technologies, as well as any new technologies that may provide improvements in location accuracy,” *id.* ¶ 11; and to assess whether it “should adopt more stringent accuracy requirements” and, if so, when those requirements should come into force, *see id.* ¶¶ 12-13.

Comments for the first part of the rulemaking were due on July 5, 2007, and replies on July 11. Comments for the second part were due on August 20, and replies on September 18.⁷ Wireless carriers submitted numerous comments in the first part explaining that currently available technologies are not able to meet § 20.18(h)’s requirements at the PSAP level and urging the Commission to study the problem further before imposing a PSAP-level requirement.

On September 7 — after the close of Part A comments, but before reply comments were due for Part B — APCO (together with the National Emergency Number Association (“NENA”)) suggested in an ex parte submission that the Commission adopt a five-year timetable for PSAP-level compliance, with specific benchmarks set forth in the letter. Just four days later, the Commission adopted the entire APCO/NENA timetable, including its interim benchmarks, in an Order that it said completed Part A, but not Part B.

⁷ *See* NPRM, 72 Fed. Reg. 33,948 (June 20, 2007).

In particular, tracking the APCO/NENA proposal verbatim, the Order requires carriers to meet the Commission's location accuracy standards within each individual PSAP. Rather than simply deferring enforcement pending resolution of Part B of the proceeding as suggested in the NPRM, the Order sets a firm five-year schedule for compliance. *See* Order ¶ 17. By September 11, 2008, a carrier must meet the applicable standard at the Economic Area ("EA") level. *See id.* ¶ 18. And by September 11, 2010, the carrier is required to meet that standard at the Metropolitan Statistical Area ("MSA") and Rural Service Area ("RSA") level; to do so at the PSAP level, for 75% of PSAPs; and to "demonstrate accuracy in *all* PSAP service areas within at least 50% of the applicable location accuracy standard." *Id.* Ultimately, the Order requires wireless carriers to meet § 20.18(h)'s standards at the PSAP level by September 11, 2012. *See id.*

The Order spends a single paragraph addressing the capability of existing technology to meet its requirements. *See id.* ¶ 14. It states that its five-year timetable for PSAP-level compliance "substantially mitigates" concerns of technological feasibility. *Id.* It finds that, "in many cases, PSAP-level compliance is technologically feasible today and would require only the investment of additional financial resources." *Id.* And it states generally that "it is [the Commission's] 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." *Id.*

Several Commissioners issued separate statements expressing regret or discomfort that the Commission had not gathered more information before acting or followed the procedures established by its own NPRM. Commissioner Copps wrote that he wished the Commission had waited for forthcoming reports from its own Office of Engineering and Technology on key

technical issues before acting. *See* Order at 30. Commissioner Adelstein, who dissented in part, criticized the Order for “highly dubious legal and policy maneuvering that bypasses a still developing record.” *Id.* at 32. Commissioner McDowell wrote that he “would have preferred that the Commission complete its own in-house testing and verification prior to our implementing benchmarks that may be unachievable at best, or, inefficient.” *Id.* at 35.

Although the Commission rushed to adopt and announce the Order on September 11, 2007 — again, just four days after the APCO/NENA proposal, but on the sixth anniversary of the terrorist attacks of September 11, 2001 — the Commission did not finish drafting or release the Order until November 20, 2007, more than two months later. The Commission then delayed publication in the Federal Register for almost three more months. The combined effect of these delays was to render it all-but-impossible to secure judicial review of the Order prior to the September 11, 2008 effective date of the first benchmark.⁸

DISCUSSION

The Commission considers four factors when ruling on a petition for a stay pending judicial review: (1) whether the petitioner has made a strong showing that it is likely to prevail on the merits of its appeal; (2) whether the petitioner has shown that it will be irreparably injured if there is no stay; (3) whether the issuance of a stay would substantially harm other parties interested in the proceedings; and (4) the public interest. *See Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam); *see also, e.g., Order, Telephone Number Portability*, 18 FCC Rcd 24664, ¶ 4 & n.4 (2003) (following *Virginia Petroleum Jobbers*).

⁸ As of the date of this application, the Commission has also not yet adopted, released, or published an order in Part B of the proceeding.

I. AT&T'S CHALLENGE IS LIKELY TO SUCCEED ON THE MERITS

A. *The Order's Finding That PSAP-Level Compliance Is Feasible Within Five Years Is Arbitrary and Capricious*

The record lacks any meaningful support for the Commission's key finding that "carriers will be able to meet the compliance deadline . . . set forth in this Order." Order ¶ 14. The Order is therefore likely to be found arbitrary and capricious because the Commission has "offered an explanation for its decision that runs counter to the evidence before [it]" and because the Commission's reasoning is "so implausible that it [can]not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Like any agency subject to the APA, the Commission "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id.* (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)). This requirement is not satisfied by "[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict." *AT&T Wireless Services, Inc. v. FCC*, 270 F.3d 959, 968 (D.C. Cir. 2001). The conceded importance of public safety, and the Commission's undoubted good intentions, cannot make up for its disregard for these basic tenets of administrative law.

1. The Order fails to support its finding that an unspecified current or future technology will enable a carrier now using a network-based solution (such as AT&T) to meet § 20.18(h)'s requirements at the PSAP level by September 11, 2012. The Order contemplates that carriers will immediately begin investing substantial resources to improve their location accuracy. But it does not say where they should invest them or in what technologies. The record

reveals no technological solution that is either now available or reasonably expected to appear in a time frame that would enable AT&T to achieve PSAP-level compliance by September 2012.

The so-called solutions proposed by some commenters do not resolve this problem. One proposed solution that could be implemented relatively quickly would be to add additional LMUs to existing sites.⁹ But the major carriers using network-based solutions have already “deploy[ed] LMUs at every cellsite in those areas where location accuracy is most challenging,” and so “installing LMUs at every cellsite would *not* enable” PSAP-level compliance.¹⁰ For example, AT&T is among the carriers that cannot materially improve accuracy by adding more LMUs. *See* Declaration of Richard E. Burns and Kristin Rinne ¶ 12 (“Burns/Rinne Decl.”) (attached hereto).

Another solution proposed was to add angle-of-arrival (“AoA”) sensors — advanced devices that allow LMUs to gather more detailed information about incoming signals — to carrier networks.¹¹ But AoA sensors, even if available for a particular carrier, are not sufficiently accurate to eliminate the need for multiple sites to be within range of a user in order to generate measurements accurate enough to satisfy § 20.18(h).¹² AoA sensors are also large and bulky, and therefore will likely require new zoning approvals that are not within a carrier’s control.¹³

Another proposal for improving the accuracy of a network-based solution is to add location-only sites. These are new cell sites — and, like ordinary cell sites, they require substantial planning, infrastructure support and cost — but they do not carry wireless

⁹ *See* TruePosition Comments 2.

¹⁰ *See* T-Mobile Reply Comments 6-7.

¹¹ *See* TruePosition Comments 3.

¹² *See id.*

¹³ *See id.*

communications traffic. Instead, they contain LMUs and are used solely to assist with identifying end users' locations.¹⁴ In addition to the substantial infrastructure support and cost that go along with such new sites, location-only sites, like new AoA sensors, require zoning approvals that are outside a carrier's control.¹⁵ Geography can also prevent the construction of new towers: one state official commented in correspondence to AT&T that meeting a PSAP-level requirement in certain coastal areas of New Jersey would require "install[ing] cell sites out in the ocean."¹⁶

The Commission also suggested, in the NPRM, that carriers might be able to improve location accuracy by turning to hybrid solutions, which incorporate both handset-based and network-based elements — although it said it would consider the merits of hybrid technologies, like other technological solutions, in Part B of the proceeding. *See* NPRM ¶ 11. TruePosition, the vendor cited by the Order for the proposition that compliance would be feasible, *see* Order ¶ 14 n.30, claimed not that a hybrid solution incorporating assisted GPS and U-TDOA technologies exists today (and indeed none does), but instead that it "would take at least three years to deploy the network side of such a solution."¹⁷ Moreover, a hybrid solution cannot be put in place for a network-based carrier until its users have appropriate handsets, which the record makes clear will take between five and eight years *after* the relevant technology is available.¹⁸ Indeed, the Commission's demanding requirements for handset penetration — 95%

¹⁴ *See* TruePosition Comments 2.

¹⁵ *See* T-Mobile Comments 6 (reporting that "some local jurisdictions have opposed new sites . . . even if they underst[oo]d that [the sites] could improve E911 performance").

¹⁶ AT&T Comments, Attachment.

¹⁷ *See* TruePosition Comments 6; *see also id.* at 5 (stating that "no hybrid approach other than a combination of U-TDOA and A-GPS will produce the desired result").

¹⁸ *See* T-Mobile Comments 7 (estimating that "it can take at least eight years" from the beginning of implementation of a handset-based solution for carriers to comply with the

of all handsets, and 100% of new handsets sold, *see* 47 C.F.R. § 20.18(g)(1)(iv), (v) — create a daunting regulatory barrier to the adoption of hybrid solutions by carriers currently using a network-based solution.

In summary, the record contains no basis for the Order’s finding that carriers will be able to achieve PSAP-level compliance with § 20.18(h) by September 11, 2012. For each suggested or tentative solution, there is uncontradicted evidence that the solution will not work.

2. In addition, the Order’s response to arguments that compliance would not be feasible does not meet the Commission’s obligation to show a “rational connection between the facts found and the choice made.” *Burlington Truck Lines*, 371 U.S. at 168. The Order does not identify a single technology that either does or could make PSAP-level compliance feasible within five years. It states that, “in many cases, PSAP-level compliance is technologically feasible today.” Order ¶ 14. Because many carriers, including AT&T, are in network-level compliance today, it follows as a matter of simple mathematics that those carriers must be in PSAP-level compliance “in many” PSAPs.¹⁹ But that self-evidently says nothing about the many other PSAPs where carriers are not in compliance, and where the record reveals no evidence suggesting they can attain compliance.

Commission’s penetration requirements); AT&T Ex Parte (Sept. 6, 2007) (estimating “at least” five years); *see also* TruePosition Comments 6 (“defer[ring] to the wireless carriers and handset vendors” as to how long a handset changeover would take). APCO’s recent statement that AT&T’s September 6 ex parte asserted that a “five-year compliance period would be appropriate,” *see* APCO Opposition to Stay at 3 (FCC filed Feb. 7, 2008), is blatantly inaccurate. The ex parte merely noted, consistent with the record evidence on this issue, that a technological mandate that required a carrier to switch out its installed base of handsets should require at least five years for that transition.

¹⁹ For example, if 95% of a network-based carrier’s calls network-wide are accurate to within 300 meters, and if, within some PSAPs, fewer than 95% of that carrier’s calls are accurate to within 300 meters, then more than 95% of that carrier’s calls must be accurate to within 300 meters in all remaining PSAPs.

The Order then states that it is “obviously in carriers’ financial interests to argue that any meaningful requirement will not be possible to meet.” *Id.* This truism of all regulatory litigation does not remove the Commission’s duty to give reasonable consideration to the carriers’ arguments. Yet the Order fails to consider a single one of the network-based carriers’ compelling arguments set forth above for the inadequacy of each proposed technological solution. It fails to acknowledge, for example, that some network-based carriers have already deployed LMUs wherever helpful. Or that AoA sensors, even if available, are not up to the job of PSAP-level compliance. Or that zoning and geographical constraints are barriers to the deployment of AoA sensors and location-only sites. Or that a switch to a not-yet-invented hybrid solution is not possible in the time allotted by the Order, especially considering the problem of handset changeover and the burdens imposed by handset penetration requirements. The Order also fails to acknowledge, much less weigh, the equally real financial interests of vendors arguing that the Commission should require carriers to buy their products or services.

The Commission’s abject failure to support its finding of feasibility will likely be fatal to the Order upon review. Several carriers have already argued in comments that the Commission is prohibited, by well-established principles of administrative law, from adopting impossible requirements.²⁰ The law is clear that “[i]mpossible requirements imposed by an agency are perforce unreasonable.” *Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991). Indeed, the Order does not assert the authority to impose infeasible requirements, but simply asserts without justification that its requirements are feasible. Because “an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers

²⁰ See, e.g., T-Mobile Comments 11-12; Verizon Wireless Comments 7-10.

were those upon which its action can be sustained,” *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943), that lack of justification will require a reviewing court to vacate the Order.

3. The deference ordinarily due the Commission’s predictive judgment cannot save the Order from its manifest irrationality. In this respect, *Nuvio Corp. v. FCC*, 473 F.3d 302 (D.C. Cir. 2006), is instructive. There, the D.C. Circuit approved the Commission’s aggressive deadline for Voice over Internet Protocol (“VoIP”) E911 compliance, but did so on an ample record. The Commission in that case based its predictive judgment that compliance would be feasible on a specific technological solution that was already on the market through the vendor Intrado. *See id.* at 305-06. It further relied on the results of “trials that demonstrated E911 access [of the required kind] was possible.” *Id.* at 306. The Order at issue here points to no available solution and no comparable testing. *Nuvio* demonstrates by comparison how short the Order falls.

Similarly, *Electronic Industries Association Consumer Electronics Group v. FCC*, 636 F.2d 689 (D.C. Cir. 1980), reinforces the conclusion that vacatur is appropriate here. In that case, the Commission attempted to establish a demanding noise standard for UHF tuners. Although the Commission did not find that existing technology could meet the new standard, it hypothesized that “there are technical improvements possible over the next four years which will make the [new standard] achievable.” *Id.* at 697. Then-Chairman Ferris commented that the FCC’s ruling was based on “elements of faith rather than fact.” *Id.* at 698. The D.C. Circuit held that “faith is not enough” and vacated the rule. *Id.* The same analysis applies to this case. Ultimately, the Commission’s finding that PSAP-level compliance is technologically feasible is rooted in the unexplained and unsupported assertion that the Commission believes — or desires — that to be the case. But wishing will not make it so. The Order is accordingly unlawful. *See*

id.; see also *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (declining to defer to the FCC’s predictive judgment where the FCC failed to “provide at least some support for its predictive conclusions”).

B. *The Order’s Finding That Its Intermediate Benchmarks Are Feasible Is Also Arbitrary and Capricious*

The Commission’s finding that “carriers will be able to meet the . . . intermediate benchmarks set forth in this Order,” Order ¶ 14, displays even more blatant disregard for the record and for the Commission’s obligations of reasoned decisionmaking. Specifically, the Order gives carriers a year from its date of adoption (less than 10 months from its release, and even less time from its publication) to comply with § 20.18(h) at the EA level. This benchmark would require a significant improvement in carriers’ present location accuracy.

Self-evidently, a time frame of one year does not allow for the development of new technologies, and the Order points to no evidence that any existing technology can do the job. Moreover, the record shows that it would take additional time to *deploy and test* a new solution, even if that solution were available to begin deployment today. For example, as noted, changing users’ handsets to employ a hypothetical new handset-based or hybrid solution requires at least five years from the date that the new technology is deployed. *See supra* pp. 11-12. Building new sites, an enormous expenditure of resources, requires zoning permits and construction time, *see supra* pp. 10-11, and no significant site construction project can be completed in less than a year. Performance testing, once the technology is deployed, requires still more time. No basis whatsoever supports the Commission’s conclusion that significant location improvements can be attained in less than a year.

The Order does not dispute these facts or state that these obstacles do not exist. It does not find that construction projects can be completed in less than a year, that handsets can be

replaced in less than a year, that new technologies can be deployed and tested in less than a year, or that EA-level compliance can be attained by carriers without building new facilities or replacing handsets. It instead offers the simple, unsupported observation that the benchmarks can be met. That bare assertion will not do. That the Order rests in such critical respects solely on “[c]onclusory explanations for matters involving a central factual dispute where there is considerable evidence in conflict,” *AT&T Wireless Services*, 270 F.3d at 968, renders it unlikely to survive review.

The Order’s third-year benchmark is also arbitrary and capricious, for substantially the same reasons presented above for its ultimate five-year timetable. Indeed, the wholesale absence of *any* analysis devoted to the third-year benchmark — which imposes PSAP-level requirements for 75% of PSAPs, and a further requirement that accuracy be “within at least 50% of the applicable location accuracy standard” in all remaining PSAPs, Order ¶ 18, in substantially less time than necessary for either a major construction project or a handset changeover — both exemplifies and exacerbates the irrationality of the Order as a whole.

C. *The Order Fails To Consider the Public-Safety Implications of Reduced Coverage Caused by Its Mandate*

The Order also is unlawful because it fails to consider a significant objection raised by multiple carriers: the potential perverse implications for public safety if carriers are forced to turn off, or prevented from expanding, wireless coverage in areas where they cannot meet the Order’s requirements. The Order is therefore likely to be found arbitrary and capricious because the agency has “entirely failed to consider an important aspect of the problem.” *State Farm*, 463 U.S. at 43.

As discussed above, the Order assumes, without any record basis or coherent reasoning, that carriers will be able to comply with its requirements. It implicitly assumes that carriers will

(a) maintain their current geographical scope of coverage, and (b) spend vast resources to achieve compliance. What the Order does not consider in any manner is whether carriers, faced with an impossible task, will instead narrow the geographical scope of their coverage to eliminate areas in which compliance physically cannot be achieved or is cost-prohibitive — by dropping existing coverage, by choosing not to extend coverage into new areas, or by a combination of both approaches. That outcome will make users in the affected areas less safe, not more. Instead of being able to complete a wireless 911 voice call to the PSAP, with a risk that the PSAP may not automatically receive precise location data, the subscriber will be unable to request emergency assistance at all. Several carriers raised this concern in their Part A comments.²¹ The Order is silent in response.

In this respect, a reviewing court will not need to decide whether the Commission could reasonably have concluded that the benefits to some users from the Order’s requirements outweigh the costs to other users who will lose access to wireless service entirely. The Commission has not made that judgment, but has instead wholly “failed to defend” its conclusion on this question. *AT&T Info. Sys., Inc. v. FCC*, 854 F.2d 1442, 1447 (D.C. Cir. 1988). For this reason as well, the Order is unlikely to survive review.

D. *The Order Violates the APA by Imposing a Timetable Without Notice and Comment*

The Order also fails to comply with the notice-and-comment requirements of the APA and with the Commission’s own rules. The APA requires the Commission to “give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation.” 5 U.S.C. § 553(c). In

²¹ See, e.g., T-Mobile Comments 14-15; RCA Reply Comments 4; SouthernLINC Reply Comments 4.

addition, the Commission's rules provide that "[a] reasonable time will be provided for filing comments in reply to the original comments, and the time provided will be specified in the notice of proposed rulemaking." 47 C.F.R. § 1.415(c). A reviewing court will likely vacate the Order for its failure to comply with these requirements.

The NPRM states expressly that Part B of the rulemaking — not Part A — will be the appropriate point to consider a "reasonable amount of time . . . [to] permit carriers to achieve compliance at the PSAP level" and whether intermediate "benchmarks [should] be established." NPRM ¶ 8. The Commission nevertheless adopted the Order a full week before Part B reply comments were due. The Order recites that it does not address Part B issues, *see* Order ¶ 7 n.12, but this cannot be reconciled with the NPRM's assignment of timetables and benchmarks to Part B. Commissioner Adelstein's partial dissent makes clear that the Commission was fully aware that it was not acting "based on a full record" and was inappropriately "plow[ing] forward" to make "findings that are" — or should have been — "the very subject of" Part B. Order at 32. Moreover, even though it has now been months since the Commission adopted the Order, and even with time running on the Order's timetable and benchmarks, Part B remains incomplete.

"[I]f [a] final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner Lead Phase-Down Task Force v. United States Env'tl. Prot. Agency*, 705 F.2d 506, 547 (D.C. Cir. 1983). In this case, the direct contradiction between the NPRM and the Order is acute and easily sufficient to satisfy this standard. Further, the Commission's failure to comply with 47 C.F.R. § 1.415(c) independently constitutes reversible error. "[I]t is elementary that an agency must adhere to its

own rules and regulations,” and “[a]d hoc departures from those rules, even to achieve laudable aims, cannot be sanctioned.” *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986).

These procedural violations were particularly harmful to the integrity of the Commission’s rulemaking because Part B was meant to address key questions about “the capabilities and limitations of existing location technologies, as well as any new technologies that may provide improvements in location accuracy.” NPRM ¶ 11. As the substantive discussion above makes clear, one cannot evaluate wireless location timetables and benchmarks meaningfully and coherently without first establishing what technological solutions are in use today, what new ones are forthcoming, and what steps can be taken to improve accuracy. The Commission’s failure to take seriously these complex questions likely explains, in large part, the Order’s unreasoned dismissal of feasibility concerns. It is an important reason the Order is unlikely to survive review.

II. AT&T WILL BE IRREPARABLY HARMED BY THE ORDER

It is unlikely that judicial review of the Order will be complete before the date of its first benchmark. The Commission did not release the Order until November 20 and has only just published the Order in the Federal Register. Accordingly, there is less than seven months between the first date at which a notice of appeal can be filed and September 11, 2008, the date of the first benchmark — not, usually, enough time to complete a complex appeal. AT&T cannot achieve EA-level compliance by the first benchmark date. It therefore faces the prospect of being out of compliance with a regulation described by the Commission as a crucial public-safety measure, and suffering major and irreparable losses to its reputation and goodwill as a result.

A. *It Is Impossible for AT&T To Comply with the First Benchmark*

AT&T has conducted a study to determine how far it is from EA-level compliance with § 20.18(h) and the degree of improvement it would need to achieve in order to reach the first benchmark. *See* Burns/Rinne Decl. ¶ 10. AT&T operates in 150 EAs. It is in compliance, as measured at the EA level, with § 20.18(h) in slightly more than half of those EAs. *See id.* Achieving compliance at the EA level would therefore require significant improvements to AT&T's network location accuracy.

AT&T knows of no way to develop, implement, and test technologies that would achieve such improvements in the less than seven months remaining before the first benchmark comes due. Further, as discussed above, the suggestions revealed by the record to improve the location accuracy of a network-based technology are all wholly inadequate to AT&T's situation:

- Accuracy cannot be improved by adding more LMUs to existing tower sites, because AT&T has already deployed LMUs at almost 100% of its sites and cannot materially improve accuracy by deploying more. *See id.* ¶ 12.
- Accuracy cannot be improved by adding AoA sensors, because an AoA sensor solution is not available from AT&T's location technology vendor and, even if it were available, would require zoning permits that take more than seven months to obtain, and in any event would have only a limited effect on EA-level accuracy. *See id.* ¶¶ 13-15.
- Accuracy cannot be improved by building location-only sites, because such sites also require zoning permits. *See id.* ¶ 19. In addition, it takes time to build new sites and to link them to AT&T's network. *See id.*
- Accuracy cannot be improved by changing to a hybrid A-GPS/U-TDOA solution, because no such solution is presently available. *See id.* ¶ 16. Further, even if a hybrid solution were available today to AT&T, it would still not work until users had received new handsets, subject to the Commission's demanding handset penetration requirements. At best, handset turnover would take at least an additional five years — not seven months. *See id.* ¶ 17.

Except by choosing to reduce its wireless coverage radically, and thus reduce the area subject to § 20.18's requirements, AT&T is certain to be out of compliance in September 2008 unless the Order is stayed.

B. *AT&T's Inability To Comply with the Benchmarks Will Cause It Irreparable Harm*

The Commission has announced in the Order that compliance with the benchmarks is both feasible and key to public safety. Although the Commission's feasibility findings are wholly unsupported, it nevertheless speaks with the credibility of the federal government. Further, if the Order is not stayed, AT&T will be in the untenable position of noncompliance with purportedly vital safety requirements and facing an enforcement action for that noncompliance. Either or both of these events will cause lasting damage to AT&T's reputation, goodwill, and relationship with its customers that courts have often found to constitute irreparable harm.

It is well established that damage to reputation and loss of customer goodwill constitutes irreparable harm. *See, e.g., Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994). Moreover, when agency action inaccurately causes a product or service to appear unsafe, that inaccurate impression creates irreparable harm of this variety. For example, the D.C. Circuit has held that forcing a manufacturer of ham to label "a genuine ham as imitation" caused irreparable harm because it "could not fail to damage [the manufacturer's] good name." *Armour & Co. v. Freeman*, 304 F.2d 404, 406 (D.C. Cir. 1962). And the Supreme Court has observed that in an industry where "public good will" is important, an announcement that a competitor has violated safety regulations can have "disastrous impact." *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 172-73 (1967) (approving a district court's finding of "irreparable injury" on several grounds).²²

²² *See also Patriot, Inc. v. United States Dep't of Hous. & Urban Dev.*, 963 F. Supp. 1, 5 (D.D.C. 1997) (finding that "damage to [the] business reputation" of estate and financial planning services companies from agency's procedurally irregular enforcement action would be irreparable); *Lavapies v. Bowen*, 687 F. Supp. 1193, 1211 (S.D. Ohio 1988) (finding that suspension from Medicare program would cause irreparable injury by "harm to [a doctor's]

As the nation's largest wireless carrier, AT&T is faced with just such harm. The safety benefits of wireless communications are a significant benefit to consumers who purchase wireless service. A report or finding that a carrier is out of compliance with federally mandated safety regulations will create the lasting impression in the marketplace that a carrier's service is unsafe. AT&T's wireless service is likely to be branded unsafe — despite AT&T's use of the latest technologies and despite its enormous commitment of resources to E911 — because of its inability to satisfy the Order's unreasoned and unreasonable demands. This “enforced distortion of the truth,” *Armour & Co.*, 304 F.2d at 406, will cause irreparable harm to AT&T's reputation.

III. A STAY WILL CAUSE NO HARM AND WILL SERVE THE PUBLIC INTEREST

Because it is impossible for AT&T (and other carriers) to comply with the first benchmark, a stay would cause no substantial harm to anyone. AT&T has no quarrel with the Order's finding, at a general level, that improvements in wireless E911 location accuracy will benefit the public. But no good can come from a legal mandate that is impossible to achieve. The question, then, is whether the improvement decreed by the Commission — in particular, the looming EA-level compliance benchmark — is remotely achievable. As AT&T has shown, it is not. Because no good can come of the Order, no harm will come of a stay. Further, the Commission's delay from late 2004 to mid-2007 in acting on APCO's original petition, coupled with the Commission's unprecedented delay between adoption of the Order and publication of its text, undercuts the Order's claim that immediate action is required.

A stay also will generate other public benefits. *First*, to the extent the Order will cause carriers to cease providing service in some areas or limit extension of their networks, *see supra*

professional reputation” that “[a] subsequent vindication . . . [would] likely not remedy”), *aff'd on other grounds*, 883 F.2d 465 (6th Cir. 1989); *Greene v. Bowen*, 639 F. Supp. 554, 563 (E.D. Cal. 1986) (same), *appeal dismissed*, 844 F.2d 791 (9th Cir. 1988) (table).

Part II.C, a stay would prevent this from occurring. This, in turn, would permit wireless users in such areas to receive service — including both the benefit of being able to make 911 voice calls, which will improve their safety even without precise location data for every call, and also the other benefits of wireless communication.

Second, a stay will prevent the diversion of resources to futile attempts at compliance with the Order’s unachievable benchmarks and timetable. Investment required immediately in technological solutions that cannot ultimately achieve the Commission’s goals will only reduce the industry’s ability to develop and deploy solutions that can. A stay would serve the public interest by avoiding this result.

Third, courts have recognized “a strong public interest in requiring an agency to act lawfully, consistent with its obligations under the APA.” *E.g., Bracco Diagnostics, Inc. v. Shalala*, 963 F. Supp. 20, 30 (D.D.C. 1997). In this case, the Order violates the APA’s prohibitions on arbitrary and capricious decisionmaking, as well as its notice-and-comment requirements. *See supra* Part I. The Commission can and should mitigate the impact of those violations on the public interest by staying the effect of the Order.

CONCLUSION

For the foregoing reasons, the Commission should stay the Order pending judicial review.

Respectfully submitted,

/s/ Colin S. Stretch

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February 22, 2008

**DECLARATION OF RICHARD E. BURNS AND KRISTIN RINNE
IN SUPPORT OF AT&T INC.'S REQUEST FOR STAY**

1. I am Richard E. Burns, President of Network Services for AT&T Mobility, LLC. My address is 5565 Glenridge Connector, Atlanta, Georgia 30342. As President of Network Services, I have responsibility for the deployment and operation of AT&T Mobility's CMRS networks, including the deployment and operation of those facilities used to route 911 calls to Public Safety Answering Points (PSAPs), and to deliver location information to the PSAPs pursuant to the federal E911 regulations.

2. I am Kristin Rinne, Senior Vice President of Architecture and Planning for AT&T, Inc. My address is 5565 Glenridge Connector, Atlanta, Georgia 30342. In my role as Senior Vice President of Architecture and Planning for AT&T, I serve as the Chief Technical Officer of AT&T Mobility, responsible for technology planning and design of AT&T Mobility's networks, including the facilities used to route 911 calls and deliver location information pursuant to the federal E911 regulations.

3. The purpose of this declaration is to explain the irreparable injury to AT&T Inc. ("AT&T") in the event the Commission's recent amendments to 47 C.F.R. § 20.18(h) are not stayed.¹ This declaration explains that AT&T cannot meet the rule's first benchmark, which requires AT&T to comply with § 20.18(h)'s requirements at the Economic Area ("EA") level by September 11, 2008.

4. Over the past several years, AT&T has poured enormous resources into improving the location accuracy and reliability of its Phase II network-based solution —

¹ See Report and Order, *Wireless E911 Location Accuracy Requirements*, PS Docket No. 07-114, CC Docket No. 94-102 & WC Docket No. 05-196, FCC 07-166 (rel. Nov. 20, 2007) ("Order").

spending an average of approximately \$321 million per year over the past six years, for a total of approximately \$1.9 billion. AT&T supports the Commission's continuing efforts to improve wireless E911 location accuracy.

5. However, the Commission's requirement that carriers achieve EA-level compliance for meeting the Phase II accuracy requirements is not achievable. The Commission's Order requires AT&T to meet that benchmark by September 11, 2008. For the reasons that follow, that requirement is not technologically feasible.

6. The applicable accuracy standard for carriers (such as AT&T) using network-based location technology requires that a carrier determine a caller's position within 100 meters in 67% of all Phase II 911 calls, and within 300 meters in 95% of such calls.² These standards apply only to PSAPs that have requested and are ready to receive Phase II E911 location information, and the rules provide an implementation period before the carrier must respond to a PSAP request.³

7. AT&T currently meets its wireless E911 Phase II location accuracy and reliability standards by using a network-based solution provided by the vendor TruePosition. The solution employs Uplink Time Difference of Arrival ("U-TDOA") technology. In a U-TDOA solution, sites in a carrier's network are equipped with Location Measurement Units ("LMUs") that measure the distance between a site and a caller who has dialed 911. The network then compares the readings from multiple sites and uses these data to estimate the caller's location.

8. To obtain accurate location information, U-TDOA requires the caller to be within range of multiple LMUs, and therefore of multiple network cell sites. There are several commonly occurring situations in which this requirement cannot be met and in which U-TDOA

² See 47 C.F.R. § 20.18(h)(1).

³ See *id.* § 20.18(f), (j).

therefore cannot meet the FCC's accuracy standards. When a caller is at or near the edge of a carrier's service area, for example, he or she may be within range of only one cell site. When a caller is moving along a highway that is served by sites in a linear (or "string-of-pearls") configuration, he or she may move from one cell site to another, being within range of one cell site, or at most two cell sites, at a time. When a caller is in an area served by one or a small number of sites — for example, a vacation resort or airport, where demand for service is heavily concentrated in a small area — he or she may similarly be within range of only one cell site.

9. As of the end of the fourth quarter of 2007, AT&T's Phase II network-wide performance is approximately 61.7 meters for 67% of all Phase II calls, and approximately 286.7 meters for 95% of such calls. The testing methodology used to generate this performance metric is consistent with Bulletin No. 71 issued by the Commission's Office of Engineering and Technology on April 12, 2000. AT&T is therefore in compliance at the network-wide (national) level with the Commission's Phase II accuracy requirements.

10. The Commission's new rule, however, would require AT&T to meet those requirements within each Economic Area ("EA") by September 11, 2008. AT&T recently performed an internal study to determine whether it was in EA-level compliance and, if not, how much improvement would be needed to achieve EA-level compliance. That study preliminarily determined that AT&T's network meets both the 100-meter and the 300-meter requirement of Rule 20.18(h) in slightly more than half of the 150 EAs that AT&T serves.

11. AT&T has considered several technological options for improving its location accuracy and reliability, but has found none that offers a realistic possibility of timely compliance with the September 11, 2008 benchmark established by the Commission's rule.

12. *Additional LMUs.* Some commenters in the Commission's proceeding suggested that carriers using a network-based technology could improve location accuracy and reliability by adding more LMUs to existing cell sites.⁴ AT&T has deployed LMUs on close to 100% of its cell sites. There is no room to materially improve accuracy in AT&T's network by adding more LMUs to existing cell sites.

13. *AoA Antennae.* Some commenters suggested that carriers using a network-based technology could improve location accuracy and reliability by employing angle-of-arrival ("AoA") antennae.⁵ AoA antennae augment a U-TDOA system by measuring the angle, as well as the distance, of a caller from the site. This additional information makes possible (all other things being equal) more accurate estimates of a caller's location. But AoA antennae are not available for AT&T's network from AT&T's location technology vendor. And, even if they were available, they would not enable AT&T, while maintaining its existing service area, to meet the requirements of the Commission's rule, on the Commission's timetable. That is so for several reasons.

14. AoA antennae are bulky: typically, each is about the size of a refrigerator. Installing equipment of this size on AT&T's existing sites would, in a significant number of cases, require AT&T to obtain additional zoning permits from the relevant local authorities. In AT&T's experience, obtaining zoning permits alone can take 18 to 24 months. AoA antennae therefore cannot be installed in time to have any effect on AT&T's location accuracy by September 11, 2008.

15. Further, the projected performance of AoA antennae currently under development is not sufficiently precise to eliminate the need for multiple measurements from different LMUs

⁴ See, e.g., TruePosition Comments 3 (filed July 5, 2007).

⁵ See, e.g., *id.*

in order to meet the 100-meter and 300-meter requirements. AoA antennae therefore do not solve the compliance challenges created at the edge of a service area, by a sole site in an otherwise uncovered area, or by a string-of-pearls site configuration. Accordingly, in the absence of unforeseen advances in technology, AoA antennae would not enable AT&T to meet the benchmarks required by the Commission's rule on the timetable the rule sets forth.

16. *Hybrid handset-network solutions.* The Notice of Proposed Rulemaking for this proceeding asked whether carriers can “employ a combination of handset-based and network-based location technologies (a hybrid solution), rather than employing one or the other, to achieve improved location accuracies.”⁶ Some commenters have suggested that carriers using either handset-based or network-based technologies could improve location accuracy and reliability by switching to a hybrid solution.⁷ No hybrid solution exists today that combines Assisted GPS (“AGPS”) and U-TDOA technology. There is no prospect that any such solution can enable AT&T to meet the Commission's first benchmark while maintaining its existing service area.⁸

17. Based on its prior experience, AT&T believes that, from the date a hybrid solution is developed and ready for implementation, it will take at least an additional 18 to 24 months for AT&T to implement the solution. Also, based on industry experience more generally, AT&T believes that it will take at least five years after implementation of a partially handset-based solution to switch out its installed base of handsets, thereby ensuring that

⁶ Notice of Proposed Rulemaking, *Wireless E911 Location Accuracy Requirements*, 22 FCC Rcd 10609, ¶ 11 (2007) (“NPRM”) (footnote omitted).

⁷ See, e.g., TruePosition Comments 3, 5-6.

⁸ This is true if compliance is assessed according to the 100-meter and 300-meter standards currently applicable to carriers using network-based solutions, and it is even more the case if compliance were to be assessed according to the 50-meter and 150-meter standards that apply to handset-based solutions.

subscribers have new handsets compatible with the solution.⁹ Because no hybrid solution presently exists, it is impossible for AT&T to implement a hybrid solution by September 11, 2008.

18. *Location-only sites.* Some commenters have suggested that carriers using a network-based technology could improve location accuracy and reliability by adding location-only sites to its network.¹⁰ These are sites that contain only LMUs and do not carry wireless communications traffic. Building location-only sites, however, will not allow AT&T to meet the September 11, 2008 benchmark.

19. Like any new sites, location-only sites require zoning permits. As described above, AT&T has found that zoning permits can take 18 to 24 months to acquire. In addition, linking new sites to AT&T's network requires the deployment of backhaul facilities, such as cables, wires, microwave transmitters, or satellite uplinks. Deployment of backhaul facilities involves overcoming additional engineering and regulatory hurdles, which require additional time and resources. As a result, adding location-only sites to its network would not enable AT&T to achieve EA-level compliance by September 11, 2008, as the Commission's new rule requires.

20. Furthermore, the Commission's NPRM stated that the Commission is "inclined" (in Phase B of its proceeding) to adopt a uniform accuracy standard, applicable to carriers that use network-based as well as those that use handset-based technologies, that is "at least as

⁹ The Commission's rules require carriers using a handset-based solution to ensure that 95% of their subscribers have compatible handsets, and that 100% of all new handsets sold are compatible. *See* 47 C.F.R. § 20.18(g)(iv)-(v). Several carriers who use handset-based solutions have been subject to Commission enforcement actions because of the difficulty of meeting these standards.

¹⁰ *See, e.g.,* TruePosition Comments 3.

stringent” as the standard now applicable for carriers that use handset-based technologies.¹¹ As the above discussion makes clear, AT&T cannot technologically meet the Commission’s first benchmark based on the current accuracy standard; it would be even less feasible to require AT&T to meet that benchmark if AT&T required to meet the 50-meter and 150-meter accuracy requirements applicable to handset-based technologies.


21. Based on AT&T’s review of available technologies, there is no technological solution that would allow AT&T to meet the Commission’s first benchmark – using the 100/300-meter standard or the 50/150-meter standard — while maintaining the scope of its existing coverage. Unless that benchmark is stayed, AT&T would be forced to consider ceasing to provide wireless service in the areas for which compliance would not be feasible.

22. This concludes our declaration.

¹¹ NPRM ¶¶ 10, 12.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

February 19, 2008


Richard E. Burns

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

February 21, 2008


Kristin Rinne