IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CTIA–THE WIRELESS ASSOCIATION, Petitioner,	)	
v.	)	Nos. 07-1475
	)	(and consolidated cases)
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA, Respondents.	)	

OPPOSITION OF THE FCC TO SPRINT NEXTEL'S MOTION FOR STAY PENDING REVIEW

The Federal Communications Commission respectfully files this opposition to the motion for stay pending judicial review filed by petitioner Sprint Nextel Corporation. Sprint Nextel asks the Court to stay the effectiveness of a Commission rule requiring wireless carriers to maintain eight hours of backup power for cell sites. The Commission adopted the rule after an independent panel concluded that the loss of electrical power following Hurricane Katrina was a main cause of widespread communications outages that severely hampered emergency response to the storm. In light of carriers' concerns about the burdens imposed by the initial version of the backup power rule, the Commission substantially relaxed the rule on reconsideration. Critically, for present purposes, the backup power requirement will not become fully effective until early 2009.

Sprint Nextel fails to establish any of the elements required for a stay pending review. Sprint Nextel has not shown that it is likely to prevail on its claims, most of which are untimely and all of which are meritless. Sprint Nextel asserts that a stay would save it some money, but compliance costs do not

constitute irreparable harm, and, in any event, any cost-savings for Sprint Nextel would come at the unacceptable price of delaying implementation of an industry-wide rule designed to ensure adequate backup power capacity in the event that a natural disaster or terrorist attack disrupts commercial power sources.

Tellingly, no other carrier affected by the backup power rule has requested a stay. Instead, the other petitioners, including CTIA–The Wireless Association, the trade association for the wireless industry, apparently believe that expedited review would adequately protect their interest in challenging a rule that does not become fully effective until 2009, and accordingly have filed a motion for expedited review (which remains pending with the Court) that the Commission does not oppose. CTIA's motion for expedition represents a far more reasonable attempt to balance the concerns of industry with critical public safety needs than does Sprint Nextel's stay motion. Indeed, Sprint Nextel fails to explain why expedited review is inadequate to address the harm it claims, and even if it had done so, any idiosyncratic interest on its part would not justify a stay of an industry-wide rule of critical importance for public safety.

BACKGROUND

On Monday, August 29, 2005, Hurricane Katrina struck the Gulf Coast and the millions of residents who live in the coastal areas of Alabama, Mississippi, and Louisiana. The devastating impacts of the storm and the ensuing flooding included "extraordinary destruction to communications companies' facilities and

communications services upon which citizens rely."[1] Katrina "knocked out more than three million customer phone lines," "dozens of central offices and countless miles of outside plant were damaged or destroyed," and "more than a thousand cell sites were knocked out of service." *Katrina Order* ¶ 2. Much of the communications outage resulted from a lack of electrical power.[2]

In January 2006, the Commission announced that it had established a federal advisory committee to review the impact of Hurricane Katrina on communications infrastructure. *See* 71 Fed. Reg. 933 (Jan. 6, 2006). Commonly known as the "Katrina Panel," the advisory committee was charged with "study[ing] the impact of Hurricane Katrina on all sectors of the telecommunications and media industries," "review[ing] the sufficiency and effectiveness of the recovery effort with respect to this infrastructure," and "mak[ing] recommendations" to the Commission "regarding ways to improve disaster preparedness, network reliability, and communication among first responders." *Ibid.*

The Katrina Panel issued its findings and recommendations in a June 12, 2006 report to the Commission (the "Katrina Report"). *See* n.2, above. As relevant here, the Katrina Report emphasized that "lack of power and/or fuel" was one of the "main problems that caused the majority of communications network

---

[1] Order, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 10541, ¶ 2 (2007) (*Katrina Order*) (Stay Mot. Exh. A).

[2] Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks, Report and Recommendations to the Federal Communications Commission, at i, 9, 17 (June 12, 2006) ("Katrina Report") (Stay Mot. Exh. D).

interruptions." Katrina Report i. Indeed, the Katrina Report cited the "lack of commercial power" (along with lack of transport connectivity) as responsible for "the majority of the adverse effects and outages encountered by wireless providers." *Id.* at 9. The Katrina Report also observed that post-disaster restoration efforts were impeded by the fact that "[b]ack-up generators and batteries were not present at all facilities." *Id.* at 17. The Katrina Panel recommended, among other things, that "[s]ervice providers, network operators and property managers should ensure availability of emergency/backup power ... to maintain critical communications services during times of commercial power failure." *Id.* at 39. The panel stated further that "emergency/backup power generators should be located onsite, when appropriate." *Ibid.*

On June 19, 2006, the Commission initiated a "comprehensive rulemaking to address and implement" the Katrina Panel's recommendations.[3] The Commission asked whether the Katrina Panel's "observations warrant additional measures or steps beyond the report's specific recommendations" and, if so, requested "suggestions and recommendations" on what additional steps should be taken. *NPRM* ¶ 7. In particular, the Commission inquired about "whether [it] should rely on voluntary consensus recommendations, as advocated by the [Katrina] Panel, or whether [it] should rely on other measures for enhancing readiness and promoting more effective response efforts." *Ibid.* With respect to

---

[3] Notice of Proposed Rulemaking, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 21 FCC Rcd 7320, ¶ 1 (2006) (*NPRM*) (Stay Mot. Exh. E).

backup power requirements, the Commission requested comment on how it "can best encourage implementation of [the Katrina Panel's] recommendations" and "welcome[d] further suggestions on measures that could be taken to strengthen 911 and E911 infrastructure and architecture." *NPRM* ¶ 16.[4]

Several parties, including telecommunications companies and representatives of 911 call centers, filed comments pertinent to the issue of carriers' backup power capabilities. One 911 call center representing a community that was "directly in the path of Hurricane Katrina" told the Commission that "[v]oluntary consensus measures ... have fallen short many times" and that "it is imperative that [wireline] and wireless telephone providers be required to demonstrate they have adequate backup procedures in place" so that callers could access the 911 system during emergencies.[5] An association of 911 call centers likewise urged the Commission (and state commissions) not to rely simply on voluntary measures, but instead "require all telephone central offices to have an

---

[4] On July 26, 2006, the agency issued a public notice expanding the rulemaking proceeding to include a request for comment on the applicability of the Katrina Panel's recommendations "to all types of natural disasters" and "other types of incidents." Public Notice, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 21 FCC Rcd 8583, 8583 (2006) (*July 26 Public Notice*). The public notice reminded parties that the Commission's rulemaking proceeding would inquire about "whether [the agency] should rely on voluntary consensus recommendations [or] on other measures for enhancing readiness and promoting more effective response efforts." *Id.* at 8584 (internal quotation marks omitted).

[5] Comments of St. Tammany Parish Communications District 1 (St. Tammany Parish Comments), at 1-2, *available at* http://fccweb01w/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document =6518419762.

emergency back-up power source."[6]

Industry commenters, on the other hand, largely argued that the Commission should not adopt mandatory rules because carriers had already implemented adequate disaster recovery plans.[7] For its part, Sprint Nextel asserted that it was "prepared" to deal with power outages "throughout the Nation" "through the use of back-up batteries, generators, Cells on Wheels ('COWs') and, unique to Sprint Nextel, Satellite Cells on Light Trucks ('SatCOLTs')." Sprint Nextel Comments (Stay Mot. Exh. F) at 4. Stating that "Commission rules cannot change the fact that the wireless industry uses commercial power in the first instance," Sprint Nextel urged the Commission not to "burden[] ... communications service providers with costly mandates." Sprint Nextel Comments at iii; *see also* CTIA Comments at 9 ("To the extent the Commission favors additional guidance or criteria beyond those already developed by industry consensus groups, ... any business continuity plans should not be overly prescriptive.").

On June 8, 2007, the Commission issued the *Katrina Order* adopting

---

[6] Comments of the National Emergency Number Ass'n (NENA Comments) at 6, *available at* http://fccweb01w/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518424067.

[7] *See, e.g.*, CTIA–The Wireless Association Comments (CTIA Comments) at 8, *available at* http://fccweb01w/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518423809 (noting that wireless carriers "ensure network reliability and reliance" by "provision[ing] their cell sites and switches with batteries to power them when electrical grids fail"); Comments of the United States Telecom Association at 5-6, *available at* http://fccweb01w/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518423561 (identifying cellular providers that had installed backup power capacity to keep them in operation for several days).

"several of the recommendations" of the Katrina Panel. *Katrina Order* ¶ 1. With respect to backup power, the Commission agreed with those commenters that argued that "adoption of [a backup power] requirement serves the public interest." *Katrina Order* ¶ 77. It accordingly required certain communications providers to maintain 24 hours of backup power for communications assets inside central offices and eight hours of power reserves for cell sites and certain other parts of their networks. *Ibid.* The Commission expected that this requirement "will not create an undue burden since several [parties] reported in their comments that they already maintain emergency back-up power." *Id.* ¶ 78.

A summary of the *Katrina Order* was published in the *Federal Register* on July 11, 2007, and the rule was set to take effect on August 10, 2007. *See* 72 Fed. Reg. 37655. Seven parties—but not Sprint Nextel—filed timely petitions for agency reconsideration of the *Katrina Order*, and one party, CTIA, asked the Commission for an administrative stay of the backup power rule. As relevant here, those parties argued that the Commission lacked statutory authority to mandate that carriers ensure adequate backup power; that the rule was adopted in violation of the Administrative Procedure Act (APA); and that, in certain locations, strict compliance with the rule might be precluded by federal, state, or local law, safety concerns, or private contracts.[8] To consider these arguments more fully, the Commission on its own motion delayed the effective date of the backup power rule

[8] *See, e.g.*, Petition for Reconsideration, CTIA–The Wireless Association at 7-25, available at http://fjallfoss.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6519610713.

until October 9, 2007.[9]

On October 4, 2007, the Commission issued an order granting the reconsideration petitions in part and denying them in part.[10] As relevant here, the Commission denied reconsideration to the extent that parties challenged the Commission's authority to adopt the backup power rule or claimed inadequate notice under the APA. *Reconsideration Order* ¶¶ 8-19. The Commission also rejected arguments that its decision to require wireless carriers to ensure eight hours of backup power was inadequately reasoned and lacked support in the administrative record. *Id.* ¶¶ 20-23. The Commission, however, granted reconsideration in part to "facilitate carrier compliance and reduce [their] burden[s]." *Id.* ¶ 1. The Commission excused compliance where it would be precluded by law, safety concerns, or private agreements. *Id.* ¶ 25. For other noncompliant assets, the Commission no longer required compliance as of the effective date of the rule and instead gave carriers twelve months from the rule's effective date in which to submit a "certified emergency back-up power compliance plan." *Id.* ¶ 27. This plan must demonstrate how the carrier will provide emergency backup power to areas covered by noncompliant assets sufficient to provide eight hours of service for areas served by cell sites. For purposes of these plans, the Commission stated that carriers need not rely on "on-

---

[9] Order, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 14246 (2007).

[10] Order on Reconsideration, *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks*, 22 FCC Rcd 18013 (2007) (*Reconsideration Order*) (Stay Mot. Exh. B).

site" upgrades to ensure eight hours of backup power, but may utilize "portable backup power sources or other sources as appropriate." *Ibid.* To implement these revisions, the Commission required carriers to file a report within six months of the rule's effective date that lists their compliant and noncompliant assets and justifies any claim for exemption based on legal, safety, or contractual concerns. *Id.* ¶ 26.

A summary of the *Reconsideration Order* was published in the *Federal Register* on October 11, 2007. *See* 72 Fed. Reg. 57879. Because the Office of Management and Budget must approve the rule's information collection requirements, *ibid.,* the rule is not expected to take effect before March 2008. As a result, carriers will not have to file their six-month report until late Summer or Fall 2008 and will not be required to have a compliance plan in place until 2009.

ARGUMENT

Before it can obtain a stay, Sprint Nextel must show that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). Sprint Nextel falls far short of making any of these showings.

I. SPRINT NEXTEL IS NOT LIKELY TO PREVAIL ON THE MERITS

Sprint Nextel contends that the backup power rule exceeds the Commission's statutory authority and, in various respects, violates the APA. The Court lacks jurisdiction to consider many of these claims. All of them lack merit.

A. Sprint Nextel's Challenge to the *Katrina Order* is Untimely

Under 28 U.S.C. § 2344, a party seeking to challenge a Commission order must file a petition for review "within 60 days" of "entry" of the "final order." The "sixty-day period is jurisdictional in nature, and may not be enlarged or altered by the courts." *Western Union Telegraph Co. v. FCC*, 773 F.2d 375, 377 (D.C. Cir. 1985) (internal quotation marks omitted).

The *Katrina Order* was entered on July 11, 2007, the date on which a summary of the order was published in the *Federal Register*. *See* 47 C.F.R. § 1.4(b)(1); *Western Union Telegraph Co.*, 773 F.2d at 376. Sprint Nextel's petition for review was filed in this Court on November 23, 2007, well after the 60-day period for challenging the *Katrina Order* had expired. Sprint Nextel's challenge to the *Katrina Order* is therefore untimely.[11]

Although Sprint Nextel's challenge to the *Reconsideration Order* is timely under § 2344, an order denying reconsideration "is unreviewable except insofar as the request for reconsideration [is] based upon new evidence or changed circumstances." *Entravision Holdings, LLC v. FCC*, 202 F.3d 311, 313 (D.C. Cir.

---

[11] A party may toll its time for seeking review under § 2344 by filing a petition for administrative reconsideration because the reconsideration petition renders the agency's order non-final as to that party. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 285 (1987); *Small Business in Telecommunications v. FCC*, 251 F.3d 1015, 1023-24 (D.C. Cir. 2001). Because Sprint Nextel did not file a reconsideration petition with the Commission, however, the *Katrina Order* became "final" as to Sprint Nextel on the date of *Federal Register* publication. *See ICG Concerned Workers Ass'n v. United States*, 888 F.2d 1455, 1458 (D.C. Cir. 1989) ("in the multi-party situation, an agency decision may be final with respect to some parties but nonfinal with respect to other parties.").

2000).[12] Even where an agency grants reconsideration in part, "only the portion of the order actually reopened ... is reviewable on its merits." *Beehive Telephone Co. v. FCC*, 180 F.3d 314, 321 (D.C. Cir. 1999). "[W]hether an agency has reopened a proceeding" turns on the "formalities of its action." *Ibid.* Mere discussion of the merits of an issue in the course of denying a reconsideration request does not constitute reopening. *See Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997).

In this case, the *Katrina Order* adopted the mandatory eight-hour back-up power rule, and the *Reconsideration Order* adhered to that decision. Accordingly, the decision to adopt "the backup power mandate in general" (Mot. at 13), was not "reopened," and Sprint-Nextel's statutory authority, notice, and arbitrary-and-capricious challenges to that mandate are therefore untimely. Sprint-Nextel's only timely claim is its challenge to reporting requirements adopted in the *Reconsideration Order*, and that claim is waived because Sprint-Nextel has not asserted it before the agency, *see* 47 U.S.C. § 405. Accordingly, the Court lacks jurisdiction over Sprint Nextel's claims, and Sprint Nextel *a fortiori* cannot establish a likelihood of success on the merits.

B. Sprint Nextel's Claims Lack Merit

Even assuming the Court had jurisdiction over all of Sprint Nextel's claims, they would fail on the merits.

---

[12] Because Sprint Nextel did not file a petition for administrative reconsideration at the Commission, it cannot rely on the "new evidence or changed circumstances" exception to challenge the Commission's decision to deny reconsideration in part. *Entravision*, 202 F.3d at 313.

1. The Commission Had Statutory Authority to Promulgate the Backup Power Rule

The FCC correctly found that it has authority under section 1 of the Communications Act to impose the backup power requirement on wireless providers. *See Reconsideration Order* ¶¶ 15-19. Title I of the Act (where section 1 is located) provides the Commission with "ancillary jurisdiction" to regulate wire and radio communications. *See, e.g., NCTA v. Brand X Internet Services*, 545 U.S. 967, 976, 996 (2005) (recognizing FCC's ancillary authority over information-service providers). The agency may exercise its ancillary jurisdiction when: (1) its "general jurisdictional grant under Title I covers the regulated subject" and (2) "the regulations are reasonably ancillary to [the] effective performance of its statutorily mandated responsibilities." *American Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005).[13]

The Commission's action in this case satisfies both criteria. As the Commission found, it has subject matter jurisdiction over the provision of service by wireless carriers, which clearly involve interstate "communication by ... radio." *See Reconsideration Order* ¶ 17 (quoting 47 U.S.C. § 151).[14] It also correctly

---

[13] Contrary to Sprint Nextel's suggestion (Mot. 9), the Commission did not assert that 47 U.S.C. § 303(r) by itself conferred substantive authority to adopt the backup power rule. Rather, § 303(r) authorizes the Commission to promulgate rules to implement the Commission's exercise of authority "pursuant to § 1 of the Act." *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 806 (D.C. Cir. 2002).

[14] Sprint Nextel incorrectly cites (Mot. 9) *American Library Association* for the proposition that § 1 is merely a "general jurisdictional grant" that "does not delegate any substantive authority to the FCC." In *American Library Association*, the Court held that the "broadcast flag" rule at issue in that case was not within the Commission's jurisdiction because it sought to regulate conduct unrelated to the

found that the backup power requirement is "reasonably ancillary to the effective performance" of the Commission's responsibilities to promote the national defense and public safety. Section 1 itself makes clear that one of the Commission's missions is to "make available [a] wire and radio communication service with adequate facilities ... for the purpose of the national defense [and] of promoting safety of life and property." 47 U.S.C. § 151.[15] Section 1 thus requires the Commission to "consider public safety" and to "take into account its duty to protect the public." *Nuvio Corp. v. FCC*, 473 F.3d 302, 307 (2006); *see also id.* at 311 (Kavanaugh, J., concurring) ("the FCC possesses the statutory authority ... to address the public safety threat by banning providers from selling voice service until the providers can ensure adequate 911 connections").[16] As this Court has recognized, it is well "within the Commission's statutory authority" to " 'make such rules and regulations ... as may be necessary in the execution' " of its section

---

act of transmitting communications. 406 F.3d at 692, 703-04. The Court did not suggest that § 1 conferred no "substantive authority" on the Commission; it merely concluded that the Commission had "exceeded the scope" of its § 1 authority in that case. *Id.* at 703.

[15] Sprint Nextel contends (Mot. 10) that 47 U.S.C. § 332(c)(1) and (3) reflects a policy that "wireless services remain deregulated." As Sprint Nextel recognizes, however, § 332 deals generally with "competition" and regulation of "rates and entry." The backup power rule does not regulate these aspects of the wireless industry.

[16] Contrary to Sprint Nextel's assertion (Mot. 10), the Commission has never said that it may not act under §§ 1 and 303(r) in addressing "wireless public safety issues." Indeed, the FCC order that Sprint Nextel relies on cites those very provisions as sources of authority. *See Improving Public Safety Communications in the 800 MHz Band*, 20 FCC Rcd 16015, 16042-43 ¶ 62 (2005).

1 responsibilities." *Rural Telephone Coalition v. FCC,* 838 F.2d 1307, 1315 (D.C. Cir. 1988) (quoting 47 U.S.C. § 154(i)).

2. The Commission Complied With APA Notice Requirements

Under the APA, a rulemaking notice must include "*either* the terms or substance of the proposed rule *or a description of the subjects and issues involved.*" 5 U.S.C. § 553(b)(3) (emphasis added). The notice "need not specify every precise proposal which the agency may ultimately adopt as a rule"; it need only "be sufficient to fairly apprise interested parties of the issues involved." *Nuvio Corp.*, 473 F.3d at 310 (internal punctuation omitted). The APA's notice requirement is satisfied if the agency's final rule is a " 'logical outgrowth' of its notice." *Covad Communications Co. v. FCC*, 450 F.3d 528, 548 (D.C. Cir. 2006).

The *NPRM* easily satisfied that standard. It asked how "the Commission can best encourage implementation" of the Katrina Panel's recommendation that service providers "*ensure availability* of emergency back-up power capabilities (located on-site, when appropriate)," and it "welcome[d] *further suggestions* on measures that could be taken to strengthen 911 and E911 infrastructure." *NPRM* ¶ 16 (emphasis added). The *NPRM* also made clear that the Commission was considering "additional measures beyond the [Katrina Panel's] recommendations." *NPRM* ¶ 7. And it specifically asked "whether [the agency] should rely on *voluntary consensus recommendations*, as advocated by the [Katrina Panel], or whether [it] should rely on *other measures* for enhancing readiness and promoting more effective response efforts," *ibid.* (emphasis added)—a line of inquiry the agency reiterated in its *July 26 Public Notice*, 21 FCC Rcd at 8584.

Indeed, not only did the *NPRM* let "interested parties ... know what to comment on" (Mot. 11, quoting *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)), parties actually commented on it. Public safety representatives argued for mandatory rules, while the industry argued that mandatory rules were unnecessary because carriers had already deployed adequate backup power capacity. *See Reconsideration Order* ¶ 13; *see also supra* pp. 5-6. Sprint Nextel itself "recommend[ed] continued industry self regulation in this area," Sprint Comments at 7, suggesting that it had adequate notice that "the *NPRM* might lead to a mandate" on backup power. *See* Stay Mot. 11.[17]

3. The Commission's Backup Power Rule Is Reasonable

Sprint Nextel also fails to establish a substantial likelihood of success on the merits of its claims that the backup power rule is arbitrary and capricious. The APA's arbitrary-and-capricious standard is a narrow one, and the "court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). Under that "highly deferential" standard, *Maine Public Utilities Commission v. FERC*, 454 F.3d 278, 286 (D.C. Cir. 2006) (internal quotation marks omitted), the Commission need only articulate a "rational connection between the facts found and the choice

[17] Although Sprint Nextel claims the *NPRM* did not "hint at the eight-hour requirement or the compliance reporting requirement" (Mot. 13), these requirements are a logical outgrowth of the rulemaking. As the Commission explained, "parties should have realized that an emergency backup power mandate would inevitably include a specific durational requirement." *Reconsideration Order* ¶ 14. Likewise, parties should have anticipated that the Commission might require carriers to file reports demonstrating their compliance with the rule.

made." *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted); *Earthlink, Inc. v. FCC*, 462 F.3d 1, 9 (D.C. Cir. 2006). Sprint Nextel cannot overcome this highly deferential standard.

Sprint Nextel argues (Mot. 13-16) that the Commission acted arbitrarily because it allegedly did not consider alternatives to the backup power rule or support the rule with record evidence. But the Commission not only *considered* alternatives, it actually *modified* the rule to address concerns raised by the industry about the requirements imposed in the *Katrina Order*. To be sure, the Commission did not waver from its view that a mandatory backup power requirement was in the public interest, but it fully justified its decision not to rely on purely voluntary measures. The Katrina Report showed that "not all locations have backup power," *Reconsideration Order* ¶ 23, and the experience of 911 call centers revealed that "[v]oluntary consensus measures ... have fallen short many times." St. Tammany Parish Comments at 1-2. Because "[a]ccess to communications technologies during times of emergency is critical to the public, public safety personnel, hospitals, and schools, among others," the Commission concluded that a mandatory rule was necessary to ensure that all locations had the "benefits of ... resilient communications during times of crises." *Reconsideration Order* ¶ 23.

The Commission also justified its choice of eight hours for cell sites and other remote locations. It was plainly reasonable for the Commission to facilitate emergency communications in the first eight hours following a natural disaster or terrorist attack by ensuring a minimum period of network operation within which

carriers could "obtain additional backup power sources" if commercial power were not restored. *Id.* ¶ 21; *see also id.* ¶ 31.[18] The Commission also explained that an eight-hour standard would mitigate the "burdens of ensuring longer durations of backup power" because many carriers were already in compliance with that standard at many locations. *See id.* ¶ 21 & n.68.

Finally, Sprint Nextel's challenge (Mot. 14) to the Commission's reporting requirements is not likely to prevail. As an initial matter, carriers have more than a "six-month window" (*ibid.*) to survey their cell sites: The reporting requirement was announced on October 4, 2007, while the six-month window will not open until the rule becomes effective—likely another few months from now. In any event, the Commission asked for the "six-month" report primarily as a means for implementing *exemptions* that carriers had requested. However, carriers are not required to request an exemption; they may instead develop a compliance plan to ensure that adequate backup power capacity is available to locations served by noncompliant cell sites. *See Reconsideration Order* ¶ 27.

II. SPRINT NEXTEL HAS NOT SHOWN IRREPARABLE HARM

"The basis for injunctive relief in the federal courts has always been

---

[18] Oddly, Sprint Nextel suggests (Mot. 13-14, 15-17) that the backup power rule is arbitrary because it does not go far enough to address fully a calamity of the level of Hurricane Katrina or prevent those network outages caused by "flood waters." The APA, however, does not treat the best as the enemy of the good. *See National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1147 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1225, 1227 (1985). The Commission acted well within its discretion in crafting a rule that would "facilitate carrier compliance and reduce [their] burden ... while continuing to further important homeland security and public safety goals." *Reconsideration Order* ¶ 1.

irreparable harm and inadequacy of legal remedies." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain a stay, Sprint Nextel must establish that the irreparable injury it would suffer without a stay would be "both certain and great," "actual and not theoretical." *Ibid.* Sprint Nextel has not met this heavy evidentiary burden.

Sprint Nextel's claim of irreparable injury rests largely on compliance costs, but "ordinary compliance costs are typically insufficient to constitute irreparable harm."[19] Moreover, even if compliance costs alone were sufficient to support a stay pending review, Sprint Nextel's cost analysis is fundamentally flawed. First, Sprint Nextel provides no analysis of the costs it expects to incur *pending judicial review*; rather, it estimates the total cost of auditing its cell sites and implementing site specific solutions. But the rule does not become fully effective until 2009, so the bulk of these costs may well occur after judicial review is complete, especially if the Court grants the motion for expedited review filed by the other petitioners. Presumably this is why those petitioners sought expedition rather than a stay.

Second, Sprint Nextel's assumption that site-by-site upgrades are the only means of complying with the backup power rule, *see* Woodruff Decl. ¶¶ 28-29, ignores the Commission's statement that carriers need not rely on "on-site" power sources in their backup power compliance plans. *Reconsideration Order* ¶ 27.[20]

---

[19] *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005).

[20] For example, Sprint Nextel previously told the Commission that it uses not only "back-up batteries" and "generators" in the event of a power failure, but also portable devises such as "COWs" and "SatCOLTs." Sprint Nextel Comments at 4.

Finally, Sprint Nextel fails to break out the costs it would incur even in the absence of the backup power rule. For example, Sprint Nextel had previously committed to spending $100 million for "hurricane preparations in storm-prone coastal communities" and insisted that it is "spending millions of dollars to improve back-up sources of power." Sprint Nextel Comments at iii, 4. Sprint Nextel does not account for those "millions" in its estimate of compliance costs.

III. A STAY WOULD SUBSTANTIALLY HARM OTHER PARTIES AND WOULD DISSERVE THE PUBLIC INTEREST

The FCC is charged with "promoting safety of life and property,"—and the "national defense"—"through the use of wire and radio." 47 U.S.C. § 151. The backup power rule carries out that responsibility by ensuring that during a natural disaster or major regional calamity—when access to 911 and emergency services is at its most critical—the public will be able to use the communications network even if the power grid fails. Implementation of that rule will serve the compelling governmental interest in promoting public safety, while a stay of the rules would disrupt the critically important process of improving disaster preparedness and network reliability.[21] An indefinite delay could potentially—and unjustifiably—compromise public safety and put lives at risk. In this regard, it is remarkable that Sprint Nextel asserts (Mot. 18) that a stay of the rules will not harm other parties

[21] Sprint Nextel argues that a stay would enable it to "devot[e] ... resources" to "other needs." Mot. 19. The Commission, however, has defined adequate backup power capacity to be of critical importance, and it is the Commission's judgment, not those of Sprint Nextel's "network engineers" (Mot. 3) that is entitled to deference.

because it would preserve the *status quo*.[22] The Commission's inquiry into the impact of Hurricane Katrina showed that the *status quo* is dangerously unacceptable, an assessment with which public safety organizations agree.[23]

In a different context, this Court has observed that "delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake." *Telecommunications Research & Action Center v. FCC,* 750 F.2d 70, 80 (D.C. Cir. 1984). The same reasoning applies here. Sprint Nextel bears an especially heavy burden given that no other carrier subject to the backup power rule has sought to stay its effectiveness pending judicial review. The Court should not stay an industry-wide rule that has the potential to save lives for the sake of the pecuniary interests of a single carrier.

CONCLUSION

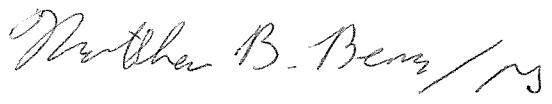
For the foregoing reasons, the Court should deny Sprint Nextel's motion for stay pending judicial review.

---

[22] Sprint Nextel's assertion that a stay would "unquestionably benefit the public interest" because it would obviate the need for the company to shut down noncompliant cell sites and assets is perhaps even more remarkable. Mot. 19. First of all, Sprint offers no reason why it would have to shut down such sites prior to March or April 2009 (*i.e.*, when the rule will be fully effective), and the Court almost certainly will be able to decide this case by that time. Furthermore, the Commission has provided exemptions to allow the continued operation of sites when compliance is precluded by law or would pose a safety risk. Finally, to the extent that Sprint Nextel chooses not to bring other sites into compliance, the company may, of course, erect new replacement sites, and it will probably be in its competitive interest to do so.

[23] St. Tammany Parish Comments at 1-2; NENA Comments at 6.

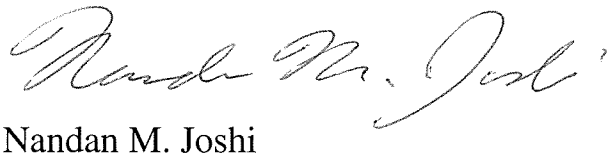
Respectfully submitted,



Matthew B. Berry
Acting General Counsel

Joseph R. Palmore
Deputy General Counsel

Daniel M. Armstrong
Associate General Counsel



Nandan M. Joshi
Counsel
Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

January 7, 2008

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CTIA-The Wireless Association, Petitioner,

v.

Federal Communications Commission and USA, Respondents.

Certificate Of Service

I, Tamika S. Parker, hereby certify that the foregoing "Opposition Of The FCC To Sprint Nextel's Motion For Stay Pending Review" was served this 7th day of January, 2008, by mailing true copies thereof, postage prepaid, to the following persons at the addresses listed below:

Michael F. Altschul
CTIA - The Wireless Association
1400 16th Street, NW
Suite 600
Washington DC 20036

Counsel For: CTIA - The Wireless Association

Matthew A. Brill
Latham & Watkins LLP
555 11th Street., N.W.
Suite 1000
Washington DC 20004-1304

Counsel For: USA Mobility, Inc.

Lynn R. Charytan
Wilmer, Cutler, Pickering, Hale & Dorr LLP
1875 Pennsylvania Ave., N.W.
Washington DC 20006-1420

Counsel For: T-Mobile USA, Inc.

Michael Fitch
PCIA - The Wireless Infrastructure Association
500 Montgomery Street
Suite 700
Alexandria VA 22314

Counsel For: PCIA - The Wireless Infrastructure Association

Craig E. Gilmore
Wilkinson Barker Knauer, LLP
2300 N Street, N.W., Suite 700
Washington DC 20037

Counsel For: PCIA - The Wireless Infrastructure Association

James R. Hobson
Miller & Van Eaton, P.L.L.C.
1155 Connecticut Ave., N.W
Suite 1000
Washington DC 20036-4306

Counsel For: National Emergency Number Association, et al.

Richard B. McKenna, Jr.
Qwest Communications International, Inc.
607 14th Street, N.W.
Suite 950
Washington DC 20005

Counsel For: Qwest Services Corp.

Carl W. Northrop
Paul, Hastings, Janofsky & Walker, L.L.P.
875 15th Street, N.W.
Washington DC 20005

Counsel For: MetroPCS Communications, Inc.

Catherine G. O'Sullivan
United States Department of Justice
Antitrust Div., Appellate Section
905 Pennsylvania Avenue, N.W., Room 3224
Washington DC 20530-0001

Counsel For: USA

Thomas J. Sugrue
T-Mobile USA, Inc.
401 Ninth Street, N.W., Suite 550
Washington DC 20004

Counsel For: T-Mobile USA, Inc.

Thomas S. Thompson
Cole, Raywid & Braverman
1919 Pennsylvania Ave., N.W.
Second Floor, Suite 200
Washington DC 20006

Counsel For: NEXTG Networks, Inc.

Helgi C. Walker
Wiley Rein LLP
1776 K Street, N.W.
11th Floor
Washington DC 20006

Counsel For: CTIA - The Wireless Association

Christopher J. Wright
Harris, Wiltshire & Grannis LLP
1200 Eighteenth Street, N.W.
12th Floor
Washington DC 20036

Counsel For: Sprint Nextel Corporation

Tamika S. Parker