Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules	)	
To Ensure Compatibility with	)	CC Docket No. 94-102
Enhanced 911 Emergency	)	
Calling Systems	)	
	)	
Petition of City of Richardson, Texas	)	
	)	

ORDER

Adopted: October 2, 2001 **Released: October 17, 2001**

By the Commission:

I. INTRODUCTION

1. In this Order, in response to a petition for clarification and/or declaratory ruling filed by the City of Richardson, Texas[1] (Richardson), we amend the Commission's rules to clarify what constitutes a valid Public Safety Answering Point (PSAP) request so as to trigger a wireless carrier's obligation to provide enhanced 911 (E911) service to that PSAP. Specifically, we hold that a wireless carrier must implement E911 within the six-month period following the date of the PSAP's request. If the wireless carrier questions whether the PSAP will be able to receive and utilize the E911 data requested by the end of the six-month period following receipt of the request, the request will be deemed valid if the PSAP demonstrates that:

- a mechanism is in place by which the PSAP will recover its costs of the facilities and equipment necessary to receive and utilize the E911 data elements;
- the PSAP has ordered the equipment necessary to receive and utilize the E911 data and the equipment will be installed and capable of receiving and utilizing that data no later than six months following its request; and
- the PSAP has made a timely request to the appropriate local exchange carrier (LEC) for the necessary trunking and other facilities, including any necessary Automatic Identification Location (ALI) database upgrades, to enable the E911 data to be transmitted to the PSAP.

In the alternative, a PSAP requesting Phase II service may demonstrate that a funding mechanism is in place, that it is Phase I-capable using a Non-call Associated Signaling (NCAS) technology, and that it has made a timely request to the appropriate LEC for the upgrade to the ALI database necessary to enable the PSAP to receive the Phase II data. We conclude that this approach will encourage the implementation of

[1] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* CC Docket No. 94-102, City of Richardson Petition for Declaratory Ruling and/or Clarification (filed April 5, 2001) (*Richardson Petition*).

wireless E911 service[2] and avoid the unnecessary expenditure of carrier and PSAP resources, while assuring that the PSAP will be ready to receive Phase I or Phase II information at the time that the wireless carrier's obligation to deliver that information becomes due.

II. BACKGROUND

2. Section 20.18(j) of the Commission's rules provides that certain commercial mobile radio service (CMRS) providers must make Phase I and Phase II E911 service available "only if the administrator of the designated Public Safety Answering Point has requested the services required …and is capable of receiving and utilizing the data elements associated with the service, and a mechanism for recovering the Public Safety Answering Point's costs of the enhanced 911 service is in place."[3]

3. This rule was initially promulgated in the *E911 First Report and Order* in this proceeding.[4] In that Order, the Commission stated that the requirement to provide E911 services would be applicable only if "a carrier receives a request for such E911 services from the administrator of a PSAP that is capable of receiving and utilizing the data elements associated with the services."[5]

4. In the *E911 Second Memorandum Opinion and Order*, the Commission acted to expedite Phase I and Phase II implementation by removing its previous requirement that a cost recovery mechanism be in place for CMRS providers, as well as for PSAPs, before a carrier would be obligated to implement E911 services in response to a PSAP's valid request for such services.[6] The Commission retained the cost recovery requirement for PSAPs, however. The Commission explained first, that E911 service implementation will require both carriers and PSAPs to make substantial investments in facility and equipment upgrades to implement service;[7] second, that carriers "cannot fulfill their obligations…unless and until the States' 911 systems are capable of receiving and utilizing the E911 information so that PSAPs can make a valid request for the service;"[8] and finally, that it wanted to ensure "that carriers are not required to make unnecessary expenditures in response to a PSAP that is not ready to use the E911 information."[9]

5. On March 20, 2000, Richardson requested E911 service from VoiceStream Wireless Corporation (VoiceStream), stating that it had an adequate cost recovery mechanism in place to bring its customer premises equipment (CPE) to the level necessary to receive Phase II data, and that the CPE

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[2] Because the provisions of section 20.18(j) of our rules apply to requests for both Phase I and Phase II service, the readiness requirements we adopt today apply to both Phase I and Phase II requests.

[3] 47 C.F.R. § 20.18(j).

[4] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676 (1996)(*E911 First Report and Order).*

[5] *First Report and Order,* 11 FCC Rcd at 18684 , para. 11.

[6] *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, RM-8143, Second Memorandum Opinion and Order, 14 FCC Rcd 20850, 20859-80 (1999) (paras. 19-74) (*E911 Second Memorandum Opinion and Order).*

[7] *Id*. at 20877, para. 66.

[8] *Id*. at 20878, para. 67.

[9] *Id*. at 20879, para. 69.

upgrades would be finalized prior to delivery of the Phase II data by VoiceStream.[10] In response, VoiceStream stated that Richardson's request did not satisfy the Commission's requirements because Richardson's equipment "is not capable of receiving and using the Phase II data."[11]

6. On April 5, 2001, Richardson filed a petition seeking clarification and/or a declaratory ruling that a PSAP makes a valid request for E911 service "by informing the carrier that its equipment upgrades for Phase II service will be finalized prior to delivery of the service by the carrier, that the PSAP has an adequate cost recovery mechanism in place to bring its equipment to the level necessary to receive Phase II data, and that the carrier is required to deliver Phase II service within six months after receiving such a request or by October 1, 2001, whichever is later, so that the service is available to the PSAP when its equipment upgrades are completed."[12]

7. On April 5, 2001,[13] the Wireless Telecommunications Bureau (Bureau) issued a Public Notice seeking comment on the *Richardson Petition*. In response, twelve parties filed comments and five parties filed reply comments.[14] Richardson and the PSAP organizations supporting its view argued that: (1) the language of the rule implies that the PSAP can and will request the service before it is capable of using it; (2) such a reading is consistent with the Commission's desire to encourage the rapid deployment of E911; (3) the presence of a cost recovery mechanism amply demonstrates that the PSAP will have Phase II capability in place within six months; and (4) requiring service-ready PSAPs to wait for six months before actually receiving service would be a waste of public funds.

8. The carriers opposing Richardson's view argued, on the other hand, that: (1) the *E911 Second Memorandum and Order* makes clear that the rule requires the PSAP to be capable of receiving and utilizing the data elements in order to be able to request 911 services; (2) any change to this interpretation requires a Notice of Proposed Rulemaking; (3) despite their good faith claims, PSAPs have not always had Phase I capability six months after requesting it; and (4) providing E911 services to PSAPs that are not capable will delay service to PSAPs that are ready, resulting in a delay in the nationwide implementation of Phase II service.

9. On July 10, 2001, the Bureau issued a second Public Notice identifying the divergent perspectives reflected in the comments addressing Richardson's Petition and stating that, "based on the language of the rule itself, the Commission's orders addressing the rule, and the comments and reply comments of interested parties, it appears that the rule as written may be capable of more than one interpretation."[15] The Bureau then sought additional comment on whether the rule should be amended to clarify its meaning and what "identifiable, measurable criteria a PSAP could be required to meet to

[10] *Richardson Petition* at 3.

[11] *Richardson Petition* at 3-4. In its letter to VoiceStream, Richardson requested both Phase I and Phase II service. VoiceStream's denial, based on the alleged invalidity of Richardson's request, addressed only Phase II.

[12] *Id.* at 1.

[13] Wireless Telecommunications Bureau Seeks Comment on Request for Clarification or Declaratory Ruling Concerning Public Safety Answering Point Requests for Phase II Enhanced 911, CC Docket No. 94-102, Public Notice, 16 FCC Rcd 7875 (2001) (*First Public Notice*).

[14] The parties included PSAPs, PSAP organizations and wireless carriers. A list of the parties filing comments and reply comments, together with short title references, is contained in Appendix A.

[15] Wireless Telecommunications Bureau Seeks Further Comment on the Commission's Rules Concerning Public Safety Answering Point Requests for Phase II Enhanced 911, Public Notice, CC Docket No. 94-102, 16 FCC Rcd 13670, 13671 (2001)(*Second Public Notice*).

demonstrate at the time it makes a request that it has taken sufficient steps to assure that it will be able to receive and utilize the E911 data prior to the delivery of service by the carrier."[16] In illustration, the Bureau inquired if it would be sufficient for the PSAP to show: (1) that it has the necessary funding available; (2) that it has purchase orders with vendors that will install the necessary facilities with obligations that the vendors must perform within the six-month period; and (3) that it has made arrangements with LECs to supply the necessary trunking, the ALI database, and any other necessary facilities or capabilities in a timely fashion. Ten comments and eight reply comments were received in response to the *Second Public Notice*.[17]

10. Many parties filing comments in response to the *Second Public Notice* support the need for some criteria to establish that a valid PSAP request has been made.[18] PSAP representatives such as Richardson and TX-CSEC argue that such criteria will preclude carriers from denying service based on "arbitrary, unilateral, self-serving, and subjective judgments" that a PSAP's request does not comply with section 20.18(j).[19] Carriers supporting the use of such criteria argue that their use will protect carriers from making premature investments in E911 facilities and equipment and will prevent unprepared PSAPs from diverting resources from the implementation of E911 service in jurisdictions that are ready to receive and use the data received from the carrier.[20] The parties disagree, however, on the criteria to be adopted: some parties reject the imposition of criteria other than the funding prerequisite,[21] while others continue to assert that the PSAP must be entirely ready to receive and utilize the Phase II data elements provided by the carrier before a valid request can be made under section 20.18(j).[22]

III. DISCUSSION

11. We begin this discussion by reiterating that, in this complex area involving multiple parties, we continue to believe that promoting cooperation and good faith negotiations between all of the parties is the best approach to ensuring a timely and effective roll-out of E911 service. In that vein, we agree with commenters on both sides of this issue that, while overly-detailed rules governing PSAP requests would be counterproductive, it would be useful for us to specify a small number of measurable, objective criteria that will establish that a PSAP requesting Phase I or Phase II service will be prepared to use the data supplied by the carrier no later than six months after making the request, should the wireless carrier challenge the validity of that request. This should help ensure that none of the parties expends resources unnecessarily. Both public safety commenters and industry comments support this view.

12. For example, APCO and NENA point out that the division of cost responsibilities articulated in the Bureau's letter to the King County, Washington 911 Program Manager[23] "puts a premium on

[16] *Id*.

[17] *See* Appendix A.

[18] CTIA Comments at 2; MARC Comments at 1; Richarson Comments at 2-3; Sprint PCS Comments at 2; TX-CSEC Comments at 2.

[19] *See, e.g.*, Richardson Comments at 1.

[20] Sprint PCS Comments at 2; Cingular Reply Comments at 4-5; Nextel Reply Comments at 2.

[21] Joint Comments of APCO and NENA at 2-3; *see also* Tarrant County Comments at 2.

[22] Cingular Comments at 2; Cingular Reply comments at 2. *But see* Joint Reply Comments of NENA, APCO, and Tarrant County at 2.

[23] Letter from Thomas J. Sugrue, Wireless Telecommunications Bureau Chief, dated May 7, 2001, to Marlys R. Davis, E911 Program Manager, King County, Washington (letter to King County).

mutual approaches to technological solutions" for the delivery of Phase I (and Phase II) data.[24] Similarly, many carriers and PSAPs reject any suggestion that the Commission establish the type of mapping capability a PSAP must demonstrate in order to make a valid request, asserting that the parties should be permitted to select their own methodologies for implementing the Commission's Phase II requirements.[25] We should not, as Richardson puts it, "micromanage" the manner in which the parties fulfil their respective responsibilities under section 20.18.[26]

13. Thus, in this order, we decline to adopt an elaborate scheme by which a PSAP may demonstrate that it is capable of receiving and utilizing E911 data, if challenged by the wireless carrier. Instead, we adopt three objective criteria that will substantiate that the PSAP will be "capable of receiving and utilizing" that data at the time the carrier's obligation becomes due. In our view, requiring a challenged PSAP to establish that these criteria have been met properly balances the parties' respective obligations and ensures both that PSAPs receive timely Phase I and Phase II service and that wireless carriers are not asked to commit resources needlessly.

14. First, the PSAP must demonstrate that a funding mechanism exists for recovering its costs of facilities and equipment necessary to receive and utilize the E911 data elements to be supplied by the carrier. Citation to or a copy of the relevant funding legislation is sufficient to demonstrate compliance with this prerequisite to a valid PSAP Phase II request.[27]

15. Second, the PSAP must demonstrate that it has ordered the equipment necessary to fulfill its Phase II obligations, including, but not limited to, CPE necessary to locate the caller's location for purposes of dispatching assistance, and that such equipment is scheduled to be installed and operable by the end of the six-month period.[28] Substantiation could take the form of a listing of the necessary facilities and equipment and copies of the relevant vendor purchase orders. These orders must contain a requirement that the vendor perform under the agreement within the six-month period or the PSAP must present other sustantiating evidence of a commitment by the vendor to perform within the six-month period.

16. Finally, the PSAP must demonstrate that it has made a timely request[29] to the proper LEC for

[24] Joint Comments of NENA and APCO at 3; *see* Joint Reply Comments of NENA, APCO and Tarrant County at 1-2; *see also* VoiceStream Reply Comments at 2.

[25] *See* Richardson Comments at 3; MARC Comments at 2; Joint Comments of NENA and APCO at 3-4; Sprint PCS Comments at 4; Tarrant County Comments at 2; TX-CSEC Comments at 5. In further illustration, Richardson references the Commission's refusal to mandate an NCAS or a Call Associated Signaling (CAS) solution for delivering Phase I data, to express a preference for a handset versus a network solution for Phase II, or to mandate the specifics of those handset solutions presently proposed by the carriers, so long as they meet the accuracy criteria. Richardson Reply Comments at 2.

[26] Richardson Reply Comments at 2.

[27] VoiceStream argues that the funds must be "approved for use" in upgrading PSAP facilities, but that the existence of executed contracts with vendors would provide sufficient evidence of this funding commitment. VoiceStream Reply Comments at 3-4.

[28] The parties' respective obligations with respect to these network components are set forth in the letter to King County. *See* footnote 23, *supra*.

[29] The following estimates of the lead-time required for LEC provisioning of the necessary facilities and equipment are based on tariff filings and should serve as guidance in determining the timeliness of the PSAP's request to the LEC. Interoffice trunking takes two days to install and customized routing in the E911 Selective Router takes 16 12-hour days to implement. *See* Qwest Communications Service Interval Guide for Resale and Interconnection at (continued….)

the facilities and equipment necessary to receive and utilize the Phase II data elements. Such facilities and equipment could include upgrades to the 911 selective router, trunking and ALI database. Evidence could consist of the letter of request, as well as any other pertinent correspondence between the PSAP and the LEC.

17. In the *Second Public Notice*, we sought comment on whether it would be sufficient for a PSAP to show, in addition to the existence of a funding source, that it has implemented Phase I using a Non-Call Path Associated Signaling (NCAS) technology. Commenters appear to have misunderstood the request as a proposal to mandate the implementation of an NCAS solution for Phase I, or to preclude PSAPs from requesting Phase I and Phase II service simultaneously.[30] Neither is accurate. The inquiry stemmed from our understanding that many of the components and attendant vendor relationships involved in implementing an NCAS solution for Phase I can be used or adapted to implement Phase II. Thus, a PSAP employing an NCAS, as opposed to a Call-Associated Signaling (CAS), technology for Phase I would have less to accomplish to be ready to receive and utilize Phase II data and would be more likely to be able to do so within the six-month period. We note, however, that migration from an NCAS Phase I solution to Phase II requires an additional upgrade to the ALI database so that it will query the Mobile Positioning Center (MPC) at the appropriate time to acquire the Phase II latitude/longitude data. We determine, therefore, that where a wireless carrier has challenged the Phase II request of a PSAP that is Phase I-capable using an NCAS technology, a presumption exists that the PSAP will be ready to receive and utilize the Phase II data within the six-month period, provided that it has made a timely request to the appropriate LEC for the ALI database upgrade necessary to receive the Phase II data, and that it has the necessary funding, as required by section 20.18(j) of our rules.

18. We conclude that the criteria we set forth above will be sufficient to eliminate reasonable doubts about a PSAP's capability of receiving and utilizing the Phase II data elements by the end of the six-month period established for carrier compliance with Phase II. In our view, more restrictive criteria, such as those proposed by CTIA, would be unnecessary, would countermand our determination to leave the specifics of Phase I and Phase II compliance to the parties, and could interfere with the negotiation process, ultimately delaying Phase II implementation.

19. Specifically, we decline to adopt the following three conditions CTIA has suggested must form the basis of a valid PSAP Phase II request: (1) that the PSAP's ALI database conform to the J-STD-036 E2 interface standard[31] or a qualifying interim solution; (2) that the PSAP either have CPE that is

(Continued from previous page)

27, 60, available at <http://www.qwest.com/wholesale/guides/sig/index.html>.

[30] Richarson Comments at 3; MARC Comments at 2; Joint Comments of NENA and APCO at 3; TX-CSEC Comments at 4; VoiceStream Comments at 9.

[31] The E2 interface is the communication link between the PSAP's ALI database and the carrier's MPC. It is through this link that ALI requests for Phase II data are transmitted and through which the data requested is returned by the MPC. Thus, it is necessary that some common interface standard be employed by the carrier and the PSAP to facilitate these communications. The J-STD-036 E2 interface standard was developed by the Telecommunications Industry Association and Electronics Industry Association for this purpose. However, as Richardson indicates in its reply comments, citing statements made by Sprint in its Phase II Waiver Request to the Commission, some LECs may decline to implement the J-STD-036 E2 interface standard. Richardson Reply Comments at 2; *see also* Sprint PCS Supplemental Phase II Implementation Report and Request for Temporary and Limited Waiver filed in this docket on July 30, 2001 at 9. VoiceStream concedes that PSAPs may elect to use a different, proprietary protocol. VoiceStream Reply Comments at 7, n. 19. In apparent acknowledgment of this point, the Joint Commenters, NENA, APCO, and Tarrant County, state in their reply comments that "the standard may be in place, but its usefulness to PSAPs remains unsettled," and, thus, that "discussions about the interface belong to the post-request period, rather than making E2 compatibility an antecedent requirement for the PSAP." Joint Reply Comments of NENA, APCO, and Tarrant County at 3.

certified to be able to use the latitude, longitude, and "confidence level" data or have contracted with a vendor to supply this capability within the six-month period following the request; and (3) that the PSAP commit to providing the data and "administrative support" necessary for Phase II deployment.[32] We agree with the Joint Commenters, NENA, APCO and Tarrant County, that CTIA's proposal "goes well beyond the Richardson issues,"[33] and with Richardson, that it constitutes a policy of "micromanagement" at variance with the Commission's continued refusal to dictate technical standards for the implementation of Phases I and II of E911 service.[34] While the E2 interface standard may prove to be that adopted by the majority of jurisdictions and may be preferable from that standpoint, we note that several commenters challenge the need to adhere to the J-STD-036 E2 interface standard for all ALI databases.[35] This reinforces our conclusion that negotiation represents the most productive means of deciding such matters, and that it is counterproductive for the Commission to dictate solutions best evaluated by the parties that must implement them, unless disputes among the parties become intractable or it otherwise becomes necessary for us to intervene to expedite the roll-out of E911 service. We do not believe we are at that point now with respect to the ALI interface standard issue.

20. We also decline to adopt a CPE certification requirement. To the extent that certification would be required from a third party, this requirement, too, entails a level of Commission scrutiny that is incompatible with our policy of leaving to the parties decisions about the technologies that will be most effective for their individual networks and needs and that we do not see as necessary at this point. Furthermore, we note, as a general matter, that our second criterion, *i.e.*, that the PSAP have ordered the equipment necessary to receive and use Phase II information, includes the acquisition of CPE necessary to process that information. The objective addressed in CTIA's third criterion, *i.e.*, that the PSAP commit to providing the necessary data and administrative support, is more appropriately secured, we believe, through the funding prerequisite set forth in section 20.18(j). To the extent that this criterion suggests that PSAPs should be required to adopt specific mapping software, we decline to adopt such a requirement. Thus, we decline to adopt the criteria proposed by CTIA for ensuring PSAP readiness.

21. On the other hand, we reject as insufficient the assertion by several members of the PSAP community that the presence of a PSAP cost recovery mechanism alone is sufficient to demonstrate that the PSAP will have the capability to receive and utilize the data within six months, thereby constituting a valid PSAP request under section 20.18(j).[36] The language of section 20.18(j) makes clear that the existence of a PSAP funding mechanism alone does not trigger a wireless carrier's obligation to deliver E911 data elements to a PSAP requesting such service. The rule also requires that the requesting PSAP be "capable of receiving and utilizing the data elements" requested. PSAP funding is not synonymous with PSAP readiness. In fact, according to several carriers,[37] PSAPs have not always had the capability to receive and utilize Phase I data despite the existence of funding and their good faith efforts to implement

[32] *See* CTIA Comments at 2, 4-5, Attachment 1 (sample letter of certification incorporating three conditions); Attachment 2 (explanation of PSAP request criteria); *see also* CTIA Reply Comments at 3-5; Sprint PCS Comments at 2-3; VoiceStream Reply Comments at 3-5.

[33] *See* Joint Reply Comments of NENA, APCO and Tarrant County at 3.

[34] Richardson Reply Comments at 2. *But see* TX-CSEC Reply Comments at 3, challenging the CTIA criteria as overly vague.

[35] *See, e.g.,* Joint Reply Comments of NENA, APCO and Tarrant County at 3-4; TX-CSEC Reply Comments at 2, conceding the importance of the E-2 interface but requesting that the Commission place this responsibility on the LECs; *see also* VoiceStream Reply Comments at 9.

[36] Joint Comments of APCO and NENA at 1-2; *see also* Tarrant County Comments at 2-3.

[37] NTCA Comments at 3; Dobson Reply Comments at 4; VoiceStream Reply Comments at 10.

their system upgrades within the prescribed six-month period.

22. Several parties have raised APA concerns with an interpretation of the Commission's rules that would allow a valid PSAP request to be made before a PSAP is fully capable of receiving and utilizing the Phase I or Phase II data elements.[38] RCA and Cingular argue that section 20.18(j) requires that a PSAP be able to receive and use the Phase II data before it makes a request for service and that the Bureau has no authority to interpret section 20.18(j) in a way that, in essence, amends the Commission's rules.[39] They contend that such an interpretation would require a notice of proposed rulemaking before it could be adopted as a new rule.[40] We, the Commission, here do amend our rules, and find that all necessary APA requirements have been met.

23. As a preliminary matter, we note that the cases cited by Cingular and RCA are inapposite. They involve rule interpretations by lower level agency personnel that are at variance with the rule promulgated by the agency. None involves a situation such as that presented here, where the interpretation proposed is first advanced in a bureau-level public notice and then published by the agency, with a request for comments, in the proposed rules section of the *Federal Register*. The Order issued today is the product of that Commission notice, and an amendment to section 20.18(j) has been adopted by the Commission.

24. Section 553(b) of the APA provides, with exceptions not relevant here, that a "[g]eneral notice of proposed rule making shall be published in the *Federal Register*."[41] Section 553(c) provides further that "[a]fter notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through the submission of written data, views, or arguments."[42] The reason for these requirements is a practical one, and courts have taken a "pragmatic" approach when interpreting these provisions in the context of specific rulemaking proceedings alleged to be violative of the APA. The notice requirement is intended to "fairly apprise interested parties of the issues involved, so that they may present responsive data or argument relating thereto."[43] The *Second Public Notice* issued by the Bureau on July 10, 2001, and published by the Commission in that part of the *Federal Register* for July 16, 2001, containing proposed rules,[44] did just that. It provided notice that the Commission was considering an amendment to section 20.18(j) to clarify what constitutes a valid PSAP request, identified proposed objective criteria for determining PSAP readiness and invited comment by all interested parties. The rule amendment we adopt today is based on the record compiled as a result of the call for comments in the *Second Public Notice*; it tracks closely the proposed criteria on which comment was sought and on which many favorable comments were received, including those of the parties raising the APA argument. Given these facts, we find that all APA requirements have been satisfied.

25. Assuming *arguendo*, that the Bureau's (rather than the Commission's) issuance of the *Second Public Notice* constitutes a technical defect in the Commission's compliance with the APA's notice and

[38] *See* Section 553(b) and (c) of the Administrative Procedure Act (APA); 5 U.S.C § 553(b) and (c).

[39] Cingular Comments at 5-7; RCA Reply Comments at 2-4.

[40] Cingular Comments at 7-9; RCA Reply Comments at 4-5.

[41] 5 U.S.C. § 553(b).

[42] 5 U.S.C. § 553(c).

[43] *See* Sen. Doc. 248, 79th Cong. 2d Sess. 200 (1946).

[44] 66 Fed. Reg. 36989 (Jul. 16, 2001).

comment requirements, such error was harmless.[45] Section 706 of the APA requires that a court reviewing an "agency action," including a rulemaking, take "due account . . . of the rule of prejudicial error."[46] Thus, analogizing to the notice and comment requirements of section 553(b), the court in *Sagebrush Rebellion* held that an agency's failure to provide notice and an opportunity to comment before taking action for which notice and comment were required by its enabling legislation, constituted harmless error because the agency had earlier provided notice and comment on almost identical issues in accordance with the notice and comment requirements of the National Environmental Protection Act. The court concluded that "the mistake . . . clearly had no bearing on the procedure used or the substance of the decision reached."[47] Here, the issuance of the original order by the Bureau, too, had no effect on interested parties. The notice was published in the *Federal Register*; its origination at the Bureau level did not prejudice "the public's ability to participate in the decisionmaking process."[48] Thus, the purpose for which the notice and comment requirements in section 553(b) were enacted has been fully satisfied here.

26. Moreover, we note that the clarification we adopt today and the accompanying rule amendment constitute a "logical outgrowth" of proposals initially set forth in the notice of proposed rulemaking that commenced this proceeding.[49] As such, they required no additional notice and comment prior to enactment by the Commission. Section 20.18(j) was a key component of the original rules enacted in this docket, and derived, in part, from concerns expressed by interested parties, in response to the notice of proposed rulemaking, concerning the logistics of deploying E911 service throughout the country.[50] During the course of this proceeding, the Commission has continued to examine and to address the respective roles that PSAPs and wireless carriers will play in implementing E911 service.[51] Courts have repeatedly supported an agency's ability to retain flexibility in dealing with complicated issues in the context of a rulemaking proceeding and have held that additional notice and comment is unnecessary where, as here, the rule or amendment adopted is a "logical outgrowth" of a proposal for which adequate notice and opportunity have been afforded.[52] For example, in an earlier FCC case, the

[45] The Commission's publication of that notice in the *Federal Register* was not procedurally defective and provided the necessary notice and opportunity to comment.

[46] 5 U.S.C. § 706.

[47] *Sagebrush Rebellion v. Hodel*, 790 F.2d 760, 764-65 (1986) (*Sagebrush Rebellion*); *see also* Riverbend Farms, Inc. v. Madigan, 958 F.2d 1479 (1992)(in which an agency's failure to publish a notice of proposed rulemaking in the *Federal Register*, while violative of the APA's notice and comment requirement, constituted harmless error because interested parties had been fully aware of meetings at which they had an opportunity to comment on the question at issue).

[48] *Sagebrush Rebellion* at 765.

[49] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, RM-8143, *Notice of Proposed Rulemaking*, 9 FCC Rcd 6170 (1994)(*E911 Notice of Proposed Rulemaking*). RM-8143 was incorporated into CC Docket No. 94-102 in the *E911 First Report and Order,* in which the Commission imposed the PSAP capability requirement. *See E911 First Report and Order*, 11 FCC Rcd at 18684, para. 11.

[50] Section 20.18(f), promulgated in the *E911 First Report and Order*, was subsequently recodified, without amendment, at section 20.18(j).

[51] *See E911 Second Memorandum Opinion and Order*, 14 FCC Rcd at 20859-80, paras. 19-74 (revising the Commission rules to eliminate the carrier cost recovery requirement as a prerequisite to a carrier's obligation to provide E911 service).

[52] *See, e.g.*, *Hodge v. Dalton*, 107 F.3d 705 (1997), *National Electrical Manufacturers Association v. EPA*, 99 F.3d 1170 (1996), *Natural Resources Defense Council, Inc. v. Thomas*, 838 F.2d 1224 (1988).

court upheld an FCC rule implementing a nationwide allocation of television licenses, although the notice of proposed rulemaking had failed to incorporate evidentiary priorities that had been announced by the Commission in advance of the rulemaking and adopted in the final rule. The court found that the FCC was not required to provide additional notice and comment prior to adopting these priorities, commenting that, "[s]urely every time the Commission decided to take account of some additional factor it was not required to start the proceedings all over again."[53] Nowhere is this argument more compelling than in the rulemaking at issue here, in which the Commission has fine-tuned over time the many concepts originally addressed in the notice of proposed rulemaking that commenced this proceeding. These have included issues such as location accuracy requirements, call-back capability, prioritization for 911 calls, and funding prerequisites for wireless carriers. Had the Commission been required to notice each issue anew, as it gained additional information from continuing public participation in the E911 proceeding, its efforts at implementing a substantial public safety service as rapidly as possible would have been severely hampered.

27. It is a matter of longstanding judicial interpretation that an agency must be able to respond to the comments it is compelled to solicit under the APA and to adopt those it finds persuasive without renoticing the rule prior to its adoption.[54] Several commenters responding to the original notice of proposed rulemaking or to a supplemental request for comment on a "Consensus Agreement" submitted by representatives of the wireless carrier and public safety communities,[55] addressed the question of PSAP capability to use the location information supplied by the wireless carrier. One carrier, for example, stated that "the touchstone of any Commission mandate concerning enhanced wireless 911 capabilities should be a bona fide request" by the PSAP and proposed several prerequisites to such a request.[56] Clearly, the questions of prerequisites to a wireless carrier's E911 service obligations and the role of PSAPs in triggering those obligations were raised by the notice of proposed rulemaking. In fact, these elements of our E911 rules have continued to evolve throughout the course of the proceeding.[57] For these reasons, as well, we believe that all APA requirements have been fully satisfied.

28. Several smaller carriers contend that the Commission should impose an actual-readiness requirement for rural, small and mid-sized wireless carriers that do not have a large customer base to absorb their E911 implementation costs, and that are thus more vulnerable to delays in implementation caused by a PSAP's inability to receive and utilize the E911 data supplied by the carrier.[58] They argue

[53] *Logansport Broadcasting Corp. v. US*, 210 F.2d 24, 28 (1954).

[54] *South Terminal Corp. v. EPA*, 504 F.2d 646 1974).

[55] *See* Commission Seeks Additional Comment in Wireless Enhanced 911 Rulemaking Porceeding Regarding "Consensus Agreement" Between Wireless Industry Representatives and Public Safety Groups, Public Notice, CC Docket No. 94-102, *published at* 61 Fed. Reg. 6963 (Feb. 16, 1996).

[56] *See* US West Comments on *E911 Notice of Proposed Rulemaking* at 21-26; *see also* U S West Comments on Consensus Agreement at 5-8; CTIA Joint Reply Comments on Consensus Agreement at 4-5, *cited* in the Commisison's discussion of the E911 deployment schedule and triggering PSAP request. *See E911 First Report and Order*, 11 FCC Rcd at 18708-09, para. 63-4.

[57] *See E911 Second Memorandum Opinion and Order*, 14 FCC Rcd at 20859-80, paras. 19-74 (revising the Commission rules to eliminate the carrier cost recovery requirement as a prerequisite to a carrier's obligation to provide E911 service).

[58] NTCA Comments at 2; Rural Companies Group Comments at 2; Dobson Reply Comments at 2. *See also* RCA Reply Comments at 5-6. RCA contends that the Initial Regulatory Flexibility Analysis issued with the second Public Notice fails to assess adequately the impact of imposing readiness criteria, as opposed to an actual readiness requirement, on small and rural carriers.

that the only way to protect smaller carriers from incurring unnecessary expenses is to require that the PSAP be capable of receiving and utilizing the data before it makes a valid Phase II request.[59] The Rural Companies Group argues that allowing a carrier to wait until a PSAP has full technological capability, may enable smaller carriers to take advantage of less-costly technological innovations or of cheaper prices, as existing technologies become less costly.[60]

29. While we are sympathetic to the concerns of smaller carriers, we find that, in light of the critical nature of our E911 rules and the need for ubiquitous, reliable emergency services, all entities involved, regardless of size, must comply those rules, including the rule amendment we adopt today. As a practical matter, we note that smaller carriers relying on smaller customer bases will likely be dealing with PSAPs who are themselves small governmental entities facing similar financial constraints. The decision we reach today attempts to balance the concerns of all parties, including those that may be small entities. While we do not require that the PSAP be fully capable of receiving and utilizing the E911 data on the date it makes the request, we do require PSAPs whose requests for E911 service have been challenged by the wireless carrier to make the demonstrations described above. The decision we reach today should encourage all parties to work together to minimize delays and financial risk. To decide that the PSAP must be capable of using the data on the date of the request would place all of the risk and uncertainty on the PSAP and would result in a needless delay in the use of this life saving technology.[61]

30. Finally, we decline to adopt a certification process such as that advocated by TX-CSEC for the criteria identified in this Order. Under this approach no documentation would be required of a challenged PSAP, and its certification would be deemed "conclusive."[62] We believe that some documentation should be forthcoming to support a challenged PSAP's assertions that it has complied with the readiness criteria adopted in this Order. We emphasize, however, that we expect the parties to negotiate in good faith and that we will take a dim view of intentional delaying tactics, such as unmerited carrier challenges to a PSAP's compliance documentation. Any carrier that misuses our readiness criteria as a pretext to forestall compliance with its E911 obligations would be subject to enforcement action.

IV. PROCEDURAL MATTERS

A. Regulatory Flexibility Act

31. As required by the Regulatory Flexibility Act, 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis of the possible economic impact on small entities of the policy and rules adopted in this Order. The Final Regulatory Flexibility Analysis is set forth in Appendix C.

B. Paperwork Reduction Act of 1995 Analysis

32. This order contains a revised information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the information collections contained in this Order, as required by the Paperwork Reduction Act of 1995, Public Law No. 104-13. Public and agency comments are due 60 days from publication of the summary of this Order in the *Federal Register*, and OMB

[59] NTCA Comments at 1-3; Rural Companies Group Comments at 1-2.

[60] Rural Companies Group Comments at 3.

[61] NTCA concedes that adopting its position would cause a PSAP to wait months for Phase II service. *See* NTCA Comments at 4.

[62] TX-CSEC Comments at 3.

comments are due 60 days from that date. Comments should address:

(1)Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility;
(2)The accuracy of the Commission's burden estimates;
(3)Ways to enhance the quality, utility, and clarity of the information collected; and
(4)Ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

33. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, Room 1-C804, 445 Twelfth Street, S.W., Washington, D.C. 20554, or via the Internet to jboley@fcc.gov, and to Edward C. Springer, OMB Desk Officer, Room 10236 New Executive Office Building, 725 Seventeenth Street, N. W., Washington, D.C. 20503, or via the Internet to edward.springer@omb.eop.gov.

C. Authority

34. This action is taken pursuant to Sections 1, 4(i), 201, 303, 309, and 332 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. §§ 151, 154(i), 201, 303, 309, 332.

D. Further Information

35. For further information, contact Jane Phillips of the Policy Division, Wireless Telecommunications Bureau, at 202-418-1310 (voice) or 202-418-1169 (TTY).

V. ORDERING CLAUSES

36. Accordingly, IT IS ORDERED that the Petition filed by the City of Richardson IS GRANTED as provided herein and that Part 20 of the Commission's Rules IS AMENDED as set forth in Appendix B.

37. IT IS FURTHER ORDERED that the rules promulgated in this Order SHALL BECOME EFFECTIVE 30 days after the date of the publication of a summary of this Order in the *Federal Register*, dependent on OMB approval of the PRA burdens.

38. IT IS FURTHER ORDERED that the Commission’s Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Order, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

Appendix A

Petition filed by the City of Richardson (Public Notice issued April 5, 2001)

Comments:

Association of Public Safety Communications Officials (APCO)
Blooston, Mordkofsky, Dickens, Duffy & Prendergast (BMDDP)
Cingular Wireless LLC (Cingular)
National Emergency Number Association (NENA)
North Carolina Wireless 911 Board
Qwest Wireless LLC (Qwest)
Sprint PCS (Sprint PCS)
Verizon Wireless (Verizon)
Voicestream Wireless Corporation (Voicestream)
Western Wireless Corporation (Western Wireless)

Reply Comments:

BMDDP
Cingular
City of Richardson (Richardson)
Dobson Communications Corporation (Dobson)
NENA
Rural Cellular Association (RCA)
Texas Commission on State Emergency Communications (TX-CSEC)
United States Cellular Corporation
Voicestream

Public Notice issued July 10, 2001

Comments:

Cellular Telecommunications and Internet Association (CTIA)
Cingular
Richardson
Mid-America Regional Council (MARC)
Joint Comments of NENA and APCO
National Telephone Cooperative Association (NTCA)
Rural Companies Group (E.N.M.R. Telephone Cooperative, Inc., New Mexico RSA 6-II Partnership, New Mexico RSA 4 East Limited Partnership, and Texas RSA 3 Limited Partnership)
Sprint PCS
Tarrant County 911 District (Tarrant County)
TX-CSEC

Reply Comments:

CTIA
Cingular
Richardson
Dobson
Joint Reply Comments of NENA, APCO and Tarrant County
Nextel Communications, Inc. (Nextel)
RCA
TX-CSEC
Voicestream

Appendix B

FINAL RULES

Part 20 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 20 - COMMERCIAL MOBILE RADIO SERVICES

1. Section 20.18 is amended by revising paragraph (j) to read as follows:

* * * * *

(j) Conditions for enhanced 911 services. The requirements set forth in paragraphs (d) through (h) of this section shall be applicable only if the administrator of the designated PSAP has requested the services required under those paragraphs and is capable of receiving and utilizing the data elements associated with the service, and a mechanism for recovering the PSAP's costs of the enhanced 911 service is in place. A PSAP will be deemed capable of receiving and utilizing the data elements associated with the service requested if it can demonstrate that it has ordered the necessary equipment and has commitments from suppliers to have it installed and operational within the six-month period specified in paragraphs (d), (f) and (g) of this section, and can demonstrate that it has made a timely request to the appropriate local exchange carrier for the necessary trunking and other facilities. In the alternative, a PSAP will be deemed capable of receiving and utilizing the data elements associated with Phase II service if it is Phase I-capable using a Non-Call Path Associated Signaling (NCAS) technology, and if it can demonstrate that it has made a timely request to the appropriate local exchange carrier for the Automatic Identification Location (ALI) database upgrade necessary to receive the Phase II information.

Appendix C

FINAL REGULATORY FLEXIBILITY ANALYSIS

As required by the Regulatory Flexibility Act (RFA),[63] an Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities was incorporated in the *Second Public Notice* in CC Docket No. 94-102[64] (hereinafter referred to as the *Second Public Notice*). The Commission sought written public comment on the proposals in the *Second Public Notice*, including comments on the IRFA. The comments received are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.[65]

A. Need for, and Objectives of, the Order

The rule amendment mandated by this Order is meant to clarify the process by which a Public Safety Answering Point (PSAP) whose request for Enhanced 911 (E911) service is challenged by a wireless carrier may demonstrate E911 capability. This information will ensure that PSAPs and carriers are working with the same knowledge, thus avoiding delays in implementing E911 service or unnecessary or premature investments due to confusion over the PSAP's preparedness. Specifically, for purposes of resolving a challenge to a PSAP request for E911 service, a wireless carrier must implement E911 within the six-month period following the date of the PSAP's request if the PSAP making the request demonstrates that: (a) a mechanism is in place by which the PSAP will recover its costs of the facilities and equipment necessary to receive and utilize the E911 data elements; (b) the PSAP has ordered the equipment necessary to receive and utilize the E911 data and the equipment will be installed and capable of receiving and utilizing that data no later than six months following its request; and (c) the PSAP has made a timely request to the appropriate local exchange carrier (LEC) for the necessary trunking and other facilities to enable the E911 data to be transmitted to the PSAP. In the alternative, a challenged PSAP may demonstrate that a funding mechanism is in place, that it is Phase I-capable using a Non-call Associated Signaling (NCAS) technology, and that it has made a timely request to the appropriate LEC for the upgrade to the ALI database necessary to enable the PSAP to receive the Phase II data.

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[63] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601 *et. seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAA). Title II of the CWAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[64] Public Notice, "Wireless Telecommunications Bureau Seeks Further Comment on the Commission's Rules Concerning Public Safety Answering Point Requests for Phase II Enhanced 911," 16 FCC Rcd 13670, Appendix A.

[65] *See* 5 U.S.C. § 604.

B. Summary of Significant Issues Raised by Public Comments in Response to the IRFA

The Commission received two direct responses to the IRFA. First, the Rural Cellular Association (RCA) argues that the IRFA in this proceeding is deficient, in that it ignores the possible impact on small and rural wireless carriers, and instead focuses only on the possible impact of the proposed rules on PSAPs. RCA also contends that the IRFA failed to assess adequately the impact of imposing readiness criteria, as opposed to an actual readiness requirement. RCA further denies that an amendment to the rule, clarifying when and how a PSAP will be considered E911-capable, would benefit small/rural carriers by making confirmation of a PSAP's readiness less burdensome. RCA asserts that the burden on small carriers can be minimized by maintaining the application of the Commission's existing rule.

In its response to the IRFA, the National Telephone Cooperative Association (NTCA) maintains that small carriers may waste limited resources providing a service that a PSAP may not be ready to utilize, unless the Commission requires that a PSAP be actually capable of receiving and utilizing the data elements associated with the service at the time it requests the service. NTCA further argues that the burden placed on a small PSAP by the requirement that PSAPs be able to utilize the information prior to requiring such information from a carrier would be "nonexistent."

The Commission responds to this criticism in detail in paragraphs 28 and 29 of the Order. Section C of the IRFA describing the number of small entities affected by the proposed rules, emphasized that the IRFA was drafted at early point in the process when the Commission acknowledged it was premature to quantify the specific impact of the suggested action on any of the affected entities, and specifically invited comment on this issue. Section E of the IRFA noted that leaving the rule as it now stands was an option and was considered with the other alternatives mentioned in the IRFA before the *Second Public Notice* was issued. The IRFA concentrated on analyzing the effect of a rule amendment on small PSAPs rather than small carriers because the burden of preparing any type of demonstration would fall on PSAPs and the burden on small carriers would not change. The key issue under discussion in the IRFA was how to make it easier for carriers of all sizes to determine when to provide a PSAP with E911 service without running the financial risk of offering service to a PSAP that is unprepared to use the service. Regardless of whether the Commission elected to maintain the existing rule or change it in some way to require a demonstration of E911 capability, the burden of proof of capability would fall on PSAPs, and the effect on carriers would either remain the same or, the Commission believed at the time of the IRFA and still believes, might even reduce the burden on carriers by possibly reducing the time carriers invest in verifying that a PSAP is E911 qualified. No convincing evidence was presented to the Commission to contradict this viewpoint. However, the Commission has determined that a showing would be appropriate only if a carrier decides to challenge a PSAP's request for service.

The Commission also received comments not in direct response to the IRFA, but regarding matters of interest to small entities. In its comments, the Rural Companies Group contends that the *Second Public Notice* fails to assess adequately the impact of imposing readiness criteria, as opposed to an actual readiness requirement, on small and rural carriers. Further, the Rural Companies Group argues that allowing a carrier to wait until a PSAP has full technological capability may enable smaller carriers to take advantage of less-costly technological innovations or of cheaper prices, as existing technologies become less costly.

In its reply comments, Dobson Communications Corporation argues that the current rule provides the appropriate certainty for carriers and does not hinder the deployment of Phase II E911 services. Dobson therefore urges the Commission to not amend or clarify the existing rule.

Because small carriers lack large customer bases to absorb their E911 implementation costs, a primary concern exists that small and mid-sized carriers are more vulnerable to delays in implementation if a PSAP shows an inability to receive and utilize the E911 data supplied by these smaller carriers.

Likewise, there is a concern that smaller carriers may be forced to devote time and resources to some PSAPs that prove to be incapable of receiving E911 service, to the detriment of those PSAPs that have current capability.

Taking these concerns into account, we find that the amendments to the rule, as described in the Order, will in fact reduce the vulnerability of the smaller carriers, as they will be working along with the PSAPs to ensure implementation of E911 service on a timely basis, and will better be able to plan their progression and allocation of resources during the implementation process. We also find that the rule amendments will make confirmation of a PSAP's readiness for E911 service less burdensome for all carriers, as the onus is placed on the PSAPs to demonstrate readiness as described in the Order, and because the showing will only be required to settle a challenge to the PSAP's preparedness.

We find unpersuasive the assertion that smaller carriers may be able to benefit from less-costly technological innovations by waiting to provide service. While it is possible that smaller carriers will pay less the longer they wait to provide service, we find that without the amendments to the existing rule, the smaller PSAPs will be unduly burdened, and will be more vulnerable, if required to be fully capable of receiving E911 service, without their providers' having to even begin the process of supplying the service.

Considering the potential burdens placed on all small entities, we find that the institution of objective criteria by rule amendment will benefit all PSAPs and carriers, including small entities, by more clearly defining E911 readiness, thus reducing the potential for misunderstanding between parties, and by reducing instances of delay in E911 implementation. In turn, this will reduce the likelihood that any PSAP or carrier, including all small entities, will have to expend its limited capital resources prematurely and/or improvidently.

Finally, as discussed in paragraph 29 of the Order, the Commission is sympathetic to the concerns of all small entities, carriers and PSAPs. In reaching its decision in the Order, the Commission attempted to balance these interests with critical interests at stake in this proceeding. The Commission believes that the approach taken in the Order will, ultimately, provide carriers of all sizes, including small carriers, with the tools they need to determine whether a PSAP will, in reality, be E911 capable, while not placing an unnecessarily onerous burden on PSAPs, 96 percent of whom qualify as small entities. Again, the showing will only be necessary when a PSAP's request for E911 service is challenged on the basis of preparedness.

C. Description and Estimate of the Number of Small Entities To Which the Proposed Rules Will Apply

The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[66] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[67] In addition, the term "small business" has the same meaning as the term "small business concern" under Section 3 of the Small Business Act, unless the Commission has developed one or more definitions that are appropriate for its activities.[68] Nationwide, there are 4.44

[66] 5 U.S.C. § 603(b)(3).

[67] 5 U.S.C. § 601(6)

[68] 5 U.S.C. § 601(3), incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632.

million small business firms, according to SBA reporting data.[69]

Under the Small Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).[70] A small organization is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."[71] Nationwide, as of 1992, there were approximately 275,801 small organizations.[72]

The definition of "small governmental jurisdiction" is one with populations of fewer than 50,000.[73] There are 85,006 governmental jurisdictions in the nation.[74] This number includes such entities as states, counties, cities, utility districts and school districts. There are no figures available on what portion of this number has populations of fewer than 50,000. However, this number includes 38,978 counties, cities and towns, and of those, 37,556, or ninety-six percent, have populations of fewer than 50,000.[75] The Census Bureau estimates that this ratio is approximately accurate for all government entities. Thus, of the 85,006 governmental entities, we estimate that ninety-six percent, or about 81,600, are small entities that may be affected by our rules.

Neither the Commission nor the SBA has developed definitions for small providers of the specific industries affected. Therefore, throughout our analysis, the Commission uses the closest applicable definition under the SBA rules, the North American Industry Classification System (NAICS) standards for "Cellular and Other Wireless Telecommunications" and "Wired Telecommunications Carriers." [76] According to this standard, a small entity is one with no more than 1,500 employees. To determine which of the affected entities in the affected services fit into the SBA definition of small business, the Commission has consistently referred to Table 5.3 in *Trends in Telephone Service* (*Trends*), a report published annually by the Commission's Common Carrier Bureau. [77]

We have included small incumbent local exchange carriers in this RFA analysis. As noted above, a "small business" under the RFA is one that, *inter alia*, meets the pertinent small business size standard

[69] *See* 1992 Economic Census, U.S. Bureau of the Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[70] 15 U.S.C. § 632.

[71] 5 U.S.C. § 601(4).

[72] Department of Commerce, U.S. Bureau of the Census, 1992 Economic Census, Table 6 (special tabulation of data under contract to Office of Advocacy of the U.S. Small Business Administration).

[73] 5 U.S.C. § 601(5).

[74] 1992 Census of Governments, U.S. Bureau of the Census, U.S. Department of Commerce.

[75] *Id*.

[76] North American Industry Classification System (NAICS) codes 513322 and 51331.

[77] FCC, Common Carrier Bureau, Industry Analysis Division, *Trends in Telephone* Service, Table 5.3 (December 2000). Estimates of entities employing 1,500 or fewer employees are based on gross revenues information filed April 1, 2000, combined with employment information obtained from ARMIS and Securities and Exchange Commission filings as well as industry employment estimates published by the Bureau of Labor Statistics. The estimates do not reflect affiliates that do not provide telecommunications services or that operate only in foreign countries.

(*e.g.*, a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[78] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope.[79] We have therefore included small incumbent carriers in this RFA analysis, although we emphasize that this RFA action has no effect on the Commission's analyses and determinations in other, non-RFA contexts.

Local Exchange Carriers. According to the most recent *Trends* data, 1,335 incumbent carriers reported that they were engaged in the provision of local exchange services. We do not have data specifying the number of these carriers that are either dominant in their field of operations, or are not independently owned. However, *Trends* indicates that 1,037 local exchange carriers report that, in combination with their affiliates, they have 1,500 or fewer employees, and would thus be considered small businesses as defined by NAICS.

Also included in the number of local exchange carriers is the rural radio telephone service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio Systems (BETRS).[80] There are approximately 1,000 licensees in the Rural Radiotelephone Service, and we estimate that almost all of them qualify as small entities under the NAICS definition.

Competitive Access Providers and Competitive Local Exchange Carriers (CAPs and CLECs). *Trends* indicates that 349 CAPs and CLECs, 87 local resellers, and 60 other local exchange carriers reported that they were engaged in the provision of competitive local exchange services. We do not have data specifying the number of these carriers that are not independently owned and operated. However, *Trends* states that 297 CAPs and CLECs, 86 local resellers, and 56 other local exchange carriers report that, in combination with their affiliates, they have 1,500 or fewer employees, for a total of 439 such entities qualified as small entities.

Fixed Local Service Providers and Payphone Providers. *Trends* reports that there are 1,831 fixed local service providers and 758 payphone providers. Using the NAICS standard for small entity of fewer than 1,500 employees, *Trends* estimates that 1,476 fixed local service providers, in combination with affiliates, have 1,500 or fewer employees and thus qualify as small entities. In addition, 755 payphone providers report that, in combination with their affiliates, they employ 1,500 or fewer individuals.

Wireless Telephone Including Cellular, Personal Communications Service (PCS) and SMR Telephony Carriers. There are 806 entities in this category as estimated in *Trends,* and 323 such licensees in combination with their affiliates have 1,500 or fewer employees, and thus qualify, using the NAICS guide, as small businesses.

Other Mobile Service Providers. *Trends* estimates that there are 44 providers of other mobile services,

[78] 15 U.S.C. § 632.

[79] *See* Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC, dated May 27, 1999. The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a) (Small Business Act); 5 U.S.C. § 601(3) (RFA). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b). Since 1996, out of an abundance of caution, the Commission has included small incumbent LECs in its regulatory flexibility analyses. *See*, *e.g.*, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket, 96-98, *First Report and Order*, 11 FCC Rcd 15499, 16144-45 (1996).

[80] BETRS is defined in sections 22.757 and 22.759 of the Commission's Rules. 47 C.F.R. §§ 22.757, 22.759.

and again using the NAICS standard, 43 providers of other mobile services utilize with their affiliates 1,500 or fewer employees, and thus may be considered small entities.

Toll Service Providers. *Trends* calculates that there are 738 toll service providers, including 204 interexchange carriers, 21 operator service providers, 21 pre-paid calling card providers, 21 satellite service carriers, 454 toll resellers, and 17 carriers providing other toll services. *Trends* further estimates that 656 toll service providers with their affiliates have 1,500 or fewer employees and thus qualify as small entities as defined by NAICS. This figure includes 163 interexchange carriers, 20 operator service providers, 20 pre-paid calling card providers, 16 satellite service carriers, 423 toll resellers, and 15 carriers providing other toll services.

Offshore Radiotelephone Service. This service operates on several TV broadcast channels that are not otherwise used for TV broadcasting in the coastal area of the states bordering the Gulf of Mexico. At present, there are approximately 55 licensees in this service. The Commission is unable at this time to estimate the number of licensees that would qualify as small entities under the SBA definition for radiotelephone communications. The Commission assumes, for purposes of this FRFA, that all of the 55 licensees are small entities, as that term is defined by NAICS.

Public Safety Answering Points. Neither the Commission nor the SBA has developed a definition of small entities applicable to PSAPs. In order to give a numerical quantification of the number of PSAPs that are small entities affected by the rule modifications, it appears there are approximately 10,000 PSAPs nationwide.[81] For purposes of this FRFA, we assume that all of the PSAPs are small entities, and may be affected by the rule amendments.

D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

As indicated in paragraph 1 of the Order, if a PSAP's request for E911 service is challenged by a wireless carrier, the PSAP must make a demonstration to the carrier, as detailed in Section A, *supra*. In the alternative, the PSAP may demonstrate that a funding mechanism is in place, that it is Phase I-capable, using a Non-Call Associated Signaling (NCAS) technology, and that it has made a timely request to the appropriate LEC for the upgrade to the ALI database necessary to enable the PSAP to receive the Phase II data. Once the showing is made, the carrier must implement E911 within six months of the date of the PSAP's request.

E. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

The Commission is severely limited in this proceeding as to minimizing the burden on small entities. The proceeding is intended to provide all Americans with the most reliable, responsive emergency services that are technologically possible. The critical nature of this goal demands that all entities involved, regardless of size, bear the same responsibility for complying with requirements adopted to expedite reaching this goal. A delay in response caused by a small entity could result in the same fatal consequences as a delay caused by a large entity.

Several commenters have asserted the *possibility* that small carriers may expend monies prematurely and/or improvidently if the PSAPs request E911 service, but are not fully capable of receiving and

[81] Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, RM-8143, *Second Memorandum Opinion and Order*, 14 FCC Rcd 20850 (1999), at Sec. III A.

utilizing it within six months. The alternative adopted herein is intended to minimize the possibility of this situation's developing by providing criteria that PSAPS and carriers may use to determine if a PSAP, whose E911 capability is challenged, is in reality prepared to use the service within six months of the request. Commenters who maintain that small carriers are at risk, ignore the fact that smaller carriers relying on smaller customer bases will likely be dealing with PSAPs that are themselves small governmental entities facing similar financial constraints. It would therefore be inequitable and short-sighted to require a small governmental entity to fund fully its share of the E911 costs, while allowing a small business entity to wait several months before funding its own share.

The Commission considered several alternatives before reaching its final decision in the Order. First, the Commission could have left the existing rule as it stands with regard to small entities. The Commission believes, however, that this would inevitably lead to more delays due to confusion as to when a PSAP has made a valid E911 service request. The Commission could also amend the rule to remove demonstration burdens and criteria on PSAPs. This alternative would seem to have a greater chance of negatively impacting small carriers though, particularly in terms of risking financial losses when a PSAP requesting E911 service claims to be fully E911 capable but isn't. In this case, carriers could provide the service prematurely and diminish the value of their financial investment until the PSAP is "in actuality" E911 capable. Finally, the Commission could amend the rule to place a more burdensome demonstration requirement on PSAPs, a course favored by several carrier commenters. As discussed in paragraphs 18-20 of the Order, the Commission finds that this alternative would not be beneficial for any of the involved parties. Not only would this place an unnecessarily oppresive burden on PSAPs, most of whom are small entities, but small carriers would need to spend more time and resources reviewing and evaluating the submission.

Commenters encouraged the Commission to require small governmental entities to fund fully their share of the E911 costs and establish a fully functional system before requiring small carriers to provide the requisite service. This alternative, while it relieves, for a while, the burden on small carriers, places the burden on small governmental entities. In addition, this alternative places all of the risk and uncertainty on the PSAPs, most of whom are small entities, and could delay the implementation of this vital public safety service for several months. The alternative adopted seeks to balance the burden between small carriers and small governmental entities by providing that the showing is only required when a PSAP's claim of E911 capability is challenged by a carrier. Therefore, no demonstration is required of the PSAP unless a carrier elects to set the newly adopted process in motion by challenging a PSAP's E911 capability. The PSAP would then need to make a demonstration that it is E911 capable. To satisfy this requirement, a PSAP may use the three-tier option by demonstrating that a cost recovery mechanism is in place, that the equipment needed to receive and utilize the E911 data has been ordered and will be installed and capable of receiving and utilizing E911 data no later than six months after its request for E911 service and that the PSAP has made a timely request to the appropriate local exchange carrier for the encessary trunking and other facilities to enable the E911 data to be transmitted to the PSAP. This three-tier option is more fully described in paragraphs 14-16 of the Order. Alternatively, as described in paragraph 17 of the Order, the PSAP may demonstrate that a funding mechanism is in place, that it is Phase I-capable, and that it has made a timely request to the appropriate LEC for the upgrade to the ALI database necessary to enable the PSAP to receive the Phase II data.

As noted in paragraph 11 of the Order, as well as in several of the comments, the process of implementing E911 services must be a joint and concerted effort between the carriers and the PSAPs. Neither side can perform the necessary functions required to implement timely and effective E911 service without working with the other. While we have taken into account the concerns of small carriers, we cannot do so to the detriment of small PSAPs. This alternative balances the concerns of all parties, including those that may be small entities, and encourages all parties to work together to minimize delays and financial risk. In light of the critical nature of our E911 rules and the need for ubiquitous, reliable emergency services, all entities involved, regardless of size, must comply with those rules.

Report to Congress: The Commission will send a copy of this Order, including this FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. [82] In addition, the Commission will send a copy of this Order, including this FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of this Order, and FRFA (or summaries thereof) will also be published in the *Federal Register*. [83]

[82] 5 U.S.C. § 801 (a)(1)(A)

[83] *See* 5 U.S.C. § 604(b)