BRIEF FOR RESPONDENTS

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

NO. 05-1248

NUVIO CORPORATION, *ET AL.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

PETER D. KEISLER
ASSISTANT ATTORNEY GENERAL

DOUGLAS N. LETTER
APPELLATE LITIGATION COUNSEL

SCOTT R. MCINTOSH
SPECIAL COUNSEL

UNITED STATES DEPARTMENT
OF JUSTICE
WASHINGTON, D.C. 20530

SAMUEL L. FEDER
GENERAL COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

TABLE OF CONTENTS

Page

STATEMENT OF ISSUES PRESENTED 1

STATUTES AND REGULATIONS 2

COUNTERSTATEMENT 2

A. Background 2

(1) 911 Service 2

(2) Voice Over Internet Protocol (VoIP) Service 6

B. The Order On Review 8

C. Subsequent Developments 14

INTRODUCTION AND SUMMARY OF ARGUMENT 16

STANDARD OF REVIEW 19

ARGUMENT 20

I. THE COMMISSION ADOPTED A REASONABLE TIMETABLE FOR IMPLEMENTING ITS VOIP 911 RULES 20

A. The Compliance Deadline Established By The Commission Reflected A Reasonable Predictive Judgment 23

B. The "Obstacles" To E911 Implementation Identified By Petitioners Should Not Prevent Timely Compliance 26

II. THE *ORDER* DID NOT MAKE AN UNEXPLAINED DEPARTURE FROM PAST PRACTICE 32

III. THE COMMISSION REASONABLY DECLINED TO IMPOSE NEW INTERCONNECTION OBLIGATIONS ON ILECS IN THIS PROCEEDING 41

IV. THE COMMISSION SATISFIED THE APA'S NOTICE AND COMMENT REQUIREMENTS 44

CONCLUSION 48

TABLE OF AUTHORITIES

Page

Cases

* *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) 45

Association of Public-Safety Communications Officials-International, Inc. v. FCC, 76 F.3d 395 (D.C. Cir. 1996) 20, 26

AT&T Corp. v. FCC, 220 F.3d 607 (D.C. Cir. 2000) 32

AT&T Corp. v. FCC, 317 F.3d 227 (D.C. Cir. 2003) 29

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 20

Crawford v. FCC, 417 F.3d 1289 (D.C. Cir. 2005) 46

Davis County Solid Waste Management v. EPA, 108 F.3d 1454 (D.C. Cir. 1997) 46

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 23

Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965 (D.C. Cir. 1999) 25

Keller Communications, Inc. v. FCC, 130 F.3d 1073 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 954 (1998) 20

Melcher v. FCC, 134 F.3d 1143 (D.C. Cir. 1998) 23

* *National Association of State Utility Consumer Advocates v. FCC*, 372 F.3d 454 (D.C. Cir. 2004) 32

Natural Resources Defense Council v. Thomas, 805 F.2d 410 (D.C. Cir. 1986) 24

* *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251 (D.C. Cir. 2004) 44

* *Teledesic LLC v. FCC*, 275 F.3d 75 (D.C. Cir. 2001) 25

United States Cellular Corp. v. FCC, 254 F.3d 78 (D.C. Cir. 2001) 20

WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969) 38

* *WJG Telephone Co. v. FCC*, 675 F.2d 386 (D.C. Cir. 1982) 45

Administrative Decisions

AT&T Wireless Services, Inc., 17 FCC Rcd 19938 (2002) 5

Page

AT&T Wireless Services, Inc., 17 FCC Rcd 9903 (2002) 5

Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band, 16 FCC Rcd 15532 (2001) 40

Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands, 18 FCC Rcd 1962 (2003) 41

Globalstar LLC, DA 06-121 (International Bureau released January 20, 2006) 41

Public Notice, Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice Over Internet Protocol 911 Compliance Letters, DA 05-2945 (released Nov. 7, 2005) 14, 15

Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 11 FCC Rcd 18676 (1996) 2, 3, 4, 33, 37

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 14 FCC Rcd 17388 (1999) 37

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 15 FCC Rcd 17442 (2000) 4, 36

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 17 FCC Rcd 25576 (2002) 40

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 18 FCC Rcd 25340 (2003) 5, 33, 39, 40

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 20 FCC Rcd 7709 (2005) 5

Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, 9 FCC Rcd 6170 (1994) 33

Page

Vonage Holdings Corp., 19 FCC Rcd 22404 (2004), *petitions for review pending, Minnesota Public Utilities Commission v. FCC*, No. 05-1069 (8th Cir. argued January 12, 2006) 7, 39, 43

Statutes and Regulations

5 U.S.C. § 553(b)(3) 45

5 U.S.C. § 706(2)(A) 19

47 U.S.C. § 208 29

47 U.S.C. § 251(a) 42

47 U.S.C. § 251(c) 42

47 U.S.C. § 251(e)(3) 3

47 U.S.C. § 271(c)(2)(B)(vii) 42

47 U.S.C. § 405 29

47 C.F.R. § 1.3 ..... 29, 38

47 C.F.R. § 9.5(c) 13

47 C.F.R. § 9.5(e)(1)-(2) 11

47 C.F.R. § 9.5(e)(2) 46

47 C.F.R. § 20.18(e)-(j) 34

Others

Industry Analysis and Technology Division, FCC Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2004*, July 2005 10

* Intrado Press Release, November 17, 2005 ..... 25, 43

Letter from Richard S. Whitt, MCI, to Marlene Dortch, FCC, Oct. 21, 2005 15

* Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, FCC, October 7, 2005 15

Letter from Susanne A. Guyer, Verizon, to Marlene Dortch, FCC, Oct. 21, 2005 15

Page

Level 3 Press Release, Vonage Selects Level 3 To Expand 911 Capabilities, September 19, 2005 24

* Level 3, A Head Start for Achieving E-911 ..... 30, 43

NENA, The Development of 9-1-1 3

* VON Coalition E911 Survey, November 2005 25

Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1287 ..... 3, 31

* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

ALI	Automatic Location Identification
ANI	Automatic Numbering Information
APA	Administrative Procedure Act
ATC	ancillary terrestrial component
CLECs	competitive local exchange carriers
CMRS	commercial mobile radio service
E911	enhanced 911
ILECs	incumbent local exchange carriers
IP	Internet protocol
IVP	interconnected VoIP provider
MLTS	multi-line telephone systems
MSS	mobile satellite service
NENA	National Emergency Number Association
NPRM	*Notice of Proposed Rulemaking*
p-ANI	pseudo-Automatic Numbering Information
PSAP	public safety answering point
VoIP	Voice over Internet Protocol

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

Americans have come to expect that when they use a telephone to dial 911, they will obtain timely assistance in an emergency. Contrary to those expectations, certain newly developed Voice over Internet Protocol ("VoIP") services – although designed and marketed as a replacement for traditional telephone service – provided grossly inadequate access to the 911 system for summoning first responders to the scene of an emergency. As a result, a number of VoIP customers were unable to obtain urgently needed assistance when they used their VoIP service to dial 911.

To ensure that Americans' reasonable expectations of 911 access are met, and to prevent further tragedies caused by inadequate 911 access, the Federal Communications Commission

adopted rules mandating the rapid implementation of 911 requirements for "interconnected" VoIP services (*i.e.*, VoIP services that allow users to place calls to and receive calls from the public switched telephone network). *IP-Enabled Services*, 20 FCC Rcd 10245 (2005) (JA) ("*Order*").

Several interconnected VoIP providers ("IVPs") challenge the Commission's VoIP 911 rules. This case presents the following issues for review:

(1) whether the FCC adopted a reasonable timetable for implementing its VoIP 911 rules;

(2) whether the rules reflect an unexplained departure from past practice;

(3) whether the Commission reasonably refrained from imposing new interconnection obligations on incumbent local exchange carriers ("ILECs") in this proceeding; and

(4) whether the Commission satisfied the notice and comment requirements of the Administrative Procedure Act ("APA").

STATUTES AND REGULATIONS

Pertinent statutes and regulations are appended to the brief for petitioners.

COUNTERSTATEMENT

A. Background

(1) 911 Service

Whenever Americans need immediate assistance to deal with life-threatening emergencies, they depend on 911 service. "Dialing 911 is the most effective and familiar way the American public has of finding help in an emergency." *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 11 FCC Rcd 18676, 18678 (¶ 3) (1996) ("*First Wireless 911 Order*").

Since its inception in the 1960s, 911 service has become a fixture in modern American society. According to the National Emergency Number Association ("NENA"), 99 percent of the nation's population now has access to 911 service, and approximately 200 million 911 calls are made in this country each year. *See Order* ¶ 6 & nn.14-15 (JA) (citing statistics from NENA's website). To the average American, 911 is "synonymous with emergency assistance." *First Wireless 911 Order*, 11 FCC Rcd at 18679 (¶ 3). In recognition of this pervasive public perception, Congress in 1999 passed legislation mandating the designation of 911 "as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance." 47 U.S.C. § 251(e)(3) (added to the Communications Act by the Wireless Communications and Public Safety Act of 1999, Pub. L. No. 106-81, 113 Stat. 1287 ("911 Act")).

Wireline carriers first began offering 911 service four decades ago pursuant to state regulations. At first, 911 calls were simply connected to the geographically appropriate public safety answering point ("PSAP"). In the 1970s, carriers started using selective routers and dedicated trunks to deliver 911 calls more quickly and efficiently.[1] Selective routers ensure that 911 calls are delivered to the geographically appropriate PSAP based on the caller's location. *Order* ¶ 15 (JA). Dedicated trunks separate 911 traffic from other telephone calls and deliver it directly to trained emergency dispatchers at the PSAPs.

Over time, technological advances enabled wireline carriers to offer a more sophisticated 911 service. This enhanced 911 ("E911") service provides the recipient of a 911 call with the caller's phone number (a feature known as Automatic Numbering Information ("ANI")) and, in

[1] NENA, The Development of 9-1-1 (available at www.nena.org/PR_Pubs/Devel_of_911.htm).

many cases, the caller's location (a capability called Automatic Location Identification ("ALI")). *Order* ¶ 13 (JA). These enhanced features save lives "by helping emergency services personnel do their jobs more quickly and efficiently." *First Wireless 911 Order*, 11 FCC Rcd at 18679 (¶ 5).

In 1996, the FCC adopted 911 rules for the wireless industry. *First Wireless 911 Order*, 11 FCC Rcd at 18678 (¶ 1). At the time, it was unclear when wireless carriers would acquire the technology necessary to determine the precise location of mobile phone users dialing 911. Thus, in setting implementation deadlines, the Commission made a predictive judgment concerning the pace of technological development – a prediction designed in part to force prompt implementation.

The Commission required wireless carriers to route all 911 calls to the geographically appropriate PSAP within one year after the wireless 911 rules took effect. *First Wireless 911 Order*, 11 FCC Rcd at 18692 (¶ 29). Six months thereafter, the agency required wireless carriers to provide 911 service that included ANI and used selective routers. *Id.* at 18708 (¶ 63); *see also Order* ¶ 17 (JA). The remainder of the wireless 911 implementation process ("Phase II") has been dedicated to identifying and implementing mechanisms for determining caller location automatically. The Commission ultimately required wireless carriers to implement an automatic caller location mechanism approximately nine years after the wireless 911 rules took effect.[2] Throughout this process, wireless carriers have regularly argued that the Commission's deadlines

[2] *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 15 FCC Rcd 17442, 17455-56 (¶ 36) (2000) ("*Fourth Wireless 911 Order*").

and requirements were unrealistic. The agency has addressed these arguments through waivers, enforcement actions, and consent decrees.[3]

As a result of the Commission's prodding, wireless carriers, like their wireline counterparts, now provide most of the country with a satisfactory level of 911 service – at a minimum, 911 calls are routed to trained emergency personnel at the correct PSAP via dedicated trunks. Americans have come to expect that level of service. Indeed, in many localities, 911 callers' locations are determined automatically, and their calls are routed, along with location and call back information, to the geographically appropriate PSAP via selective routers. *Order* ¶ 13 (JA).

Since enactment of the wireless 911 rules, the Commission has considered applying 911 requirements to new services on a case-by-case basis. In some cases, the Commission has concluded that 911 regulation is more appropriate at the state level. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 18 FCC Rcd 25340, 25361-62 (¶ 50) (2003) ("*E911 Scope Order*"). Where the Commission finds that federal regulation is warranted, it has examined several criteria when crafting 911 rules for a particular service. An important factor in this analysis is whether "customers using the service … have a reasonable expectation of access to 911 and E911 services." *Id.* at 25347 (¶ 18).

[3] *See, e.g., Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 20 FCC Rcd 7709 (2005) (granting E911 waivers to some small wireless carriers); *AT&T Wireless Services, Inc.,* 17 FCC Rcd 9903 (2002) (notice of apparent liability for forfeiture); *AT&T Wireless Services, Inc.,* 17 FCC Rcd 19938 (2002) (adopting consent decree).

(2) Voice Over Internet Protocol (VoIP) Service

Recently, the explosive growth of the Internet has fostered the development of services that use Internet Protocol ("IP") to convey "real-time, two-way voice communications." *Order* ¶ 24 (JA). Some of these VoIP services are interconnected to the public switched telephone network. *Ibid.* These interconnected VoIP services are available to anyone with a broadband (*i.e.*, high-speed) connection to the Internet. *Ibid.* (JA -).

From a user's perspective, interconnected VoIP services are functionally similar to traditional telephone service. *Order* ¶ 23 (JA). Such services allow users to place calls to and receive calls from anyone with a standard phone line. *Order* ¶ 24 (JA). In many cases, the services can be used with "conventional analog telephones" or with IP-based phones, which resemble traditional telephones. *Order* at n.77 (JA). Emphasizing these functional similarities, IVPs frequently market their services as a replacement for traditional telephone service. For example, Vonage, the IVP with the largest number of customers, advertises that it offers "an all-inclusive phone service that can replace your current phone company." *See* www.vonage.com/help_vonage.php. It is thus unsurprising that consumers expect interconnected VoIP services to function like "regular" telephone service. *Order* ¶ 23 (JA).

In March 2004, the FCC commenced a rulemaking to address numerous issues concerning the proliferation of IP-enabled services such as VoIP. *IP-Enabled Services,* 19 FCC Rcd 4863 (2004) (JA) ("*NPRM*"). Among other things, the Commission sought comment on whether it should "extend 911 and E911 requirements to such services, and if so, by what means and to what extent." *Id.* ¶ 56 (JA). The Commission also noted that, in determining the regulatory obligations of such services, consumer expectations play a crucial role. It distinguished "services that might be viewed as replacements for traditional voice telephony (and

… thus raise social policy concerns relating to emergency services …) from other services." *Id.* ¶ 37 (JA). The agency requested comment on "the time frame" for addressing "911 and E911 regulatory issues in the IP context." *Id.* ¶ 57 (JA).

Before it resolved any of the issues in this rulemaking, the FCC in November 2004 issued an order preempting the Minnesota Public Utilities Commission from applying certain tariffing and entry regulations to the VoIP service offered by Vonage. *Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004) ("*Preemption Order*"), *petitions for review pending, Minnesota Public Utilities Commission v. FCC*, Nos. 05-1069 *et al.* (8th Cir. argued January 12, 2006). The Commission determined that Minnesota could not apply these regulations to Vonage "without negating valid federal policies and rules" because Vonage's VoIP service "cannot be separated into interstate and intrastate communications." *Id.* at 22404 (¶ 1). Among other things, the FCC preempted the Minnesota commission from imposing 911 requirements on Vonage as a condition of market entry. *Id.* at 22430-31 (¶ 42). The FCC explained that "[a]llowing Minnesota's [911 regulation] to stand would invite similar imposition of 50 or more additional sets of different" state entry requirements, "which could severely inhibit the development of … VoIP services." *Id.* at 22427 (¶ 37). The Commission also indicated that it would preempt "comparable" regulations imposed by other states on VoIP services. *Id.* at 22424 (¶ 32). At the same time, the FCC declared its intention "to address the 911 issue as soon as possible" in its rulemaking for IP-enabled services. *Id.* at 22432 (¶ 44). In the meantime, the FCC said that it expected Vonage "to continue its 911 development efforts and to continue to offer some type of public safety capability." *Id.* at 22431 (¶ 43).

B. The Order On Review

At an open meeting on May 19, 2005, the FCC adopted rules establishing 911 requirements for interconnected VoIP services. It determined that such requirements were urgently needed. Given the similarities between interconnected VoIP and traditional telephone service, the Commission concluded that consumers "reasonably could expect to be able to dial 911 using [interconnected VoIP] service" to obtain prompt emergency assistance. *Order* ¶ 23 (JA). In reality, however, the Commission found evidence that subscribers to interconnected VoIP services were not receiving even minimally adequate 911 service.

Before the FCC adopted its VoIP 911 rules, many IVPs – including petitioners – routinely routed their subscribers' 911 calls to PSAPs' 10-digit administrative telephone numbers. Br. 9-10 & n.16. As public safety officials explained to the Commission, this practice was "unacceptable and hazardous" because most PSAPs are not prepared to handle emergency calls to their administrative numbers. New York City Ex Parte Letter, April 22, 2005, at 1 (JA). In New York City, for example, the phone serving the PSAP's administrative number "is not equipped in any respect to serve an emergency response or public safety purpose," "is not … attended by a trained 911 call taker," and "is not capable of receiving or displaying the kind of automated location and number information that enables appropriate 911 response." *Id.* at 2 (JA). This situation is not unique to New York. In many areas of the country, "PSAP administrative numbers are answered by low-level clerical staff, not by trained public safety telecommunicators operating from state-of-the-art consoles. Indeed, administrative numbers are often 'answered' by voice-mail, especially during 'non-business' hours." APCO Ex Parte Letter, April 15, 2005, at 1 (JA).

Moreover, even when routing calls to administrative numbers, IVPs did not have mechanisms in place to ensure that 911 calls were routed to the geographically appropriate PSAP. As a result, those 911 calls could "be sent to a PSAP hundreds of miles from the site of the emergency with no ability to dispatch first responders to the scene." APCO Comments at 4 (JA) (noting that a VoIP 911 call "made in Houston, Texas … was routed to a PSAP in Nashville, Tennessee"); *see also* New Jersey Ratepayer Advocate Comments at 18-19 (JA -) (a VoIP 911 call that was placed from the Dallas/Fort Worth airport was routed to the PSAP in Anne Arundel County, Maryland).

The failure of IVPs to provide their customers with even minimally adequate 911 service had produced tragic consequences. *See Order* at n.2 (JA). For instance, a Texas couple was shot multiple times during a home invasion burglary while their daughter unsuccessfully tried to reach 911 through their VoIP service. Her 911 call was answered by a recorded message directing her to dial 911 from another telephone. In a separate incident, a Connecticut woman whose infant son had suffered an epileptic seizure could not reach an emergency dispatcher when she dialed 911 using her interconnected VoIP service. Instead, her call was routed to the police department's main number and answered by a recording. Similarly, when a Florida woman dialed 911 using her interconnected VoIP service after her infant daughter stopped breathing, she reached a recording informing her that the administrative offices of the sheriff's department were closed. Paramedics ultimately arrived in response to a call from a neighbor's phone, but the baby could not be revived.[4]

[4] These VoIP users testified about their experiences at the Commission's May 2005 open meeting. An audio/video recording of the meeting is available on the Commission's website at www.fcc.gov/realaudio/mt051905.ram.

The Commission was concerned that the number of tragedies like these would increase dramatically unless the agency took immediate corrective action. The use of VoIP is expected to expand rapidly. Anyone with a broadband connection can sign up for VoIP service; and by the end of 2004, nearly 38 million broadband lines had been deployed throughout the United States – an increase of 17 percent in just six months.[5] Furthermore, there is "no limit to the number of entities that may engage in the provision of interconnected VoIP services in a given geographic area." *Order* ¶ 43 (JA). These factors contributed to industry projections that "the number of residential VoIP 911 calls will rise from 370,000 in 2004 to 3.5 million in 2006." *Order* ¶ 10 (JA). The Commission concluded: "This nearly tenfold increase in expected VoIP 911 calls dictates swift action on our part." *Ibid.*

Accordingly, citing "the urgent need to address public safety issues related to interconnected VoIP," *Order* at n.2 (JA), the FCC adopted "an immediate E911 requirement that applies to all interconnected VoIP services." *Order* ¶ 2 (JA). The Commission required all IVPs, within 120 days of the effective date of the *Order* (*i.e.*, more than six months after the *Order*'s adoption), to "transmit all 911 calls, as well as a call back number and the caller's 'Registered Location' for each call, to the PSAP, designated statewide default answering point,

[5] *See* Industry Analysis and Technology Division, FCC Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2004,* July 2005, at 3.

or appropriate local emergency authority that serves the caller's Registered Location." *Order* ¶ 37 (JA).[6]

In adopting its VoIP 911 rules, the FCC balanced "the needs of the public safety community to get call back and location information … against existing technological limitations" of IVPs. *Order* ¶ 36 (JA). The Commission recognized that IVPs (unlike traditional telephone companies) currently do not always have the technological capability automatically to determine a customer's location. *Order* ¶ 46 (JA). Without such technology, it is difficult for providers of so-called "nomadic" VoIP services to track the location of their customers. Because nomadic services are "portable" and "can be used from any broadband connection," they create "challenges similar to those presented in the wireless context" – in particular, difficulty in pinpointing the exact location of customers when they are using nomadic services. *Order* ¶ 25 (JA). To address this problem, the Commission adopted a more limited E911 requirement for interconnected VoIP. This "Registered Location" requirement relies on interconnected VoIP subscribers to provide their IVPs with accurate location information and to update that information whenever they relocate, instead of requiring the information to be automatically provided without consumer input, as the FCC requires of wireless carriers. *Order* ¶ 46 (JA). The Commission characterized this modified E911 requirement as a "first step …

[6] The Commission also directed all IVPs, by the *Order*'s effective date, to: (1) "advise every subscriber, both new and existing," of "the circumstances under which E911 service may not be available through the interconnected VoIP service or may be in some way limited by comparison to traditional E911 service"; (2) "obtain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood this advisory"; and (3) "distribute to all subscribers, both new and existing, warning stickers" informing subscribers if E911 service may be limited or unavailable. *Order* ¶ 48 (JA); *see also* 47 C.F.R. § 9.5(e)(1)-(2). Although petitioners make passing reference to this portion of the rules (Br. 4, 32, 52-54), they do not appear to challenge the notification requirements.

toward a more advanced solution in which the user automatically can be located without assistance from the user." *Order* ¶ 56 (JA).[7]

The Commission also required that "all interconnected VoIP 911 calls be routed through the dedicated Wireline E911 Network," a network operated by a group of ILECs. *Order* ¶ 40 (JA); *see also id.* ¶ 14 (JA -). The agency understood that "compliance with this obligation" would necessarily depend on the ability of IVPs to gain access to the ILECs' trunks and selective routers, whether through competitive local exchange carriers ("CLECs") "that have negotiated access with the [ILECs], through direct connection to the [ILECs], or through third-party providers." *Order* ¶ 40 (JA). The Commission found evidence that ILECs "are increasingly offering E911 solutions that allow [IVPs] to interconnect directly to the Wireline E911 Network through tariff, contract, or a combination thereof." *Order* ¶ 39 (JA). The Commission also found that some CLECs and third-party providers were already offering E911 services that gave IVPs access to the Wireline E911 Network. *Order* ¶ 38 (JA). To address concerns about the ILECs' continued cooperation, the Commission stated that it would "closely monitor" the situation and would "not hesitate to take further action should that be necessary." *Order* ¶ 40 (JA).

In defining the scope of the VoIP 911 service obligations, the FCC's new rules require IVPs to provide E911 service "only in those areas where Selective Routers are utilized." *Order* ¶ 41 (JA). Thus, IVPs are not subject to any 911 obligations in those areas that are not interconnected with the Wireline E911 Network. *See Order* ¶ 41 & n.136 (JA); *see also id.* ¶

[7] To pave the way for its next step, the agency immediately initiated a rulemaking to consider the adoption of a more advanced VoIP E911 solution that automatically determines a caller's location. *Order* ¶¶ 2, 56-57 (JA , -).

6 (JA) (four percent of the counties in the United States receive no 911 service). In addition, the rules exempt IVPs from providing a call back number or location information in those areas where the PSAP is incapable of receiving or processing the data. *Order* ¶ 42 (JA); 47 C.F.R. § 9.5(c).

The *Order* became effective 30 days after its publication in the Federal Register on June 29, 2005. *Order* ¶ 73 (JA); 70 Fed. Reg. 37273 (June 29, 2005). Consequently, under the terms of the *Order*, all IVPs were required to implement the new E911 service requirements by November 28, 2005 – 120 days after the rules took effect, and more than six months after the Commission adopted the rules. *See Order* ¶ 37 (JA). By that date, each IVP was required to submit a letter to the FCC detailing its compliance with the rules. *Order* ¶ 50 (JA).

The Commission acknowledged that it had adopted an "aggressively short" timetable for implementing the VoIP 911 requirements; but it concluded that "the threat to public safety if we delay further is too great and demands near immediate action." *Order* ¶ 37 (JA). The Commission further determined that its timetable for VoIP 911 deployment, while aggressive, was not unreasonable. It based this assessment on several factors. First, the Commission noted that a number of companies had already developed or were in the process of developing solutions to facilitate E911 implementation by IVPs. *Order* ¶¶ 38-39 (JA -). Record evidence showed that such solutions could be fully operational in short order. For example, BellSouth indicated that its E911 offering for nomadic IVPs "could reasonably be implemented within 120 days." BellSouth Ex Parte Letter, May 16, 2005, at 1 (JA). In addition, the Commission observed that "the network components that have been developed to make wireless E911 possible can also be used for VoIP E911, which should make the implementation process simpler and far less expensive than the initial upgrades necessary for wireless E911." *Order* ¶ 53

(JA). Furthermore, in light of its past experience, the Commission predicted that its E911 rules for interconnected VoIP service would "speed the further creation and adoption of [E911] services" in the same way that its wireless E911 rules had "helped foster the widespread availability of E911 services for mobile wireless users." *Order* ¶ 25 (JA). For all of these reasons, the Commission concluded that IVPs could feasibly meet the implementation deadline established by the *Order*.

C. Subsequent Developments

On November 1, 2005, petitioners moved to stay the November 28 deadline for compliance with the *Order*'s 911 service requirements. While petitioners' stay motion was pending, the FCC's Enforcement Bureau issued a public notice describing the specific information that IVPs must include in their 911 compliance letters to the Commission. Public Notice, Enforcement Bureau Outlines Requirements of November 28, 2005 Interconnected Voice Over Internet Protocol 911 Compliance Letters, DA 05-2945 (released Nov. 7, 2005) ("Public Notice"). In the public notice, the Enforcement Bureau expressly endorsed the "innovative" 911 compliance plans that AT&T, MCI, and Verizon had outlined in earlier submissions to the Commission. *Id.* at 4-5. The Bureau "strongly encourage[d] other providers to adopt similar measures." *Id.* at 5.

The compliance plans proposed by AT&T, MCI, and Verizon rely on "an automatic detection mechanism" that enables the IVP "to identify when a customer may have moved his or her interconnected VoIP service to a new location." Public Notice at 4. For example, pursuant to AT&T's "Heartbeat Solution," AT&T has designed its VoIP telephone adapters to enable it to detect when an adapter has been disconnected and then reconnected. Once the Heartbeat Solution detects a reconnection, "the AT&T network will temporarily suspend the customer's

service and will post a message at the customer's web portal directing the customer to confirm the existing registered location address or register a new location address." Letter from Robert W. Quinn, Jr., AT&T, to Marlene Dortch, FCC, October 7, 2005, at 2 ("Quinn Letter"). AT&T will not restore service until the customer has responded to AT&T's inquiry concerning the customer's location. Thus, under this system, "the customer will be required to register a new address when the service is being used nomadically." *Ibid.* MCI and Verizon have developed similar mechanisms for determining the location of nomadic VoIP users.[8] The Enforcement Bureau noted that mechanisms of this sort will ensure that each interconnected VoIP subscriber "continues to receive 911 service even when using the interconnected VoIP service nomadically." Public Notice at 4.

The compliance plans that the Bureau endorsed also include commitments to stop accepting new customers "in areas where the provider cannot provide 911 service" and "to adopt a 'grandfather' process for existing customers for whom the provider has not yet implemented either full 911 service or the automatic detection capability." Public Notice at 4. Under the "grandfathering" process proposed by AT&T, for instance, AT&T's existing customers could "continue to use the service from their registered primary locations (and nomadically wherever 911 is available)." Quinn Letter at 3; *see also* Guyer Letter at 3-4.

In its public notice, the Enforcement Bureau expressly stated that it would "*not* require providers that have not achieved full 911 compliance by November 28, 2005, to discontinue the provision of interconnected VoIP service to any existing customers." Public Notice at 5

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[8] *See* Letter from Susanne A. Guyer, Verizon, to Marlene Dortch, FCC, Oct. 21, 2005, at 2-3 ("Guyer Letter"); Letter from Richard S. Whitt, MCI, to Marlene Dortch, FCC, Oct. 21, 2005, at 2-4.

(emphasis added). But the Bureau also said that it expected IVPs to "discontinue marketing VoIP service, and accepting new customers for their service, in all areas where they are not transmitting 911 calls to the appropriate PSAP in full compliance with the Commission's rules." *Ibid.*

By order dated November 15, 2005, this Court denied petitioners' stay motion. It ruled that petitioners had "not demonstrated the irreparable injury requisite for the issuance of a stay." In reaching this conclusion, the Court relied on the FCC's assurance that it would not require IVPs that failed to achieve timely compliance with the challenged rules to terminate service to current customers. The Court also found a "lack of substantiation for petitioners' contention that they will suffer irreparable harm in the event they are prohibited from accepting new customers in certain areas after November 28, 2005."

More than 200 IVPs have filed letters with the FCC describing their compliance with the *Order*'s requirements. According to an initial assessment by Commission staff, more than half of the IVPs that submitted compliance letters reported that they are now providing compliant E911 service to 90 percent or more of their subscribers. In addition, a number of IVPs, including petitioners, have requested waivers of the VoIP 911 rules. Those waiver requests are pending before the Commission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Today, Americans expect that when they pick up the telephone and dial 911, they will be promptly connected to a safe and reliable system for directing their calls to emergency services. That expectation – and the overriding need for such a capability – is not diminished because IVPs use the Internet to provide voice communications services. It was thus perfectly reasonable

for the FCC to act to ensure that a reliable and effective 911 service is available to the increasingly significant segment of the public that uses VoIP to make phone calls.

Petitioners do not dispute the need for dependable 911 service for "all forms of VoIP." Br. 20. Nor do they question the Commission's authority to impose 911 requirements on IVPs. Instead, they complain that the Commission's deadline for implementing its VoIP 911 requirements is unreasonable. Petitioners do not put forth an alternative timetable for compliance, however; rather, they suggest that they should be left to their own devices – under an entirely undefined schedule that could take "years" (Br. 25) – to implement 911 service. Recognizing the critical public interests at stake, the Commission reasonably rejected this recipe for unwarranted delay. Drawing upon decades of experience in promoting 911 capabilities for wireline and wireless telephone service, the Commission set an implementation schedule that it found would be achievable. The Commission's predictive judgment, which balances the imperative public interest in reliable VoIP 911 service against the burden imposed on IVPs by refusing to delay compliance, has been borne out by events. The FCC's *Order* should be affirmed.

I. The record in this proceeding revealed a patently unacceptable situation. Many IVPs – including petitioners – were systematically routing their subscribers' 911 calls to PSAPs' administrative telephone numbers, which are not equipped to handle requests for emergency assistance. As a result, when some VoIP subscribers used their service to dial 911 in an emergency, they were unable to obtain the help they needed. This already perilous situation threatened to become even more dangerous in the near future. With the growing popularity of interconnected VoIP services, VoIP 911 calls were expected to increase almost tenfold in just

two years. Unless IVPs acted quickly to remedy the fundamental flaws in their 911 service, the number of tragedies caused by inadequate VoIP 911 service could increase dramatically.

Faced with this burgeoning crisis, the FCC reasonably decided to require prompt implementation of E911 service by IVPs. While the Commission acknowledged that the *Order* established an aggressive schedule for E911 compliance, it reasonably found that its November 2005 compliance deadline – 120 days after the *Order*'s effective date, and more than six months after the *Order* was adopted – could feasibly be met. The Commission noted that some VoIP E911 solutions had already been developed, and that the network infrastructure that had previously been built for wireless E911 would facilitate the deployment of VoIP E911. In addition, the Commission reasonably predicted that its adoption of a strict compliance deadline would spur the development of new E911 solutions for IVPs. That prediction turned out to be prescient.

The Commission recognized that providers of nomadic VoIP services would face special implementation challenges. To address this concern, the Commission adopted a modified E911 requirement for IVPs. To comply with that requirement, IVPs need not determine a caller's location automatically, as wireless carriers must do. Petitioners argue that nomadic IVPs cannot even satisfy this modified E911 requirement by the compliance deadline. They claim that certain "obstacles" make timely compliance impossible. But petitioners greatly exaggerate the extent of these so-called "obstacles," none of which should prevent timely compliance. Moreover, given the profound public safety concerns weighing in favor of rapid 911 deployment here, petitioners have not come close to showing that the balance struck by the Commission was unreasonable.

II. The *Order* did not make an unexplained departure from past FCC practice. Contrary to petitioners' contention, the Commission's treatment of wireless 911 fully supports the

approach the agency took here. In both instances, the Commission could not know when relevant E911 solutions would be fully operational, so it made predictive judgments, choosing deadlines designed in part to spur innovation and hasten E911 deployment. While the precise deadlines for VoIP and wireless differed, so did the capabilities required of the two services. For example, automatic determination of a caller's location, which has occupied the bulk of the wireless E911 implementation period, is something IVPs are not even required to do. Moreover, IVPs can now build upon the infrastructure deployed for wireless E911, which should permit accelerated deployment of VoIP E911. Insofar as the Commission's approach in this case differed from its 911 requirements for other services, any variations in treatment were fully warranted by the differences between interconnected VoIP service and those other services.

III. The Commission reasonably concluded that it was unnecessary to impose additional interconnection obligations on ILECs in this proceeding. The record showed that the ILECs were fully cooperating with IVPs and that IVPs have multiple third-party options for interconnecting with the Wireline E911 Network. In addition, the ILECs already have substantial legal obligations to provide E911 access.

IV. The Commission here satisfied the APA's notice and comment requirements. Contrary to petitioners' claims, the agency did not need to propose specific rules to comply with those requirements. The APA requires only that a notice identify the issues to be resolved, a requirement the *NPRM* plainly satisfied here.

STANDARD OF REVIEW

The Court must uphold the FCC's VoIP 911 rules unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Under this highly deferential standard of review," the Court "presumes the validity of agency action,

and must affirm unless the Commission failed to consider relevant factors or made a clear error in judgment." *Cellco Partnership v. FCC*, 357 F.3d 88, 93 (D.C. Cir. 2004) (citations and internal quotations omitted). Applying this deferential standard, this Court has repeatedly affirmed FCC decisions concerning issues of public safety. *See, e.g., United States Cellular Corp. v. FCC*, 254 F.3d 78 (D.C. Cir. 2001); *Keller Communications, Inc. v. FCC*, 130 F.3d 1073 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 954 (1998); *Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996) ("*APCO*").

ARGUMENT

I. THE COMMISSION ADOPTED A REASONABLE TIMETABLE FOR IMPLEMENTING ITS VOIP 911 RULES

Until the FCC adopted 911 rules in this proceeding, many IVPs – including petitioners – were merely transmitting 911 calls to PSAPs' 10-digit administrative telephone numbers. Br. 9-10 & n.16. This practice was "detrimental to public safety" because PSAPs do not use these numbers for emergency calls and typically lack the resources to do so. New York City Ex Parte Letter, April 22, 2005, at 2 (JA); *see also Order* at n.142 (JA).

As long as IVPs persisted in sending their subscribers' 911 calls to PSAPs' administrative numbers, it was virtually inevitable that some subscribers would fail to reach the appropriate public safety personnel in a timely manner during an emergency. Indeed, Vonage – the industry leader – recently acknowledged the obvious inadequacy of IVPs' existing 911 services. Vonage disclosed that deficiencies in its 911 services "may cause significant delays, or even failures, in callers' receipt of the emergency assistance they need."[9] This proceeding

[9] Vonage Holdings Corp., Form S-1 (filed February 8, 2006), at 11 (available on the SEC's EDGAR database, www.sec.gov/edgar.shtml).

brought to light some of the devastating consequences of such delays and failures. *Order* at n.2 (JA). And there was good reason to believe that the number of tragedies could rapidly multiply if IVPs did not fundamentally change their 911 practices. Because VoIP service is available from any broadband connection, evidence in the record projected a "nearly tenfold increase in expected VoIP 911 calls" between 2004 and 2006. *Order* ¶ 10 (JA).

Given the inherent inadequacy of IVPs' existing 911 service, and given the expected growth in the number of VoIP 911 calls by the end of 2006, the Commission was justifiably concerned that the threat to public safety posed by IVPs' mishandling of 911 calls could spiral into a much more widespread crisis unless the agency took swift and decisive action. Against this backdrop, the Commission reasonably decided to require prompt implementation of its new VoIP 911 service requirements. It required IVPs, within 120 days of the effective date of the *Order* (more than six months after the rules were adopted), to "transmit all 911 calls, as well as a call back number and the caller's 'Registered Location' for each call," to the geographically appropriate PSAP "via the dedicated Wireline E911 Network." *Order* ¶ 37 (JA -). The Commission recognized that it had established an "aggressively short" timeframe for VoIP 911 deployment; but in light of the explosive growth predicted for interconnected VoIP service, the agency reasonably determined that "the threat to public safety if we delay further is too great and demands near immediate action." *Ibid.* (JA).

At the same time, the Commission reasonably predicted that its deadline for VoIP E911 compliance, although demanding, could feasibly be met. A number of factors supported this reasoned predictive judgment. For one thing, as the Commission pointed out, the implementation process for VoIP E911 should be "simpler and far less expensive than the initial upgrades necessary for wireless E911" because "the network components that have been

developed to make wireless E911 possible can also be used for VoIP E911." *Order* ¶ 53 (JA). Furthermore, the record showed that both ILECs and CLECs were already offering interconnection services that would enable many IVPs to satisfy the E911 compliance deadline. *Order* ¶¶ 38-39 (JA -). Although petitioners suggest otherwise (Br. 28-29), at least one of the E911 solutions cited in the *Order* – Qwest's – was designed for "portable" VoIP services. *Order* ¶ 38 (JA). The Commission also found that its adoption of E911 obligations for IVPs would "speed the further creation and adoption of [E911] services" for all interconnected VoIP services, including nomadic VoIP. *Order* ¶ 25 (JA). In addition, Vonage had already deployed an E911 solution for its nomadic VoIP customers in Rhode Island; and it reported that the process of deploying this solution "took only eight weeks from start to finish." Letter from Jeffrey Citron, Vonage, to Edward Whitacre, Jr., SBC, February 18, 2005, at 1 (JA) (attached to SBC Ex Parte Letter, April 26, 2005).[10]

Petitioners contend that "E911 implementation poses much greater challenges for nomadic than for fixed VoIP service," and that "the FCC ignored those challenges in fashioning its rules." Br. 25. To the contrary, the Commission specifically accounted for the special challenges confronting providers of nomadic VoIP services. It recognized that nomadic IVPs, like wireless carriers, may have trouble identifying the exact location of subscribers who are using their service nomadically. *Order* ¶ 25 (JA). Currently, it "is not always technologically feasible" for IVPs "to automatically determine the location of their end users without end users' active cooperation." *Order* ¶ 46 (JA). Faced with this technological barrier, the Commission realized that it could not reasonably mandate the rapid deployment of a VoIP E911 service that

[10] *See also* Verizon Ex Parte Letter, May 11, 2005, at 2-3 (JA -) (describing a nomadic VoIP E911 solution that was scheduled to be deployed in New York City in the summer of 2005).

automatically determined the caller's location. The Commission therefore imposed a considerably less onerous obligation on IVPs: a Registered Location rule that requires IVPs "to obtain location information from their customers." *Ibid.* The Commission reasonably found that IVPs could come into compliance with this modified – and less burdensome – E911 requirement within the timeframe prescribed by the *Order*.

A. The Compliance Deadline Established By The Commission Reflected A Reasonable Predictive Judgment

Petitioners complain that the record contained no evidence of any existing E911 solutions that would allow nomadic IVPs to satisfy the new 911 requirements by the compliance deadline. Br. 28-29. That is not true. The Commission found that both ILECs and CLECs were already offering VoIP E911 solutions. *Order* ¶¶ 38-39 (JA -). Ultimately, however, no record evidence could provide a definitive answer to the inherently indeterminate question of how much time would be needed to implement these solutions on a broader scale. To answer that question, the FCC necessarily had to make a forecast as to when IVPs could feasibly complete implementation of the new 911 requirements: "In such circumstances complete factual support in the record for the Commission's judgment or prediction is not possible or required." *Melcher v. FCC*, 134 F.3d 1143, 1151 (D.C. Cir. 1998) (quoting *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 814 (1978)).

In making its prediction, the Commission reasonably anticipated that the establishment of a specific implementation deadline would "speed the further creation and adoption of [E911] services" for interconnected VoIP. *Order* ¶ 25 (JA). The technology was already available to develop such new services. As Vonage acknowledged, "there is no technical obstacle to implementing" VoIP E911. Vonage Ex Parte Letter, April 18, 2005, Exhibit B, Letter to SBC at

1 (JA). The Commission reasonably decided that a firm implementation deadline would help spark the development of innovative E911 solutions using existing technologies.

Past experience had shown that the agency's adoption of E911 requirements could serve as a powerful catalyst for creative new solutions. Specifically, "the Commission's adoption of E911 service obligations in the wireless context helped foster the widespread availability of E911 services for mobile wireless users, where it formerly was not possible for wireless carriers automatically to determine the precise geographic location of their customers." *Order* ¶ 25 (JA). This is hardly a novel approach. For example, when the Environmental Protection Agency adopts deadlines for satisfaction of emissions standards, it considers not only pollution control technology that is already available, but also how its standards can influence the development of new technology. The adoption of such "technology-forcing" standards "helps to encourage and hasten the development of new technology." *Natural Resources Defense Council v. Thomas,* 805 F.2d 410, 428 n.30 (D.C. Cir. 1986) (internal quotations omitted).

In this case, the FCC's "technology-forcing" approach yielded impressive results. Just as the Commission predicted, its adoption of VoIP E911 requirements sparked a flurry of innovation. In the months leading up to the November 2005 compliance deadline, third-party providers introduced E911 solutions for nomadic VoIP services. Level 3 developed a nomadic E911 solution that encompasses roughly 70 percent of the nation's households. Vonage is now using the Level 3 solution to provide E911 service to its nomadic customers. *See* Level 3 Press Release, Vonage Selects Level 3 To Expand 911 Capabilities, September 19, 2005 (available at www.level3.com/press/6396.html). In addition, Intrado completed interconnection agreements with the major ILECs in November 2005, laying the foundation for a far-reaching E911 solution

for nomadic VoIP services. *See* Intrado Press Release, November 17, 2005 (available at www.intrado.com/main/press/pressreleases/051117.jsp).

Similarly, the Commission's implementation deadline spurred many IVPs to act quickly to improve their 911 service. For instance, as we discussed in Part C of the Counterstatement, several IVPs developed automatic detection mechanisms that enhance their ability to monitor the movements of their nomadic customers and to ensure that those customers update their Registered Location information whenever necessary. According to a recent survey, 83 percent of the IVPs in a prominent VoIP trade association reported that the Commission's *Order* "helped focus their … attention" on the 911 issue and "accelerate[d]" their deployment efforts. VON Coalition E911 Survey, November 2005, at 1 (available at www.von.org/usr_files/911 -- Survey 2005 final.pdf). The same survey found that IVPs had deployed E911 faster than any other communications companies had done. *Id.* at 2. Given the VoIP industry's dramatic progress in implementing E911, there is no basis for petitioners' claim that the implementation schedule set by the FCC was "patently unreasonable." Br. 34.

Contrary to petitioners' assertion (Br. 33-34), the predictive judgment underlying the FCC's selection of a specific compliance deadline "is entitled to particularly deferential review." *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (internal quotations omitted). Where, as here, the FCC bases a decision in part on a prediction about the development of new solutions, it "functions as a policymaker and, inevitably, a seer – roles in which it will be accorded the greatest deference by a reviewing court." *Teledesic LLC v. FCC*, 275 F.3d 75, 84 (D.C. Cir. 2001) (internal quotations omitted). Judged by that highly deferential standard, the agency's predictive judgment in this case was plainly reasonable. Indeed, subsequent events confirmed the accuracy of the Commission's prediction that a firm

compliance deadline would trigger innovation that facilitated prompt implementation of VoIP E911 service.

Characterizing the Commission's compliance deadline as "impossibly aggressive," petitioners assert that the agency should have adopted one of the "reasonable" alternative proposals advanced by various parties. Br. 32-33. But "the fact that there are other solutions to a problem is irrelevant provided that the option selected is not irrational." *APCO*, 76 F.3d at 400 (internal quotations omitted). The FCC's implementation deadline was reasonably designed to prod IVPs to take much needed steps to provide minimally sufficient 911 service. The Commission's adoption of a strict deadline helped produce immediate and essential changes in IVPs' methods for processing 911 calls. By contrast, the alternative proposals favored by petitioners would have delayed VoIP E911 deployment for months or even "years." Br. 25. Given the tragedies that have already resulted from inadequate VoIP 911 service, and given the projected tenfold increase in the number of VoIP 911 calls in the near future, the Commission reasonably concluded that the public could not tolerate any further delay in the implementation of VoIP E911 service.

B. The "Obstacles" To E911 Implementation Identified By Petitioners Should Not Prevent Timely Compliance

Petitioners claim that technical and financial "obstacles" to implementation made the FCC's compliance deadline "impossible" to meet. Br. 25-32. But petitioners have greatly exaggerated the extent of these so-called "obstacles," none of which (either alone or in combination) should prevent timely compliance. Moreover, given the profound public safety concerns weighing in favor of rapid 911 deployment here, petitioners have not come close to showing that the balance struck by the Commission was unreasonable.

At the outset, petitioners maintain that no technically feasible E911 solution currently exists for nomadic VoIP services. Br. 25. That is incorrect. NENA and a group of IVPs have collaborated to develop the "i2" standard, a network architecture that enables nomadic IVPs to provide E911 service. *See* VON Coalition and NENA, Answering the Call for 9-1-1 Emergency Services in an Internet World, January 2005, at 6-8 (JA -) (attached to VON Coalition Ex Parte Letter, April 15, 2005). Even before the Commission adopted the *Order*, IVPs had already conducted successful trials of the i2 solution for nomadic services in several areas.[11] Thus, as Vonage has observed, "there is no technical obstacle to implementing" VoIP E911. Vonage Ex Parte Letter, April 18, 2005, Exhibit B, Letter to SBC at 1 (JA).

Petitioners point to several other purported impediments to timely E911 implementation, primarily access to pseudo-Automatic Numbering Information ("p-ANI") and economic feasibility. Neither of these purported impediments undermines the reasonableness of the FCC's timetable for VoIP E911 compliance.[12]

Access to p-ANI. Users of wireless and nomadic VoIP services sometimes place calls using "non-native" telephone numbers (*i.e.*, numbers whose area codes are not associated with the caller's location). For example, a wireless phone user can make a call in Seattle from a wireless phone number with a Pittsburgh area code. Because some equipment in the Wireline

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[11] *See, e.g.*, Vonage Ex Parte Letter, October 14, 2004, Exhibit 1 (JA -) (press release describing a successful E911 trial for nomadic VoIP in Rhode Island); Qwest Ex Parte Letter, April 11, 2005, Attachment at 1 (JA) (discussing a successful trial of the i2 solution in King County, Washington); Vonage Ex Parte Letter, April 18, 2005, at 2 (JA) ("implementing the I2 solution is technically feasible"); Intrado Ex Parte Letter, April 19, 2005, Attachment at 10 (JA) (identifying two i2 solutions that are "operational today").

[12] Petitioners also complain of difficulties in interconnecting with the ILECs. That claim overlaps substantially with their complaint that the FCC erred in not imposing additional obligations on the ILECs. We address that contention in Part III below.

E911 Network cannot directly link a Pittsburgh phone number to a Seattle PSAP, wireless carriers developed a technique using p-ANI for such situations. A p-ANI number has the same number of digits as a traditional phone number, but it alerts the PSAP to query the ALI Database for non-traditional location information. *See Order* ¶ 17 (JA).

Petitioners argue that the use of p-ANI does not provide a technically feasible solution for VoIP E911. Br. 27. At the same time, they complain that, even if p-ANI were technically feasible for IVPs, the Commission failed to appoint a p-ANI administrator to ensure that IVPs have nationwide access to p-ANI. Br. 27-28.

As an initial matter, the Commission in no way mandated the use of p-ANI in the *Order*. IVPs are free to choose any technical solution to comply with the Commission's rules. Nevertheless, petitioners are wrong when they assert (Br. 27) that the use of p-ANI to support VoIP E911 is not technically feasible. They base that claim on selective quotations from a letter submitted by Level 3. Br. 27 & nn.46-48. The language quoted by petitioners concerns the technical infeasibility of "number spoofing" – a less sophisticated technique for routing non-native 911 calls than the i2 solution now offers. *See* Level 3 Ex Parte Letter, May 13, 2005, at 1 (JA). In the same letter, Level 3 stated that the provision of VoIP E911 service to non-native phone numbers would not be technically feasible "until I2 solutions are implemented." *Id.* at 2 (JA). As we noted above at page 27 and note 11, i2 solutions are now being implemented. Those solutions incorporate p-ANI. *See* Vonage Ex Parte Letter, April 25, 2005, Exhibit A at 3 (JA) (noting that NENA's i2 standard includes p-ANI); AT&T Ex Parte Letter, May 9, 2005, at 2 (JA) ("implementation of I2 will … solve" problems associated with providing VoIP E911 to "non-native numbers").

Petitioners also fault the FCC for failing to appoint a p-ANI administrator. Br. 27-28. But neither petitioners nor any other party asked the agency to name a p-ANI administrator before the *Order* was adopted. Consequently, the Court lacks jurisdiction to consider the issue. *See* 47 U.S.C. § 405; *AT&T Corp. v. FCC*, 317 F.3d 227, 235-36 (D.C. Cir. 2003).

In any event, petitioners acknowledge that, in most areas of the country, there already is a p-ANI administrator. Br. 27. Petitioners' real complaint appears to be that, in many areas, the administrator is the ILEC, and that "some [ILECs] have refused to provide p-ANIs to IVPs or CLECs." *Ibid.* As a general matter, however, the Commission found that all the major ILECs were cooperating and working diligently to assist IVPs in developing E911 solutions. *See Order* ¶ 39 (JA -). Indeed, even before the VoIP 911 rules were adopted, Qwest was providing p-ANI to Vonage. *See* Vonage Ex Parte Letter, April 25, 2005, Exhibit A at 1 (JA).[13]

This record evidence justified the Commission's predictive judgment that IVPs were capable of providing E911 service to non-native numbers by the November 2005 compliance deadline, whether via p-ANI or through some other means. To the extent that petitioners have genuine problems with a particular ILEC or are unable to obtain p-ANI in a particular region where they provide service, such fact-specific issues are most properly raised in a complaint or waiver petition. *See* 47 U.S.C. § 208; 47 C.F.R. § 1.3.

Economic Feasibility. Petitioners argue that it was not economically feasible for nomadic IVPs to comply with the *Order*'s requirements by the November 2005 deadline. Br. 31-32. But petitioners exaggerate the burdens associated with compliance. To begin with, there

[13] *See also* BellSouth Ex Parte Letter, May 12, 2005, at 4 (JA) (the E911 solution offered by BellSouth "enables a VoIP provider to provide 9-1-1 service to customers with … 'non-native' telephone numbers").

is no "nationwide" obligation, as petitioners claim. The *Order* requires only that IVPs provide E911 service in those areas where they provide interconnected VoIP service. And as we explained in Part C of the Counterstatement, AT&T's Heartbeat solution enables nomadic IVPs to suspend their service to customers who have relocated to areas where E911 has not yet been implemented. Using this technique, nomadic IVPs can accomplish E911 implementation in stages over an extended period of time, gradually expanding the geographic scope of their VoIP service as they deploy E911 service in new areas. In some instances, nomadic IVPs may even choose not to incur the expense of implementing E911 "in places where they have no customers today and may never have customers in the future." Br. 31. Instead, using the Heartbeat solution, IVPs may simply block their customers from using their service in those isolated areas (which are so remote that they are not likely to attract many VoIP users anyway).

The Commission has also made clear that, even where IVPs provide service, they need not provide E911 in those areas that are not interconnected with the Wireline E911 Network. *Order* ¶ 41 (JA). By petitioners' own estimate (Br. 11-12 & n.21), 14 percent of the counties in the United States (encompassing more than 14 million lines) lack E911 capability. Those areas are thus exempt from the VoIP 911 rules. Furthermore, although petitioners claim that nomadic IVPs must "spend an extraordinary amount of time" to obtain interconnections (Br. 31), Level 3 offers an E911 solution that immediately connects nomadic IVPs to PSAPs reaching almost 70 percent of American households. *See* Level 3, A Head Start for Achieving E-911 (available at www.e911direct.com).

Contrary to petitioners' assertion (Br. 32), the FCC has *not* decided "to deprive the public of nomadic and non-native VoIP absent compliance with" the implementation deadline. As the Enforcement Bureau's November 2005 public notice plainly stated, and as the Court found when

it denied petitioners' stay motion, the FCC has no intention of requiring the termination of interconnected VoIP service to current customers in those areas where IVPs do not meet the E911 compliance deadline. *See* Counterstatement, Section C. Although IVPs cannot accept new customers in those noncompliant areas, they can continue to expand their customer base in regions where E911 compliance has been achieved.

Petitioners contend that the Commission failed to consider "the very obvious possibility that the nomadic VoIP industry could well die in its infancy because of the prohibitive economics of compliance with the *Order*." Br. 31. But petitioners have cited no evidence to support this dire claim. As the Court noted in denying petitioners' stay motion, petitioners failed to substantiate any irreparable harm. Petitioners' brief, like their stay motion, offers no hard evidence to support their speculative assertion that E911 compliance could drive them out of business. In any event, the FCC made a reasonable judgment that any possible risk that expedited 911 implementation posed to IVPs' commercial viability was outweighed by the growing threat to public safety if IVPs continued to route 911 calls in a systematically unsatisfactory manner.

Petitioners assert that IVPs' customers "have received robust disclosures regarding the absence of wireline-type E911 and the limitations of VoIP 9-1-1 services." Br. 32. If petitioners mean to suggest that their customers (having received these disclosures) should be permitted to assume the risk of accepting interconnected VoIP service that does not comply with the *Order*'s E911 requirements, the FCC rightly rejected that premise. The Commission found that allowing customers to "opt-out of E911 service is fundamentally inconsistent" with the agency's statutory obligation "to 'encourage and support efforts by States to deploy comprehensive end-to-end emergency communications infrastructure and programs.'" *Order* ¶ 47 (JA) (quoting 911 Act,

§ 3(b)). As one commenter observed, "if VoIP is permitted to erode the ubiquity and efficiency of the E9-1-1 system, the general public and not just the VoIP subscriber will be adversely impacted." Boulder Regional Emergency Telephone Service Authority Comments at 3 (JA). Among other concerns, "[s]ome users of an interconnected VoIP service," such as a babysitter, for example, "will not be subscribers." *Order* at n.156 (JA). Such users may not wish to consent to inadequate 911 service. The Commission thus reasonably decided that "[u]biquitous access to emergency response services is far too critical to leave to the vagaries of the marketplace." Citizens Utility Board Comments at 28 (JA) (cited in *Order* at n.151 (JA)).

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At bottom, this case involves a dispute over agency line-drawing. In setting a specific compliance deadline, the Commission reasonably exercised its "wide discretion to determine where to draw administrative lines." *AT&T Corp. v. FCC*, 220 F.3d 607, 627 (D.C. Cir. 2000). While petitioners would have preferred a different deadline, this Court is "generally unwilling to review line-drawing performed by the Commission unless [petitioners] can demonstrate that lines drawn … are patently unreasonable, having no relationship to the underlying regulatory problem." *National Association of State Utility Consumer Advocates v. FCC,* 372 F.3d 454, 461 (D.C. Cir. 2004) (internal quotations omitted). Petitioners cannot make that showing here. The Court should affirm the reasonableness of the compliance deadline that the Commission selected.

II. THE *ORDER* DID NOT MAKE AN UNEXPLAINED DEPARTURE FROM PAST PRACTICE

Petitioners argue that the *Order* deviated without explanation from "policy guidelines" that the FCC previously applied when implementing 911 service for new technologies. Br. 35. This claim lacks merit.

Petitioners assert that "the FCC consistently has avoided imposing 'specific regulatory requirements' on nascent services that 'may impede the development of the service in ways that might reduce its ability to meet public safety needs.'" Br. 37 (quoting *First Wireless 911 Order,* 11 FCC Rcd at 18718 (¶ 83)). The language quoted by petitioners, however, described a specific Commission finding concerning mobile satellite service ("MSS"), not a broad "guideline." The Commission found that "adding specific regulatory requirements *to MSS* may impede the development" of *that* service "in ways that might reduce its ability to meet public safety needs." *First Wireless 911 Order,* 11 FCC Rcd at 18718 (¶ 83) (emphasis added). More importantly, even assuming that this finding reflected a generally applicable policy, petitioners fail to explain how the *Order* in this case departed from that policy. They have not shown how the requirements imposed by the *Order* might reduce the ability of VoIP services to meet public safety needs. Indeed, as we explained in Part I of the Argument, the *Order*'s requirements have already improved the capabilities of IVPs to provide effective 911 service.

Petitioners make much of the FCC's past statements that "any [911] rules adopted must provide sufficient flexibility to foster the development of alternative methods and technological innovation,"[14] and that overly prescriptive E911 requirements "would be inconsistent with the Commission's policy to promote the advancement of new technologies."[15] Br. 37-38. The rules at issue here are not inconsistent with those statements. In referring to the need for "flexibility" and the promotion of new technologies, the Commission was simply expressing its desire to avoid adopting E911 rules that prescribed the use of a specific technology. The challenged rules

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[14] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 9 FCC Rcd 6170, 6174 (¶ 21) (1994).

[15] *E911 Scope Order,* 18 FCC Rcd at 25367 (¶ 62).

in this case adhere to that policy. IVPs are free to choose from a wide array of technological options for satisfying the rules, including "interconnecting indirectly through a third party such as a [CLEC], interconnecting directly with the Wireline E911 Network, or … any other solution that allows a provider to offer E911 service" in accordance with the rules. *Order* ¶ 38 (JA); *see also Order*, Statement of Chairman Martin at 1 (JA) ("By not dictating the technical means by which providers must come into compliance, we do not impose undue regulation on these services.").

Petitioners also claim that the *Order* abandoned the "phased approach" to implementing E911 that the FCC had previously adopted for other communications services. Br. 46. That claim is baseless. The Commission explicitly adopted a phased approach here. It established an "immediate" short-term E911 requirement that did not mandate the automatic determination of a caller's location; and it made clear that it intended "in a future order to adopt an advanced E911 solution for interconnected VoIP that must include a method for determining a user's location without assistance from the user." *Order* ¶ 2 (JA). In conjunction with the *Order*, the Commission issued a notice of proposed rulemaking seeking comment on the next phase of E911 implementation for VoIP services. *See Order* ¶¶ 56-63 (JA -). In that notice, the agency described the *Order*'s E911 requirements as a "first step … toward a more advanced solution." *Order* ¶ 56 (JA). The next step that the Commission envisions for IVPs – a more sophisticated E911 solution that automatically determines a caller's location – is very similar to the "Phase II" requirements for E911 implementation by providers of commercial mobile radio service ("CMRS"). *See* 47 C.F.R. § 20.18(e)-(j).

Petitioners cannot plausibly maintain (Br. 44) that the FCC ignored the important policy of encouraging new technologies when it adopted the challenged rules. Far from neglecting that

policy, the Commission cited the promotion of new services as a principal reason for adopting the rules. It reasoned that the rules, by mandating swift E911 implementation, would "speed the further creation and adoption of [E911] services" for IVPs and their customers. *Order* ¶ 25 (JA). As we explained in Part I.A of the Argument, subsequent events vindicated the Commission's judgment. Its new rules spurred the rapid deployment of several new VoIP E911 solutions.

Petitioners complain that, for purposes of E911 implementation, the Commission treated IVPs differently from providers of three other types of communications services: (1) CMRS (commercial wireless service); (2) multi-line telephone systems ("MLTS"); and (3) MSS. Br. 38-46. As explained below, insofar as the Commission adopted a different approach here, that approach was warranted by the differences between interconnected VoIP service and these other services.

CMRS. Although petitioners assert that the *Order* diverged from the FCC's framework for wireless 911 implementation (Br. 38-42), the agency's treatment of CMRS providers fully supports the approach the Commission took here. When the FCC first adopted 911 rules for CMRS, it did not know when wireless carriers would have the technology needed to determine the exact location of mobile phone users making 911 calls. The Commission thus made a predictive judgment in establishing a deadline for wireless E911 implementation. The deadline was designed to spur innovation and hasten E911 deployment, and the wireless 911 rules "helped foster the widespread availability of E911 services for mobile wireless users, where it formerly was not possible for wireless carriers automatically to determine the precise geographic location of their customers." *Order* ¶ 25 (JA). The *Order* here adopted the same basic approach.

Petitioners are simply wrong when they assert that the FCC is requiring the VoIP industry "to do in four months what the CMRS industry has been permitted to do … over the course of

ten years." Br. 41. This argument compares apples and oranges. Unlike IVPs, wireless carriers are required to determine a caller's location automatically. Virtually all of the wireless industry's E911 deployment efforts have focused on that capability, which has proved challenging because mobile customers may be constantly moving. *Order* ¶ 17 (JA); *see also Fourth Wireless 911 Order*, 15 FCC Rcd at 17445-56 (¶¶ 6-37). IVPs, in contrast, are merely required to "obtain location information" directly "from their customers" and to route calls to geographically appropriate PSAPs via dedicated trunks. *Order* ¶ 46 (JA). These requirements are significantly less arduous than determining location automatically. In that important respect, the challenged rules do not require IVPs to implement "full E911 capabilities," as petitioners claim (Br. 36). Indeed, even *before* the wireless 911 rules took effect, virtually all wireless carriers were already routing 911 traffic to geographically appropriate PSAPs via dedicated trunks – the core of the requirements challenged by petitioners. *See First Wireless 911 Order*, 11 FCC Rcd at 18679-80 (¶¶ 4, 6).

The timeframe that the FCC established for implementation of these less demanding E911 requirements was amply justified. For one thing, IVPs were not starting from scratch. The "network components" that were previously developed to make E911 possible for CMRS providers "can also be used for VoIP E911," making "the implementation process" for IVPs "simpler and far less expensive than the initial upgrades necessary for wireless E911." *Order* ¶ 53 (JA). In light of these considerations, Vonage has said that it "does not anticipate that it will face the same issues that have made CMRS E-9-1-1 such a daunting challenge." Vonage Ex Parte Letter, May 9, 2005, at 7 (JA).

At the same time, the expectations of consumers and public safety officials have changed since wireless carriers began implementing 911 service 10 years ago. In the last decade, the

combined efforts of regulators and telecommunications carriers "have resulted in the nearly ubiquitous deployment of 911 service." *NPRM* ¶ 51 (JA). Consumers now reasonably expect to receive effective 911 capability from a service marketed as a replacement for traditional telephone service. *See Order* ¶ 48 (JA -). And PSAPs now reasonably expect to receive 911 calls quickly and efficiently via dedicated trunks; they do not have the resources or capability to handle 911 calls to their administrative numbers. *Order* at n.142 (JA); New York City Ex Parte Letter, April 22, 2005, at 1-2 (JA -); APCO Ex Parte Letter, April 15, 2005, at 1 (JA). The Commission thus faced a systemic deficiency in existing VoIP 911 service, which had already led to several tragedies. *See Order* at n.2 (JA). Under the circumstances, the Commission reasonably perceived a need for prompt implementation of E911 service by IVPs.

The rapid expansion of the VoIP industry magnified the need for swift action. The number of VoIP 911 calls was expected to increase almost tenfold between 2004 and 2006. *Order* ¶ 10 (JA).[16] Unless the Commission acted quickly to remedy the fundamental defects in existing VoIP 911 service, many more VoIP subscribers could soon face emergencies without dependable access to the 911 system.

Petitioners complain that the VoIP 911 rules did not include the sort of "waiver process" that the Commission created for CMRS providers. Br. 40 (citing *First Wireless 911 Order*, 11 FCC Rcd at 18710 (¶ 66)). But there is a waiver process here. Section 1.3 of the FCC's rules states: "Any provision of the rules may be waived by the Commission on its own motion or on

[16] By contrast, in the first two years of wireless 911 implementation, the number of wireless 911 calls increased by 63 percent – a small fraction of the estimated rate of growth in the volume of VoIP 911 calls during a comparable time period. *See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 FCC Rcd 17388, 17390 (¶ 3) (1999).

petition if good cause therefor is shown." 47 C.F.R. § 1.3. Invoking this rule, petitioners and various other IVPs have filed waiver petitions with the Commission in this proceeding. Those petitions remain pending. An applicant for waiver of a Commission rule "faces a high hurdle" (*WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969)), particularly where, as here, important public safety concerns are at stake. Nonetheless, if an IVP can make a sufficient showing of good cause (*e.g.*, by demonstrating that implementation delays were attributable to factors beyond the IVP's control), the Commission will consider waiving its VoIP 911 rules in appropriate circumstances.

MLTS. Petitioners assert that IVPs serving MLTS must "apparently" comply with the VoIP E911 requirements even though many other MLTS providers have no 911 obligations. Br. 43. That is incorrect. For 911 purposes, IP-based MLTS and traditional MLTS receive the same regulatory treatment. The *Order* specified that the VoIP 911 rules do not apply to "the sale or use" of MLTS-type customer premises equipment (such as an IP-based private branch exchange) "that itself uses … VoIP services to terminate traffic to and receive traffic from" the public switched telephone network. *Order* at n.78 (JA). Thus, consistent with Cisco's request, the Commission did "not impose E911 regulations on enterprises that use IP-based MLTS." Br. 44 (citing Cisco Ex Parte Letter, May 12, 2005, at 1-2 (JA -)). Petitioners have no basis for claiming (Br. 44) that the agency ignored this issue.

More generally, petitioners contend that the Commission's approach to VoIP E911 implementation was inconsistent with its earlier decision to refrain from imposing any federal E911 obligations on MLTS. Br. 42-43. With respect to MLTS, however, the FCC declined to adopt federal E911 rules because it determined that the states were better able to devise E911 requirements that accounted for "the unique needs and circumstances of various residential and

business MLTS." *E911 Scope Order*, 18 FCC Rcd at 25363 (¶ 54). The Commission reasonably reached a different conclusion regarding VoIP services.

In contrast to traditional MLTS, where the FCC deferred to the states, the Commission decided to preempt state entry regulation of VoIP. In November 2004, it preempted Minnesota from imposing 911 requirements on Vonage's VoIP service as a condition of market entry. *Preemption Order,* 19 FCC Rcd at 22430-31 (¶ 42). The Commission determined that Minnesota could not apply state entry regulations (including 911 requirements) to Vonage because Vonage's VoIP service cannot be separated into interstate and intrastate communications, and because subjecting Vonage's service to potentially conflicting state entry regulations would undermine the FCC's deregulatory policies in the interstate market. *Id.* at 22415-18 (¶¶ 20-22). The Commission also made clear that it would preempt "comparable" regulation of VoIP services in other states. *Id.* at 22424 (¶ 32). The Commission recognized that, unlike in the traditional MLTS context, it would have to take the lead in ensuring E911 implementation for VoIP services. That is why it characterized the *Order* in this proceeding as "a necessary and logical follow-up" to the *Preemption Order*. *Order* ¶ 3 (JA).

MSS. Petitioners try to draw a comparison between interconnected VoIP service and MSS, which is subject to less rigorous 911 requirements. Br. 44-46. But as the Commission has made clear, consumer expectations regarding these two services are vastly different. MSS, which uses mobile handsets to communicate via satellite, is not designed or marketed as a replacement for traditional telephone service. Due to technical limitations, "MSS handsets generally are not operational inside buildings or even on city streets surrounded by buildings"

because the "satellite signal is usually too weak to penetrate buildings."[17] Consequently, "MSS callers are likely to be located in remote areas where no PSAP may be available."[18]

On account of technical constraints and the higher cost of MSS relative to terrestrial commercial wireless services, general consumer demand for MSS has been limited. Predictably, in light of these factors, MSS providers receive very few 911 calls. In 2003, Globalstar reported receiving an average of 12 satellite 911 calls per month; and Mobile Satellite Ventures reported receiving just ten 911 calls during all of 2002. *E911 Scope Order,* 18 FCC Rcd at 25349 n.69.

In contrast to consumer expectations about IVPs' service, the paucity of 911 calls from MSS users demonstrates that consumers do not equate MSS with the sort of conventional telephone service that can connect them to the 911 system. Citing the "low volume of 911 calls that MSS carriers currently receive," the FCC in 2003 required MSS carriers that provide interconnected "real-time, two-way switched voice service" to "establish national call centers to which all subscriber 911 emergency calls are routed." *E911 Scope Order,* 18 FCC Rcd at 25349-50 (¶ 24). While the Commission eventually plans to require MSS carriers to comply with E911 requirements, it saw no reason to require "immediate compliance," *id.* at 25355 (¶ 37), because two MSS providers were "already operating" emergency call centers with "apparent success" in processing the small number of 911 calls made by MSS users. *Id.* at 25352 (¶ 31).

Recently, the FCC adopted rules allowing MSS providers to seek authority "to integrate ancillary terrestrial components (ATCs) into their MSS networks."[19] ATCs will allow MSS

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[17] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Band,* 16 FCC Rcd 15532, 15444 (¶ 24) (2001).

[18] *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems,* 17 FCC Rcd 25576, 25586 (¶ 25) (2002).

carriers to expand their coverage to "places where [they] have previously been unable to offer reliable service," including urban areas. *Globalstar LLC*, DA 06-121, ¶ 2 (International Bureau released January 20, 2006). Because this supplemental terrestrial service more closely resembles conventional telephone service than MSS does, the FCC has made clear that different 911 requirements will apply to the terrestrial component of an integrated ATC/MSS service. The terrestrial portion of the service must satisfy the same E911 requirements that apply to terrestrial wireless carriers, including automatic location identification and direct routing of this information to geographically appropriate PSAPs. *See id.* ¶ 41. This distinction between satellite and terrestrial services reinforces the point that MSS – unlike interconnected VoIP – is not sufficiently similar to traditional telephone service to warrant the imposition of E911 obligations.

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In sum, there is no respect in which the *Order* makes an unexplained departure from past FCC practice. Petitioners' claims to the contrary lack merit.

III. THE COMMISSION REASONABLY DECLINED TO IMPOSE NEW INTERCONNECTION OBLIGATIONS ON ILECS IN THIS PROCEEDING

Petitioners criticize the FCC for failing to impose new obligations on ILECs to provide IVPs with interconnections to the Wireline E911 Network. They assert that IVPs could not possibly make the necessary interconnection arrangements in time to meet the compliance deadline. Br. 29-31, 46-49. These claims are meritless. The record showed that the ILECs were

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[19] *Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands*, 18 FCC Rcd 1962, 1964 (¶ 1) (2003).

fully cooperating, that they already have substantial legal obligations in this area, and that IVPs have multiple options for interconnecting with the Wireline E911 Network.

The Commission determined that IVPs can obtain interconnection directly from an ILEC or "indirectly through a third party such as a [CLEC]." *Order* ¶ 38 (JA). With respect to direct interconnection, the Commission found that all the major ILECs were cooperating and working diligently to assist IVPs in developing E911 solutions. *Order* ¶ 39 (JA). For example, the record showed that both Qwest and BellSouth were already offering tariffed E911 solutions that gave IVPs essentially the same network access that wireless carriers receive. *Ibid.* (JA -). Moreover, BellSouth stated that its provision of E911 services to IVPs "could reasonably be implemented within 120 days," much less than the time that IVPs actually received to complete implementation – more than six months following the *Order*'s adoption. BellSouth Ex Parte Letter, May 16, 2005, at 1 (JA). Verizon had announced plans to introduce an E911 solution for IVPs in New York City in the summer of 2005 and to offer that solution in other locations soon thereafter. *Order* ¶ 39 (JA). And SBC had offered to negotiate agreements with IVPs for direct connection to selective routers and ALI databases. *Ibid.* (JA). In light of this record evidence, it was reasonable for the Commission to conclude that the ILECs would not impede timely VoIP E911 implementation.

Moreover, as the Commission noted and petitioners concede (Br. 46-47), ILECs already have substantial obligations to provide access to the necessary components of the Wireline E911 Network. The Commission currently requires ILECs "to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers," pursuant to 47 U.S.C. §§ 251(a), (c), and 271(c)(2)(B)(vii), making available "all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with" the *Order*'s

requirements, "including NENA's I2 or wireless E911-like solutions." *Order* ¶ 38 (JA -). At the very least, these statutory mandates ensure that CLECs, who clearly are "telecommunications carriers," are legally entitled to obtain access to the Wireless E911 Network. And the Commission found that CLECs were already providing E911 access to IVPs. *See ibid.* (JA).[20]

Petitioners assert that IVPs could not rely on CLECs or other third-party interconnection options because those alternatives supposedly would not be available in time. Br. 29-30. Developments in the wake of the *Order* have refuted that assertion. Since the *Order* was issued, two third-party providers have begun offering extensive E911 solutions to IVPs. Level 3 now offers an E911 solution for both fixed and nomadic VoIP users. By November 2005, that solution included connections to PSAPs reaching nearly 70 percent of U.S. households. *See* Level 3, A Head Start for Achieving E-911. And although petitioners doubted that Intrado could negotiate the interconnections needed for a VoIP E911 solution before the compliance deadline (Br. 29-30), the company did just that. Intrado announced on November 17, 2005 – more than 10 days before the deadline – that it had reached interconnection agreements with all of the major ILECs. *See* Intrado Press Release, November 17, 2005. The speedy deployment of substantial E911 solutions by Level 3 and Intrado verified the reasonableness of the FCC's prediction that IVPs would be able to obtain the interconnections they needed to achieve timely compliance with the *Order*'s requirements.

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[20] The Commission has not yet determined whether IVPs generally are "telecommunications carriers" for purposes of the Communications Act. *See Preemption Order*, 19 FCC Rcd at 22411 (¶ 14). If the agency ultimately determines that either particular IVPs or IVPs generally are "telecommunications carriers," those IVPs will have the same legal rights as CLECs do.

Taking into account the evidence of ILECs' cooperation, their existing legal obligations, and the availability of third-party alternatives, the agency reasonably anticipated that all parties would continue "to work together to develop and deploy VoIP E911 solutions" in a timely manner. *Order* ¶ 40 (JA). This sort of prediction "regarding the actions of regulated entities" is "precisely the type of policy [judgment] that courts routinely and quite correctly leave to administrative agencies." *Public Citizen, Inc. v. NHTSA*, 374 F.3d 1251, 1260-61 (D.C. Cir. 2004) (internal quotations omitted). Moreover, the Commission made clear that, going forward, it "will closely monitor" the cooperation of ILECs, CLECs, and IVPs; and it promised that it "will not hesitate to take further action should that be necessary." *Order* ¶ 40 (JA).

While petitioners claim that there have been difficulties with particular ILECs in particular places, these are precisely the kinds of specific factual allegations appropriate for a waiver petition or complaint. Petitioners have not come close to demonstrating that the general framework adopted by the Commission is unreasonable.

IV. THE COMMISSION SATISFIED THE APA'S NOTICE AND COMMENT REQUIREMENTS

Finally, there is no merit to petitioners' claim (Br. 49-54) that the FCC failed to comply with the APA's notice and comment requirements in this proceeding. The *NPRM* that initiated this proceeding plainly foreshadowed the rules that the agency adopted in the *Order*. In the *NPRM*, the Commission expressly requested comment on whether it should "extend 911 and E911 requirements to [IP-enabled] services, and if so, by what means and to what extent." *NPRM* ¶ 56 (JA). More specifically, the *NPRM* asked "whether it may be appropriate to impose a requirement that some or all IP-enabled voice services provide 911 functionality to consumers." *NPRM* ¶ 57 (JA). The Commission also sought comment on "the time frame"

for addressing "911 and E911 regulatory issues in the IP context." *Ibid.* It even suggested that it might consider expediting the deployment of VoIP E911 "to avoid a scenario" in which a more gradual transition to E911 "would require costly and inefficient 'retrofitting' of embedded IP infrastructure." *Ibid.* Consequently, petitioners have no basis for claiming (Br. 50) that the FCC "did not solicit comment" on "the timeline for implementation."

Likewise, petitioners are mistaken when they assert (Br. 50-52) that notice was inadequate here because the *NPRM* did not propose specific rules. To pass muster 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). Thus, while a notice "must be sufficient to fairly apprise interested parties of the issues involved," it "need not specify every precise proposal" that the agency "may ultimately adopt as a rule." *Action for Children's Television v. FCC*, 564 F.2d 458, 470 (D.C. Cir. 1977) (internal quotations omitted). A notice that does not propose any particular rules complies with the APA "if it affords interested parties a reasonable opportunity to participate in the rulemaking process, and if the parties have not been deprived of the opportunity to present relevant information by lack of notice" of a key issue. *WJG Telephone Co. v. FCC*, 675 F.2d 386, 389 (D.C. Cir. 1982) (citations and internal quotations omitted).

The Commission met that standard here. Indeed, as petitioners themselves point out (Br. 25-35, 46-49), numerous parties submitted comments on the timing of E911 implementation and the interconnections that IVPs would need to deploy E911. These comments leave no doubt that the *NPRM* gave "interested parties a reasonable opportunity … to present relevant information" concerning the core issues in this case. *WJG Telephone*, 675 F.2d at 389 (internal quotations omitted). The APA requires nothing more.

Petitioners assert that they would have supplemented the record with additional information if they had known that the FCC planned to adopt an "affirmative acknowledgement" rule. Br. 52-54. That rule requires IVPs to "[o]btain and keep a record of affirmative acknowledgement by every subscriber, both new and existing, of having received and understood" an advisory informing subscribers if E911 service may be limited or unavailable. 47 C.F.R. § 9.5(e)(2). Petitioners do not appear to challenge that rule.[21] Rather, they seem to argue that alleged notice problems involving the affirmative acknowledgement rule justify the vacatur of *all* the rules that were adopted in the *Order*. *See* Br. 54. That contention has no basis in law or logic. *See Davis County Solid Waste Management v. EPA*, 108 F.3d 1454 (D.C. Cir. 1997) (if a legally objectionable portion of an agency's regulatory program is severable from the program's other rules, there is no reason to vacate the program in its entirety).

In any event, the affirmative acknowledgement rule does not run afoul of the APA's notice requirements because that rule is "a logical outgrowth of the initial notice." *Crawford v. FCC*, 417 F.3d 1289, 1295 (D.C. Cir. 2005) (internal quotations omitted). In seeking comment on appropriate regulation for VoIP, the Commission noted the significance of consumer expectations: "Some IP-enabled services resemble traditional wireline telephony, while others do to a lesser degree. These functional differences likely shape end users' expectations regarding the service…. [C]onsumers might consider a telephone replacement IP-enabled service to be very much like traditional telephony." *NPRM* ¶ 37 (JA). The Commission also

[21] Petitioners state that the affirmative acknowledgement rule was "impossible to comply with" because it required "a 100% response rate." Br. 52-53. Yet they acknowledge that the FCC's Enforcement Bureau subsequently clarified that no enforcement action would be taken for failure to achieve such a response rate if IVPs took some additional steps. Br. 6 n.8, 54. Elsewhere, petitioners claim (Br. 22) that they have complied with the Commission's customer notification requirements.

recognized that the efforts of government regulators and telecommunications carriers had "resulted in the nearly ubiquitous deployment of 911 service." *NPRM* ¶ 51 (JA); *see also id.* ¶¶ 56-57 (JA -). Therefore, it should have come as no surprise that the Commission enacted rules to ensure that consumers – who have reasonably come to expect "nearly ubiquitous" 911 service – understand that "a telephone replacement IP-enabled service" may in fact not be as much "like traditional telephony" as they expect. *See NPRM* ¶ 36 (JA -) ("services that might be viewed as replacements for traditional voice telephony … raise social policy concerns relating to emergency services"). The *Order*'s notification requirements – including the affirmative acknowledgement rule – thus flowed logically from the issues identified in the *NPRM*.

CONCLUSION

For the foregoing reasons, the Court should deny the petitions for review.

Respectfully submitted,

PETER D. KEISLER
ASSISTANT ATTORNEY GENERAL

SAMUEL L. FEDER
GENERAL COUNSEL

DOUGLAS N. LETTER
APPELLATE LITIGATION COUNSEL

JACOB M. LEWIS
ASSOCIATE GENERAL COUNSEL

SCOTT R. MCINTOSH
SPECIAL COUNSEL

DANIEL M. ARMSTRONG
ASSOCIATE GENERAL COUNSEL

UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JAMES M. CARR
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

February 22, 2006

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

NUVIO CORPORATION, *et al.*,	)	
	)	
PETITIONERS,	)	
	)	
V.	)	
	)	NO. 05-1248
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,	)	
	)	
	)	
RESPONDENTS.	)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 13942 words.

JAMES M. CARR
COUNSEL
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

February 22, 2006