

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

Nuvio Corporation, <i>et al.</i> ,)	
Petitioners,)	
)	
v.)	No. 05-1248 (and
)	consolidated cases)
Federal Communications Commission)	
and United States of America,)	
Respondents.)	

**OPPOSITION OF RESPONDENTS
TO EMERGENCY MOTION FOR PARTIAL STAY**

On May 19, 2005, the Federal Communications Commission adopted rules requiring providers of interconnected Voice over Internet Protocol (“VoIP”) services to provide “911” service to their customers by November 28, 2005. The Commission concluded that the new rules were needed to ensure that users of interconnected VoIP services – which are marketed as a replacement for traditional telephone service – would have prompt and reliable access to emergency assistance in times of urgent need. Notwithstanding the critical public safety concerns addressed by these rules, petitioners have moved for a partial stay of some of the rules pending judicial review.

Petitioners have failed to show that a stay is warranted. As shown below, the order on review is fully consistent with the FCC’s actions in related areas, and the timetable for implementing E911 capabilities is amply justified by the profound public interest in safety that underlies the 911 system. At the same time, petitioners substantially overstate the near-term impact of the agency’s order on their business operations. As the FCC’s Enforcement Bureau has announced in a recent public notice, VoIP providers that fail to comply with the challenged rules by November 28 will *not* be required to discontinue service to existing customers. Because

the Commission’s order is likely to be sustained, and because the impact of the order on petitioners is far less drastic than they suggest, the Court should deny the stay motion.¹

BACKGROUND

A. The Order On Review

One of the FCC’s most important missions under the Communications Act is “promoting safety of life and property through the use of wire and radio communication.” 47 U.S.C. § 151. In an effort to fulfill that mandate, the Commission has taken steps to foster the development of the “911” system, which enables telephone users to gain immediate access to emergency services such as law enforcement and medical assistance. In the order on review, the FCC adopted rules requiring providers of interconnected VoIP service – a type of voice communications service enabled by Internet Protocol (“IP”) – to supply enhanced 911 (“E911”) capabilities to their customers. *IP-Enabled Services*, 20 FCC Rcd 10245 (2005) (“*Order*”).

“Basic 911 service is a forwarding arrangement in which calls dialed to 911 are transmitted ... to a single geographically appropriate PSAP or public safety agency.” *Order* ¶ 12. “E911 systems route 911 calls through the use of a Selective Router to a geographically appropriate PSAP [public safety answering point] based on the caller’s location.” *Order* ¶ 13. E911 provides the recipient of a 911 call with the caller’s call back number (a feature known as Automatic Numbering Information or “ANI”) and, in many cases, location information (a

¹ Petitioners have styled their stay request an “emergency” motion, and they have requested a ruling before November 15, 2005. Any “emergency” in this case is largely of petitioners’ own making. Since at least June 3, 2005, when the Commission released the text of its order and its new rules, petitioners have known that the challenged rules would require them to take action to implement enhanced 911 service by November 28, 2005. Indeed, in early August 2005, one petitioner, Nuvio, moved unsuccessfully for expedited consideration of this case. Petitioners have offered no explanation why they waited until November 1, 2005, to seek a stay.

capability called Automatic Location Identification or “ALI”). *Ibid.* Both wireline and wireless carriers already provide E911 services in many localities. *Ibid.*

Recently, some companies have begun offering VoIP services, which enable customers to engage in voice communications using IP, in some cases over the Internet. This case concerns “interconnected” VoIP services, which allow users both to receive calls from and transmit calls to the public switched telephone network. *Order* ¶ 24. Such services behave in many respects like traditional telephone service. *Order* ¶ 23. Not only do such services allow a user to place and receive calls like traditional telephone service, but they are also marketed as a replacement for traditional telephone service and, in some cases, can be used with “conventional analog telephones” by attaching the telephones to an adapter. *Order* ¶ 23 & n.77.

Although interconnected VoIP services function in many respects like traditional telephone services, *Order* ¶ 23, the Commission found evidence that subscribers to interconnected VoIP services were not receiving reliable E911 service. The Commission found that lack of E911 service ran counter to the reasonable expectations of consumers: “[W]e believe that a service that enables a customer to do everything (or nearly everything) the customer could do using an analog telephone, and more, can at least reasonably be expected and required to route 911 calls to the appropriate destination.” *Ibid.*

More importantly, the Commission found that the failure of interconnected VoIP services to provide adequate 911 service had already led to tragic and devastating consequences. *See Order* at n.2. For instance, a Texas couple was shot multiple times while their daughter unsuccessfully tried to reach 911 on their VoIP service during a home invasion burglary. In a separate incident, a Connecticut woman whose infant son had suffered a grand mal seizure could not reach an emergency dispatcher when she dialed 911 using her interconnected VoIP service.

And a Florida woman who dialed 911 using her interconnected VoIP service was unable to contact emergency personnel when her infant son had stopped breathing. Emergency personnel ultimately arrived in response to a call from a neighbor's phone, but the baby could not be revived.²

The Commission was concerned that the number of tragedies like these would greatly increase as consumers used interconnected VoIP services in increasingly larger numbers. The Commission cited evidence in the record that, "while the number of residential 911 calls placed over VoIP services (VoIP 911 calls) will account for less than two percent of all residential 911 calls for the period 2004-2006, the number of residential VoIP calls will rise from 370,000 in 2004 to 3.5 million in 2006." *Order* ¶ 10. 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, the FCC adopted "an immediate E911 requirement that applies to all interconnected VoIP services." *Order* ¶ 2. Among other things, the Commission required all interconnected VoIP service providers ("IVPs"), within 120 days of the *Order*'s effective date, 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, or appropriate local emergency authority that serves the caller's Registered Location and that has

² These three VoIP users testified about their experiences at the Commission's agenda meeting on May 19, 2005. An audio/video recording of that meeting is available on the Commission's website at www.fcc.gov/realaudio/mt051905.ram.

been designated for telecommunications carriers under section 64.3001 of the Commission's rules." *Order* ¶ 37.³

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. 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. To address this problem, the Commission adopted a more limited E911 requirement that relies on subscribers to interconnected VoIP service to provide accurate location information to their IVPs, but does not require the information to be automatically provided without consumer input, as the FCC required of wireline and wireless providers. *Order* ¶ 46. At the same time, the Commission commenced a rulemaking proceeding to consider, *inter alia*, the feasibility of requiring equipment used in the provision of interconnected VoIP service to employ more advanced E911 solutions. *Order* ¶¶ 2, 56-63.

In adopting its E911 rules for interconnected VoIP service, the Commission balanced "the needs of the public safety community to get call back and location information ... against existing technological limitations" of IVPs. *Order* ¶ 36. The Commission recognized that 120 days was "an aggressively short amount of time in which to comply with these requirements," but concluded that "the threat to public safety if we delay further is too great and demands near

³ The *Order* became effective 30 days after its publication on June 29, 2005, in the Federal Register. *Order* ¶ 73; 70 Fed. Reg. 37273 (June 29, 2005). The 120-day period for compliance began to run on July 29, 2005, and ends on November 28, 2005.

immediate action.” *Order* ¶ 37. Moreover, while the Commission acknowledged that “certain VoIP services pose significant E911 implementation challenges,” *Order* ¶ 25, it also 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. In addition, 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.

Under the terms of the *Order*, IVPs must implement the new E911 requirements by November 28, 2005. In addition, on or before that date, all IVPs must submit letters to the FCC detailing their compliance with the E911 rules. *Order* ¶ 50.

Four IVPs petitioned for review of the *Order*. On November 1, 2005, they filed a motion for partial stay pending review. Petitioners ask the Court to stay sections 9.5(b) and (c) of the FCC’s rules. Section 9.5(b) provides that, as of November 28, 2005, IVPs must transmit all 911 calls, as well as ANI and the caller’s Registered Location for each call, to the appropriate PSAP or other designated emergency answering point. Section 9.5(c) exempts IVPs from providing ANI or location information for 911 calls that are routed to a designated answering point that is not capable of receiving and processing either ANI or location information. This exemption, however, does not affect IVPs’ obligation under section 9.5(b) to transmit all 911 calls to the appropriate answering point as of November 28, 2005. *See Order*, Appendix B.

B. The Enforcement Bureau’s Public Notice

On November 7, 2005, the FCC’s Enforcement Bureau issued a public notice describing the specific information that IVPs must include in their E911 compliance letters to the

Commission.⁴ In the public notice, the Enforcement Bureau expressly endorsed the “innovative” compliance plans that AT&T, MCI, and Verizon had outlined in earlier submissions to the Commission. Public Notice at 4-5. The Bureau “strongly encourage[d] other providers to adopt similar measures” to those proposed by AT&T, MCI, and Verizon. *Id.* at 5.

The compliance plans of those three companies 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, AT&T has developed a movement detection process that it calls the “Heartbeat Solution.” To implement this 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.⁵ The Enforcement Bureau noted that mechanisms of this sort will ensure that each customer of interconnected VoIP service

⁴ 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). A copy of the public notice is attached.

⁵ 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.

“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 (emphasis added). At the same time, the Bureau declared: “[W]e do expect that [IVPs] will 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.*

ARGUMENT

Before they can obtain a stay, petitioners must show that: (1) they will likely prevail on the merits; (2) they will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) a stay will serve the public interest. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Cir. Rule 18(a)(1). To succeed in invoking “the court’s extraordinary injunctive powers,” a party must, at the very least, demonstrate “either a high probability of

success and some injury, or *vice versa*.” *Cuomo v. NRC*, 772 F.2d 972, 974 (D.C. Cir. 1985).

Petitioners have failed to justify their stay request under this stringent standard.

I. PETITIONERS ARE NOT LIKELY TO PREVAIL ON THE MERITS

Petitioners challenge the *Order* on two grounds. First, they argue that the *Order* makes an “unexplained departure” from the FCC’s past policy for implementing E911 obligations. Motion at 7-11. Second, they maintain that the agency established an unreasonable timetable for implementing E911 requirements for interconnected VoIP. *Id.* at 11-14. Neither claim is likely to prevail.

A. The *Order* Is Not An “Unexplained Departure” From Past Policy.

There is no merit to petitioners’ contention that the *Order* diverged without explanation from past FCC policy concerning 911 implementation. Petitioners base that claim primarily on the FCC’s treatment of wireless – commercial mobile radio service (“CMRS”) – providers. They note that, in contrast to the 120-day implementation timetable adopted in the *Order*, “the FCC has afforded CMRS providers over a decade to implement 911 and E911.” Motion at 9.

As the Commission explained, however, the implementation of 911 for wireless providers fully supports the Commission’s actions here. For one thing, CMRS providers have been required to provide access to basic 911 service since 1997, whereas IVPs even now are not providing basic 911. Moreover, “network components” that have already “been developed to make wireless E911 possible can also be used for VoIP E911,” and, as a result, “the implementation process” for interconnected VoIP should be “simpler and far less expensive than the initial upgrades necessary for wireless E911.” *Order* ¶ 53. Equally importantly, because wireless 911 has now been available in most areas for some time – and traditional wireline 911 has been available for even longer – consumers now reasonably expect to have 911 capability on

a service marketed as a replacement for traditional telephone service: “[R]ecent incidents make clear that consumers in many cases may not understand that the reasonable expectations they have developed with respect to the availability of 911/E911 service via wireless and traditional wireline telephones may not be met when they utilize interconnected VoIP services.” *Order* ¶ 48.

In addition, IVPs are subject to much less onerous E911 requirements than are CMRS providers. Wireless providers have faced “significant obstacles” in implementing E911 because FCC rules require them to provide PSAPs with “accurate ALI [*i.e.*, Automatic Location Identification]” regarding their customers – even though the location of those customers may be constantly changing due to the mobile nature of wireless service. *Order* ¶ 17. The rules at issue here do not impose any comparable burden on IVPs. Unlike CMRS providers, IVPs need not provide location information automatically to comply with FCC rules. Instead, the *Order* merely requires that IVPs “obtain location information” directly “from their customers.” *Order* ¶ 46. That requirement is significantly less burdensome than the requirement for CMRS, especially now that AT&T and others have developed automatic detection mechanisms to facilitate the collection of location information from nomadic VoIP users. *See* Public Notice at 4.

Another factor significantly contributed to the Commission’s adoption of an expedited implementation schedule for VoIP E911. As mentioned above, record evidence showed that consumers are beginning to adopt interconnected VoIP services in increasingly larger numbers. *Order* ¶ 10. Indeed, the Commission cited evidence of an expected ten-fold increase in VoIP 911 calls between 2004 and 2006. *Ibid.* In light of the increasing volume of VoIP 911 calls and the Commission’s findings that several tragedies had already been caused by lack of reliable

VoIP 911 service, *Order* at n.2, the Commission reasonably perceived a pressing need for rapid implementation of E911 service by IVPs.

Petitioners assert that the *Order* deviated from the “phased implementation” framework that the Commission adopted for CMRS. Motion at 11. To the contrary, the Commission has also taken a “phased implementation” approach in this proceeding. In the *Order*, the agency adopted an “immediate” modified short-term E911 requirement that did not mandate the use of ALI; but 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,” which is more comparable to the CMRS requirement cited by petitioners. *Order* ¶ 2. Indeed, at the same time that it released the *Order*, the Commission issued a notice of proposed rulemaking seeking comment on the next phase of E911 implementation for interconnected VoIP. *See Order* ¶¶ 56-63.

Petitioners also complain that the imposition of E911 requirements on IVPs serving Multi-Line Telephone Systems (“MLTS”) is inconsistent with the FCC’s treatment of other MLTS providers, who are not now required by FCC rules to route E911 calls. Motion at 10-11. Understandably, the Commission did not address this alleged inconsistency because, to the best of our knowledge, no party presented this issue to the agency before the *Order* was released. Consequently, petitioners are barred from raising the claim here. *See* 47 U.S.C. § 405; *AT&T Wireless Services, Inc. v. FCC*, 365 F.3d 1095, 1101-03 (D.C. Cir. 2004).⁶

⁶ In comments filed on September 15, 2005, in response to a petition for reconsideration of the *Order*, Time Warner Telecom has squarely presented to the Commission the same MLTS issue that petitioners attempt to raise here. After the Commission addresses that issue, any aggrieved parties will have an opportunity to seek judicial review of the agency’s resolution of the issue.

In any event, this Court has long recognized that “agencies need not address problems ‘in one fell swoop.’” *United States Cellular Corp. v. FCC*, 254 F.3d 78, 86 (D.C. Cir. 2001) (quoting *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190, 1207 (D.C. Cir. 1984)). That principle of administrative law makes particular sense here, as the Commission has found that state and local governments are in the best position to devise E911 requirements for MLTS providers in the first instance. *See Revision of the Commission’s Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25361-67 (¶¶ 49-63) (2003). In contrast, due to the difficulty in separating the interstate from the intrastate components of IP communications, the Commission has preempted such state and local regulation for VoIP service. *See Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004) (preempting Minnesota’s regulation of a VoIP service, including Minnesota’s E911 requirements), *petitions for review pending, Minnesota Public Utilities Commission v. FCC*, 8th Cir. No. 05-1069 (and consolidated cases); *see also Order* ¶ 3. The FCC thus acted well within its discretion when it adopted E911 requirements for IVPs without also adopting similar requirements for MLTS providers.

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,”⁷ and that overly prescriptive E911 requirements “would be inconsistent with the Commission’s policy to promote the advancement of new technologies.”⁸ Motion at 8-9. Contrary to petitioners’ suggestion, the rules at issue here are not inconsistent with those

⁷ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 9 FCC Rcd 6170, 6174 (¶ 21) (1994) (“1994 E911 Order”).

⁸ *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 18 FCC Rcd 25340, 25367 (¶ 62) (2003).

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 in this case adhere to that policy: They do not require the adoption of any particular technological solution for implementing E911. *See Order, Statement of Chairman Martin at 1* (“By not dictating the technical means by which providers must come into compliance, we do not impose undue regulation on these services.”). 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 competitive LEC [local exchange carrier], 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; *see also id.* ¶ 39 (describing the development of a variety of E911 solutions by incumbent LECs).

Petitioners cryptically assert that the Commission has previously weighed “the impact of proposed [E911] rules on the ‘commercial success’ of new services.” Motion at 8 (quoting *1994 E911 Order*, 9 FCC Rcd at 6176 (¶ 34)). If petitioners mean to suggest that the agency has assessed whether the burden of E911 requirements would jeopardize the success of new services, the order that they cite does not say what they imply. In that order, the Commission made the very different observation that a new service’s prospects for “commercial success ... would be affected by whether [the new service] is capable of providing enhanced 911 services.” *1994 E911 Order*, 9 FCC Rcd at 6176 (¶ 34). As the Commission rightly recognized, consumers demand communications services that provide prompt and reliable access to emergency assistance. In light of that demand, the FCC’s efforts in this proceeding to hasten the implementation of E911 are reasonably designed to promote not just public safety, but also the long-term commercial viability of interconnected VoIP.

In any event, the FCC reasonably concluded that the urgent need to promote public safety outweighed commercial considerations in this case: “[W]hile a provider of VoIP service enjoys the opportunity to introduce new and exciting public interest benefits to the communications marketplace, and to profit from those offerings, that opportunity brings with it the responsibility to ensure that public safety is protected.” *Order* ¶ 56. The FCC thus reasonably adopted an aggressive timetable for implementation of VoIP E911 in an effort to prevent future tragedies. *See Order* ¶ 37 (“the threat to public safety if we delay further is too great and demands near immediate action”). The Commission’s policy judgments concerning matters of public safety are entitled to substantial deference. *See Association of Public-Safety Communications Officials-International, Inc. v. FCC*, 76 F.3d 395 (D.C. Cir. 1996).

Petitioners have no basis for claiming (Motion at 11) that the FCC ignored the important policy of encouraging new technologies when it adopted the challenged rules. Far from ignoring that policy, the Commission cited the promotion of new services as a principal reason for adopting the rules. It concluded that the rules, by mandating swift E911 implementation for interconnected VoIP, would “speed the further creation and adoption of [E911] services,” just as “the Commission’s adoption of E911 service obligations in the wireless context helped foster the widespread availability of E911 services for mobile wireless users.” *Order* ¶ 25.

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

B. The FCC Adopted A Reasonable Schedule For E911 Implementation.

In setting an implementation deadline in this proceeding, the FCC acknowledged that nomadic VoIP services “pose significant E911 implementation challenges.” *Order* ¶ 25.

Balancing these concerns against other considerations, the Commission reasonably predicted that

providers of nomadic VoIP services could overcome their implementation challenges and come into compliance with the new E911 requirements within 120 days after the *Order* took effect – *i.e.*, more than six months after the Commission adopted the *Order*.

The Commission based its predictive judgment on several factors. First, it found that the “network components” that had already “been developed to make wireless E911 possible can also be used for VoIP E911,” thereby making the implementation process for interconnected VoIP “simpler and far less expensive than the initial upgrades for wireless E911.” *Order* ¶ 53. In addition, the record showed that a number of LECs were already offering interconnection services that would enable many IVPs to satisfy the E911 implementation requirements. *Order* ¶¶ 38-39. Finally, the Commission reasoned that its establishment of a firm implementation deadline would “speed the further creation and adoption of [E911] services” for VoIP. *Order* ¶ 25. Past experience had shown that the agency’s adoption of E911 requirements could serve as a powerful catalyst for technological innovation. For example, “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.” *Ibid.*

This Court has long recognized that “an agency’s predictive judgment regarding a matter within its sphere of expertise is entitled to particularly deferential review.” *Fresno Mobile Radio, Inc. v. FCC*, 165 F.3d 965, 971 (D.C. Cir. 1999) (internal quotations omitted). Applying that highly deferential standard, the Court should uphold the FCC’s reasonable predictive judgment concerning the feasibility of its implementation schedule for VoIP E911.

Petitioners contend that evidence in the record showed that IVPs could not implement the new E911 requirements within the timeframe prescribed by the agency. Motion at 11.

Ultimately, however, no record evidence could provide a definitive answer to the inherently indeterminate question of how much time would be needed to implement new FCC rules. To answer that question, the FCC necessarily had to make a prediction as to when IVPs could feasibly complete implementation of the new E911 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)). Nonetheless, the Commission’s reasonable predictive judgment in this case is based in large part on record evidence. Among other things, the agency found evidence that LECs were already offering E911 solutions for interconnected VoIP. *Order* ¶¶ 38-39. The record also indicated that equipment that had been developed to implement wireless E911 could also be used to implement VoIP E911. *Order* ¶ 53. These considerations supported the FCC’s judgment that its timetable for implementation was feasible.

Subsequent events have further substantiated the reasonableness of the agency’s judgment. Just as the Commission predicted, its adoption of an aggressively short implementation schedule has sparked the development of innovative E911 solutions. AT&T, MCI, and Verizon have recently designed automatic detection mechanisms that should facilitate implementation of the FCC’s E911 requirements by all IVPs. *See* Public Notice at 4. Moreover, on the basis of a recent industry survey, a group of leading IVPs “now estimates that the vast majority” of subscribers to interconnected VoIP will have access to E911 by the FCC’s November 28 deadline. VON Coalition, VoIP Leaders Announce Significant Progress on E9-1-1 (released Nov. 7, 2005).

Finally, petitioners contend that the Commission “offered no specific justification” for selecting its implementation deadline. Motion at 14. In setting a specific 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). This Court is “generally unwilling to review line-drawing performed by the Commission unless a petitioner can demonstrate that lines drawn ... are patently unreasonable, having no relationship to the underlying regulatory problem.” *National Ass’n of State Utility Consumer Advocates v. FCC*, 372 F.3d 454, 461 (D.C. Cir. 2004) (internal quotations omitted). In this case, the brevity of the compliance period was justified by the urgency of the underlying problem. The Commission explained that it adopted an “aggressively short” implementation schedule to address “the threat to public safety” that would only grow greater with further delay. *Order* ¶ 37.

II. PETITIONERS HAVE NOT SHOWN IRREPARABLE HARM

“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.” *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting *Sampson v. Murray*, 415 U.S. 61, 88 (1974)). To obtain a stay, petitioners must establish that the irreparable injury they would suffer without a stay would be “both certain and great,” “actual and not theoretical.” *Ibid.* In other words, they must provide “proof indicating that the harm [they allege] *is certain to occur.*” *Ibid.* (emphasis added). Petitioners have not met this heavy evidentiary burden.

Petitioners base their claim of irreparable harm primarily on the assertion that they will have to cut off service to many of their existing customers if they do not obtain a stay. Motion at 14-17. That is incorrect. As the Enforcement Bureau’s recent public notice made clear, the FCC will “not require providers that have not achieved full E911 compliance by November 28, 2005,

to discontinue the provision of interconnected VoIP service to any existing customers.” Public Notice at 5. Thus, a stay is not needed to avert widespread service disruptions.

Apart from their claims related to service interruptions, petitioners offer little else to support their assertion of irreparable harm. They speculate that they may lose future business as long as they are unable to offer full E911 service to potential new customers. Motion at 15-17. Such “unsubstantiated and speculative allegations” cannot suffice to establish the sort of “certain and great” injury that would warrant a stay. *Wisconsin Gas*, 758 F.2d at 674.

Petitioners also contend that timely enforcement of the FCC’s E911 rules will irreparably harm their “goodwill and market reputation.” Motion at 16. This argument rests principally on the false premise that petitioners will be required to disconnect many of their customers.

Finally, while pressing their claim that a stay is necessary to spare them from irreparable injury, petitioners wholly ignore the irreparable injury that would be caused by granting a stay. As the Commission noted, several tragedies have already occurred because of inadequate E911 service provided by IVPs. The Commission found that such instances were only likely to increase in the absence of prompt corrective measures. Therefore, as discussed below, a stay would clearly not serve the public interest.

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

Congress has entrusted the FCC with the essential task of “promoting safety of life and property through the use of wire and radio.” 47 U.S.C. § 151. The availability of 911 service plays a central role in achieving that paramount objective. The service “is critical to our nation’s ability to respond to a host of crises.” *Order* ¶ 4. Recognizing the vital public interest in reliable 911 service, the Commission in this case adopted rules that are reasonably designed to hasten the

development of E911 service for interconnected VoIP. Prompt implementation of those rules will serve the compelling governmental interest in promoting public safety.

A stay of the rules would disrupt the critically important process of expanding the deployment of E911 to new communications services. Any such delay could potentially – and unjustifiably – compromise public safety. This is not an idle concern. In recent years, major emergencies – such as the September 11 terrorist attacks and Hurricane Katrina – have provided powerful reminders of the crucial need for reliable and widely available emergency communications services. More specifically, the Commission in this proceeding learned of a number of incidents in which users of interconnected VoIP service could not gain access to urgently needed emergency assistance. *Order* at n.2. This is an intolerable situation, and the Commission acted expeditiously to address it. A stay would delay the implementation of E911 requirements that are urgently needed to avert future tragedies. In the meantime, lives could needlessly be lost.

Petitioners argue that the risk to their customers is minimal because petitioners’ “extensive notification efforts ... have ensured that all customers are now aware of any potential limitations on their 911 access.” Motion at 18. But petitioners admit that they have not received notification acknowledgments from all of their customers. *Ibid.* In any event, the Commission found that previous notification efforts had not adequately informed customers of the 911 limitations of interconnected VoIP. *Order* ¶ 48. More importantly, the Commission made a considered judgment that – even with better notification – it is not appropriate to allow consumers to “opt-out of E911 service.” *Order* ¶ 47. “The prospect that an individual might opt out of 911 service on his or her primary home communications system ... raises serious public policy issues,” *Order* at n.151, and is “fundamentally inconsistent with ... comprehensive end-

to-end emergency communications infrastructure and programs.” *Order* ¶ 47 (internal quotations omitted). Petitioners’ argument is equivalent to asserting that no great harm would result from selling cars without seat belts so long as roughly 90 percent of car buyers acknowledge the limitations of the arrangement. The Court should reject that argument.

Petitioners also contend that a stay would best promote public safety by preventing the “compelled disconnection” of existing VoIP customers. Motion at 19-20. As we have already explained, however, the FCC will not require IVPs to discontinue service to any existing customers who are not receiving full E911 service by November 28. *See* Public Notice at 5.

In a different context, this Court has observed that “delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.” *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984). The same reasoning applies here. Petitioners bear an especially heavy burden in seeking to delay the implementation of regulations that are essential to promoting public safety. They have given the Court no good reason to stay FCC rules that have the potential to save lives.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for partial stay.

Respectfully submitted,

Douglas Letter
Appellate Litigation Counsel

Samuel L. Feder
Acting General Counsel

Scott R. McIntosh
Special Counsel
Civil Division
United States Department of Justice
Washington, D.C. 20530

Jacob M. Lewis
Associate General Counsel

John E. Ingle
Deputy Associate General Counsel

James M. Carr
Counsel

Federal Communications Commission
Washington, D.C. 20554
(202) 418-1740

November 8, 2005