Before the
OFFICE OF MANAGEMENT AND BUDGET
Washington, D.C. 20503

In the matter of	)	
	)	
Information Collection Regarding Emergency	)	
Backup Power for Communications Assets as	)	**73 F.R. 52354**
Set Forth in the Commission's Rules	)	
(47 CFR §12.2)	)	
	)	

COMMENTS OF SPRINT NEXTEL

Sprint Nextel Corporation ("Sprint Nextel"), pursuant to the *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission* published in the Federal Register on September 9, 2008, 73 F.R. 52354, hereby respectfully submits these comments on the issue of whether the Federal Communications Commission's ("FCC" or "Commission") decision mandating the filing of new and onerous reports meets the requirements of the Paperwork Reduction Act of 1995, Public Law 104-13 ("PRA").[1] The reports were prescribed as part of a regulatory scheme under which Commercial Mobile Radio Service

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[1] The reporting requirements were adopted by the Commission in its *Reconsideration Order* in *Recommendations of the Independent Panel Reviewing the Impact of Hurricane Katrina on Communications Networks,* (EB Docket No. 06-119 and WC Docket No. 06-63), 22 FCC Rcd 18013 (2007) ("*Katrina Proceeding*") Both the *Reconsideration Order* and the initial *Katrina Order* in this proceeding (22 FCC Rcd 10541 (2007)) are being challenged before the United States Court of Appeals for the District of Columbia Circuit by CTIA-The Wireless Association ("CTIA"), Sprint Nextel and USA Mobility, Inc. *See CTIA- The Wireless Association, et al. v. Federal Communications Commission and The United States of America,* No. 07-1475 *et al.* ("*CTIA v. FCC*") On February 28, 2008, the Court issued an *Order* (per curiam) granting Sprint Nextel's Motion to Stay the effective date of the FCC's rules imposing these onerous reporting requirements pending "resolution of Sprint Nextel's petition for review." *CTIA v. FCC*, slip op. at 2 (February 28, 2008). On July 8, 2008, the Court issued a decision in which it stated it would hold the appeals in abeyance because the Office of Management and Budget (OMB) had yet to consider whether the new rules met the requirements of the PRA and thus the case was not ripe for decision. *CTIA v. FCC*, slip op at 4 (July 8, 2008).

("CMRS") providers "must have an emergency backup power source … for at all of their assets necessary to maintain communications that are normally powered from local commercial power."[2] Such assets include (1) the facilities located inside central offices or mobile switching centers for which CMRS providers are required to maintain at the minimum 24 hours of emergency backup power; and (2) "cell sites, remote switches and digital loop carrier system remote terminals for which CMRS providers are required to maintain at the minimum 8 hours of backup power."[3]

Sprint Nextel, among others, filed comments in response to the FCC's Initial PRA Statement published in the November 15, 2007 Federal Register "seeking comments on the burden of complying with the information collections included in the backup power rule."[4] Sprint Nextel explained that the FCC's estimate of the burden its reporting requirements would place on CMRS providers was unexplained, unrealistic and totally without merit.[5] In response to the comments filed by Sprint Nextel and others, the FCC has now modified its estimate of the burden. But the FCC's new burden estimate is just as inexplicable and unrealistic as its initial estimate. Thus, as set forth below, the OMB should reject the FCC's proposed reporting requirements.

I. BACKGROUND

In the wake of the Katrina disaster, the Commission convened a panel of experts "to review the impact of Hurricane Katrina on communications infrastructure in the areas affected by the hurricane and to make recommendations…regarding ways to improve disaster

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2 47 C.F.R. §12.2(a).
3 *Id.*
4 Supporting Statement at 4.
5 Sprint Nextel PRA Comments at 2.

preparedness, network reliability and communications among first responders … ."[6] With respect to backup power, this body of experts based its recommendation on the best practices governing backup power as promulgated by the Network Reliability and Interoperability Council (NRIC). Thus, citing NRIC VII Recommendation 7-7-5204, the Katrina Panel recommended that:

> Service providers, network operators and property managers should ensure availability of emergency/backup power (*e.g.*, batteries, generators, fuel cells) to maintain critical communications services during times of commercial power failures, including natural and manmade occurrences (*e.g.*, earthquakes, floods, fires, power brown/blackouts, terrorism). The emergency/backup power generators should be located onsite, when appropriate.

In its *Notice of Proposed Rulemaking* ("*NPRM*") on the Katrina Panel Report, 21 FCC Rcd 7320, 7322 (2006), the Commission simply requested comments on the Panel's backup power recommendation. The Commission did not ask for or give any indication that it was considering the adoption of a standard specifying the minimum number of hours of backup power that a CMRS provider should have at its cell sites and other facilities. Nor did the Commission give notice of a proposal to apply such standard regardless of whether such sites and facilities were necessary to maintain critical communications services during emergencies. Moreover, no party addressing the backup power issue in their pleadings in response to the *NPRM* even so much as suggested that the Commission consider a "one-size-fits-all" backup power standard.

Despite this lack of notice and record evidence, the Commission in its *Katrina Order* found, *inter alia,* that CMRS providers should maintain emergency backup power at all of their cell sites and other dispersed facilities that are powered commercially for a minimum of eight

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[6] *Katrina Order* 22 FCC Rcd at 10542 ¶4

hours. The Commission also found that CMRS providers should have 24 hours of backup power at their mobile switching centers.[7] The difficulty with these findings is that the Commission did not explain why it rejected the flexibility embodied in the NRIC best practices; why it concluded that every cell site needed to have eight hours of backup power; or, for that matter, how it arrived at its conclusion that eight hours is necessary and appropriate. Of equal importance, the Commission did not cite a specific statutory provision which gave it the authority to impose a backup power rule.

The Commission's new rule immediately was met with protest from CMRS providers and other communications carriers. Several parties, including CTIA, filed petitions seeking reconsideration of the Commission's legally unjustified and ill-informed decision to prescribe an inflexible backup power rule. Individual CMRS providers either filed their own petitions or, like Sprint Nextel, filed comments in support of previously filed reconsideration petitions.

The Commission found that the petitioners raised several "meritorious issues." *Reconsideration Order* at18013 ¶1. However, on reconsideration, the Commission did not rescind its prescription; instead it merely attempted to write into its *Reconsideration Order* support for its previous decision despite the utter lack of evidence in the record. The Commission found that CMRS providers would now have to comply with the eight-hour backup power rule unless they could provide detailed and convincing evidence that such compliance is not possible (1) because of a "risk to safety of life or health"; (2) because of "private legal obligation or agreement"; or (3) because of "Federal, state, tribal or local law." *Reconsideration Order* at 18024 ¶25. CMRS providers are required to make such demonstration in a new report listing their assets that already comply with the backup power mandate, that perhaps qualify for

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[7] Under the new rule, both incumbent and competitive local exchange carriers would likewise have to maintain 24 hours of backup power at their central offices.

one of the above exemptions, and, that do not meet the mandate nor fall within one of the exempted categories. *Reconsideration Order* at 18024-25 ¶26.

Each CMRS provider is required to submit this initial report within six months of the rule's effective date. Six months later, *i.e.,* one year from the rule's effective date, each CMRS provider is required to bring all non-compliant and non-exempt assets into compliance with the new rule or to file with the Commission a "certified emergency backup power compliance plan" detailing how it "intends to provide [eight hours of] emergency backup power to 100 percent of the area covered by any non-compliant asset." *Reconsideration Order* at 18025 ¶27.

For purposes of the PRA, the Commission originally found that it would take only 70.32 hours on average for a CMRS provider to prepare each of the required reports. 72 F.R. 64221. However, as Sprint Nextel and others pointed out in their previous comments on whether the FCC met its burden under the PRA, this finding was unsupported and unsupportable. Indeed, the FCC never explained how it arrived at the 70.32 hour estimate. In its submission to the OMB the FCC now says that on average a CMRS provider will need only 96 hours to prepare the initial six month report and that on average a CMRS provider will need to spend 192 hours to prepare the compliance plan.[8] Moreover, the FCC tells the OMB that each carrier will need to spend $312,000 to comply with the reporting requirements.[9] But, like its initial estimate of the burden, these revised figures are without basis. Thus, the OMB should not approve the information collection requirements prescribed by the Commission.

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[8] Supporting Statement at 6.

[9] Supporting Statement at 8. The FCC expects that 73 CMRS providers will file a six month report and that only 20 CMRS providers will file the twelve month report. Based on the FCC's own methodology, the $312,000 figure appears to be the total cost that all reporting carriers would incur to comply. The cost to a carrier filing only the six month report would, under the FCC's methodology, be only $3,355 ($312,000/93) The cost to a carrier filing both reports would be $6,710 ($312,000/93x2).

II. THE COMMISSION'S ESTIMATES OF TIME BURDEN AND COSTS ARE UNREALISTIC.

A. The Six-Month Report

As stated, a CMRS provider must, within six months of the *Reconsideration Order's* effective date, submit to the Commission what amounts to an inventory of all its assets subject to the backup power rule. The Commission, however, is not interested in a simple list that identifies the type of facility, *e.g.,* mobile switching center, cell tower, a distributed antenna system node and other non-traditional sites, each asset's location, and the amount of backup power that has been deployed at each of those types of facilities.[10] On the contrary, the CMRS provider's report must identify which of its assets meet the backup power rule; which of its assets do not; and which of its assets might be exempt because complying with the rule would (1) present a safety and health risk, (2) violate private legal obligations or (3) be at odds with Federal, state, tribal or local law. A typical large CMRS provider has thousands, if not tens of thousands, of these sites, making the production of the information that the Commission is requiring highly time-consuming and costly.

Furthermore, the Commission's proposed reports require the production of even more complex and burdensome information. The Commission has decreed that a provider's six-month report include "a description of the facts supporting the basis of the … CMRS provider's claim of preclusion from compliance."[11] For example, a CMRS provider claiming an exemption "due to a legal constraint must include the citation(s) to the relevant laws and, in order to be deemed precluded from compliance, the law or other legal constraint must prohibit the LEC or CMRS

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[10] This information should have been compiled by the Commission in the rulemaking proceeding itself so that it could learn the extent to which CMRS providers have deployed emergency backup power at their facilities and whether the amount of such deployed backup power is sufficient to ensure continued CMRS service in the event of outages.

[11] *Katrina Reconsideration Order* at 18025 ¶26.

provider from complying with the backup power requirement."[12] A CMRS provider claiming that it "cannot comply with the backup power mandate with respect to a particular asset due to a private legal obligation or agreement must include the relevant terms of the obligation or agreement and the dates on which the relevant terms of the agreement became effective and are scheduled to expire." [13] Additionally, a CMRS provider claiming that it cannot comply with the backup power mandate with respect to a particular asset due to risk to safety of life or health must include a description of the particular public safety risk and sufficient facts to demonstrate substantial risk of harm."[14]

Given that within twelve months of the rule's effective date, a CMRS provider must either bring all non-compliant assets into compliance or submit a report detailing how it will do so, the CMRS provider cannot ignore the exemption categories and simply classify all of its assets that do not already meet the Commission's backup power rule as non-compliant. This is so because the CMRS provider does not know if it would be able to install a larger generator or more batteries at a site in order to comply with the Commission backup power rule without raising safety and health concerns, without violating the terms of the lease agreement that the provider entered into with the owner of the land or building where a facility is located, and without ensuring that such installation would not run afoul of a law, regulation or ordinance enacted by a city, county, state, tribe or the Federal government.

Thus, in order to compile the information demanded by the Commission in the six-month report, Sprint Nextel, for one, would have to visit and inspect tens of thousands of its sites – sites that were never designed to house the kind of equipment necessary to meet the Commission's

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12 *Id.*

13 *Id.*

14 *Id.* All exclusions will be audited by the Commission's Public Safety and Homeland Security Bureau to ensure that they "are reasonable and accurate." *Id.*

new backup power rule – to determine whether the site can physically accommodate additional backup equipment and, if not, what modifications to the site would be needed, *e.g.*, expanding the building housing the backup batteries or fortifying a rooftop to accommodate the weight of a permanent generator together with enough fuel to power the site for eight hours. Sprint Nextel would have to review tens of thousands of contracts and leases to determine whether it has a right to install additional equipment or whether modifications to contracts/leases will have to be negotiated to permit such installation. Also Sprint Nextel would have to review all applicable Federal, state, local and tribal regulations and ordinances, including all applicable environmental laws, to determine whether the installation of larger capacity generators filled with diesel fuel and additional batteries would be permitted. If permitted, Sprint Nextel would then have to determine what additional legal or regulatory steps, if any, would have to be taken, *e.g.*, preparing an environmental assessment, before installation could proceed.

Sprint Nextel will have to assemble an inter-disciplinary team including site development personnel, structural engineers (from both within and outside the company), contract specialists and lawyers (both in-house and especially outside counsel in each state who specialize in real estate, zoning and environmental law) in order to gather the necessary information for Sprint Nextel's six-month report. Moreover, given the fact that thousands of sites will need to be surveyed, Sprint Nextel's team will have to work virtually non-stop before the first report is due, and even then will most likely fail to complete the work within the required six-month time period.[15] These thousands of man-hours, moreover, are critical man-hours that could be spent actually enhancing Sprint Nextel's network to improve coverage and capacity, as well as

[15] The number of sites that would have to be surveyed in order to prepare the six-month report necessarily means that a great many of Sprint Nextel's site development experts and engineers that would have to be assigned to this effort.

hardening the network to withstand the very type of disasters the Commission seeks to address in this proceeding.

The FCC would have the OMB ignore these facts because, according to the FCC, they "conflict with the representations" made by Sprint Nextel and others made during the underlying rulemaking proceeding.[16] However, the FCC does not bother to quote any language from the parties' rulemaking comments that "conflict" with the statements made by these parties in their PRA comments. And in the case of Sprint Nextel it could not. There in no language in the pages in Sprint Nextel's comments cited by the FCC (pages 6-9) that could reasonably be interpreted as demonstrating that Sprint Nextel has ready access to "much, if not all, of the information necessary for the backup power information collection."[17] To the contrary, in the pages cited, Sprint Nextel explains the steps it has taken and continues to take to enable it to continue providing services or rapidly restore services in the wake of disasters.

Nonetheless the FCC insists that "[m]uch of the information that [it] seek[s] is of the type that the carriers will routinely have as part of their customary preparation for disruptions to commercial power supply and/or as a result of compliance with the backup power requirement that does not involve an information collection."[18] Such statement suggests a misguided view as to the type of information necessary for carriers to develop business continuity plans. Sprint Nextel, for example, does not have a database of the zoning or environmental laws in each jurisdiction where is has deployed facilities that it can "readily access" to determine if it would be able to augment the backup power already installed at such facilities without running afoul of such laws. Sprint Nextel would have to retain local counsel in each jurisdiction to provide such

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16 Supporting Statement at 5.

17 *Id.*

18 *Id.* at 7.

information. Similarly, Sprint Nextel does not have a database of information from which it could determine that a rooftop where it has installed a cell site would be able to support the weight of the additional emergency power sources that would have to be installed to enable Sprint Nextel to meet the new backup power rule. Thus it would have to dispatch its own structural engineers or retain the services of outside engineering consultants to determine if such rooftops needed to be reinforced. And Sprint Nextel does not have information readily available that would enable it to determine if there was enough space at its sites for additional backup power sources to be installed. Such determinations could only be made after a physical inspection of the site.

In its initial PRA statement the FCC, without any explanation whatsoever, found that CMRS providers would need only 70.32 hours to gather the necessary data and prepare the report. Sprint Nextel and others challenged the FCC's time estimate as totally unrealistic. In Sprint Nextel's case such time estimate meant that the FCC expected that Sprint Nextel would be able to review, analyze and report on an individual tower or cell site in less than 5 seconds.

In the PRA statement at issue here, the FCC has increased the time it would take a CMRS provider to prepare the six-month report by an additional 19 hours to 96 hours. But again such estimate is totally unrealistic. The FCC's revised estimate means that the FCC now believes that Sprint Nextel would be able to review, analyze and report on an individual tower or cell site in about 15 seconds. It is absurd to think that Sprint Nextel can gather the site-specific information necessary to prepare the six-month report. It suggests that the Commission "plucked [the report preparation time] out of thin air." *Time Warner Entm't Co. v. FCC*, 240 F.3rd 1126, 1137 (D.C. Cir. 2001). For this reason alone, the OMB cannot approve the six-month reporting requirement.

B. The Twelve-Month Report

As stated, CMRS providers are required to deploy the necessary equipment at each of their non-compliant, non-exempt sites to meet the new emergency backup power requirements by the one year anniversary of the rule's effective date or file "a certified emergency backup power compliance plan." *Reconsideration Order* at 18025 ¶27. In Sprint Nextel's case, it will be virtually impossible to bring its non-compliant sites into compliance by this date. This is so because Sprint Nextel will, at a minimum, likely have to acquire thousands of additional batteries, fuel cells and generators as well as strengthen the structures that house the batteries or support the generators (*e.g.*, rooftops) to ensure that there are no untoward effects caused by the additional weight or volume of the new equipment. If necessary, Sprint Nextel will also have to renegotiate lease agreements, secure zoning variances and obtain approval from the environmental and perhaps the historic preservation authorities in the jurisdiction where the sites are located.

Thus, Sprint Nextel will need to file a certified emergency backup power plan. While Sprint Nextel is at this time uncertain as to the elements of its compliance plan, it is clear that it will take Sprint Nextel more than the 192 hours the Commission says is needed to develop a compliance plan and report it to the Commission. The development of a compliance plan will require that Sprint Nextel obtain, synthesize and verify information from various teams throughout the organization including Network, Procurement, Corporate Security and Legal. For example, if one of the elements of Sprint Nextel's compliance plan is an increased reliance on portable generators, Sprint Nextel's compliance plan report would likely have to explain why such reliance is justified. Indeed, given the Commission's edict that CMRS providers must submit convincing evidence as to why a particular site may qualify for one of the exemptions,

Sprint Nextel doubts that a general statement that Sprint Nextel will use portable generators would be sufficient for the compliance plan. Again the OMB simply cannot accept the FCC's estimate here at face value and should not approve the twelve-month information collection requirement.

C. The FCC's Cost Estimates

The FCC estimates that in order to comply with the onerous reporting requirements at issue here, each carrier would need to spend $312,600.[19] Such estimate is, like the FCC's time estimates, without basis. In fact, as noted above, the explanation given by the FCC as to how it arrived at this cost figure suggests that the $312,600 cost figure is for the industry as a whole and not the cost for each responding carrier.

The FCC claims that the cost estimates submitted by the parties should be dismissed because, or so the FCC believes, such parties have ready access to the information they will be required to submit. Clearly, the FCC's belief here is unsupportable for the reasons discussed above. It is also unsupportable because the FCC had before it an affidavit from Sprint Nextel's then Vice President for Site Development and Field Operations in the Network Services division who explained in detail that Sprint Nextel would have to spend upwards of $100,000,000 just to gather the information necessary to submit the six-month report. The FCC does not explain why it has ignored such evidence.

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[19] Supporting Statement at 8.

III. CONCLUSION

In sum, Sprint Nextel respectfully urges the OMB not to approve the information collection requirements at issue here and instead send the rule back to the FCC with instructions to adopt a rule that would not impose onerous reporting burdens on CMRS providers in violation of the PRA.

Respectfully submitted,

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