

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

In the Matter of)
The Commercial Mobile Alert System) PS Docket No. 07-287

THIRD REPORT AND ORDER

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By the Commission:

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I. INTRODUCTION

1. This Commercial Mobile Alert System Third Report and Order (CMAS Third Report and Order) represents our next step in establishing a Commercial Mobile Alert System (CMAS), under which Commercial Mobile Service (CMS) providers¹ may elect to transmit emergency alerts to the public. We take this step pursuant to the mandate of Section 602(b) of the WARN Act,² which requires the Commission to adopt rules allowing any CMS provider to transmit emergency alerts to its subscribers; requires CMS providers that elect, in whole or in part, not to transmit emergency alerts to provide clear and conspicuous notice at the point of sale of any CMS devices that they will not transmit such alerts via that device; and requires CMS providers that elect not to transmit emergency alerts to notify their existing subscribers of their election.

2. In this CMAS Third Report and Order, we adopt rules implementing Section 602(b) of the WARN Act. Specifically, we:

- adopt notification requirements for CMS providers that elect not to participate, or to participate only in part, with respect to new and existing subscribers;
- adopt procedures by which CMS providers may elect to transmit emergency alerts and to withdraw such elections;
- adopt a rule governing the provision of alert opt-out capabilities for subscribers;
- allow participating CMS providers to recover costs associated with the development and maintenance of equipment supporting the transmission of emergency alerts; and
- adopt a compliance timeline under which participating CMS providers must begin CMAS deployment.

3. By adopting these rules, we take another significant step towards achieving one of our highest priorities – to ensure that all Americans have the capability to receive timely and accurate alerts, warnings and critical information regarding disasters and other emergencies irrespective of what communications technologies they use. As we have learned from recent disasters, including Hurricane Katrina in 2005 and the recent floods that have impacted our Midwestern and Southern states, it is essential to enable Americans to take appropriate action to protect their families and themselves from loss of life or serious injury. This CMAS Third Report and Order also is consistent with our obligation under Executive Order 13407³ to “adopt rules to ensure that communications systems have the capacity to transmit alerts and warnings to the public as part of the public alert and warning system,”⁴ and our mandate under the

¹ For purposes of Section 602 of the Warning, Alert and Response Network (“WARN”) Act, Congress specifically defined “commercial mobile service” as that found in section 332(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. § 332(d)(1) (the term “commercial mobile service” means any mobile service that is provided for profit and makes interconnected service available to the public or to such classes of eligible users as to be effectively available to a substantial portion of the public, as specified by regulation by the Commission). Warning, Alert and Response Network (“WARN”) Act, Title VI of the Security and Accountability For Every Port Act of 2006, Pub. L. No. 109-347, 120 Stat. 1884 (2006).

² WARN Act, § 602(b).

³ Public Alert and Warning System, Exec. Order No. 13407, 71 Fed. Reg. 36975 (June 26, 2006) (*Executive Order 13407*). In *Executive Order 13407*, the President stated that it was the “policy of the United States to have an effective, reliable, integrated, flexible and comprehensive system to alert and warn the American people in situations of war, terrorist attack, natural disaster, or other hazards to public safety and well-being . . .,” and established certain obligations in this regard for the Department of Homeland Security, the National Oceanic & Atmospheric Administration (NOAA) and the FCC.

⁴ *Executive Order 13407*, § 3(b)(iii).

Communications Act to promote the safety of life and property through the use of wire and radio communication.⁵

4. This CMAS Third Report and Order is the latest step in the Commission's ongoing effort to enhance the reliability, resiliency, and security of emergency alerts to the public by requiring that alerts be distributed over diverse communications platforms. In the 2005 EAS First Report and Order, we expanded the scope of the Emergency Alert System (EAS) from analog television and radio to include participation by digital television and radio broadcasters, digital cable television providers, Digital Audio Radio Service (DARS), and Direct Broadcast Satellite (DBS) systems.⁶ As we noted in the Further Notice of Proposed Rulemaking that accompanied the EAS First Report and Order, wireless services are becoming equal to television and radio as an avenue to reach the American public quickly and efficiently.⁷ As of June 5, 2008, the wireless industry reports that approximately 260 million Americans subscribed to wireless services.⁸ Wireless service has progressed beyond voice communications and now provides subscribers with access to a wide range of information critical to their personal and business affairs. In times of emergency, Americans increasingly rely on wireless telecommunications services and devices to receive and retrieve critical, time-sensitive information. A comprehensive wireless mobile alerting system would have the ability to alert people on the go in a short timeframe, even where they do not have access to broadcast radio or television or other sources of emergency information. Providing critical alert information via wireless devices will ultimately help the public avoid danger or respond more quickly in the face of crisis, and thereby save lives and property.

II. BACKGROUND

5. On October 13, 2006, the President signed the Security and Accountability For Every Port (SAFE Port) Act into law.¹ Title VI of the SAFE Port Act, the WARN Act, establishes a process for the creation of the CMAS whereby CMS providers may elect to transmit emergency alerts to their subscribers. The WARN Act requires that we undertake a series of actions to accomplish that goal, including requiring the Commission, by December 12, 2006 (within 60 days of enactment) to establish and convene an advisory committee to recommend technical requirements for the CMAS.² Accordingly, we formed the Commercial Mobile Service Alert Advisory Committee (CMSAAC), which had its first meeting on December 12, 2006.³ The WARN Act further required the CMSAAC to submit its recommendations to the Commission by October 12, 2007 (one year after enactment).⁴ The CMSAAC submitted its report on that date.

6. On December 14, 2007, we released a Notice of Proposed Rulemaking requesting comment on issues related to implementation of Section 602 of the WARN Act.⁵ The Commission has received over 60 comments and ex parte filings.⁶ On April 9, 2008, we released a First Report and Order,⁷ adopting technical standards, protocols, processes and other technical requirements "necessary to enable

⁵ See 47 U.S.C. § 151.

⁶ See Review of the Emergency Alert System, EB Docket No. 04-296, *First Report and Order and Further Notice of Proposed Rulemaking*, 20 FCC Rcd 18625 (2005) (EAS First Report and Order and Further Notice).

⁷ See *id.* at 18653 ¶ 69.

⁸ CTIA The Wireless Association, at <http://www.ctia.org/> (site last visited on June 5, 2008).

¹ See SAFE Port Act, *supra* note 1.

² WARN Act, § 603(a), (d).

³ See Notice of Appointment of Members to the Commercial Mobile Service Alert Advisory Committee, Agenda for December 12, 2006 Meeting, *Public Notice*, 21 FCC Rcd 14175 (PSHSB 2006).

⁴ WARN Act, § 603(c).

commercial mobile service alerting capability for commercial mobile service providers that voluntarily elect to transmit emergency alerts.”⁸ On July 8, 2008, we adopted a Second Report and Order establishing rules requiring noncommercial educational and public broadcast television station licensees and permittees to install necessary equipment and technologies on, or as part of, the broadcast television digital signal transmitter to enable the distribution of geographically targeted alerts by CMS providers that have elected to participate in the CMAS.⁹ This Third Report and Order implements further WARN Act requirements consistent with the Commission’s goal of establishing an effective and efficient CMAS.

III. DISCUSSION

A. Notification by CMS Providers Electing Not to Transmit Alerts

1. Notification at Point of Sale

7. *Background.* Section 602(b)(1) provides that “within 120 days after the date on which [the Commission] adopts relevant technical standards and other technical requirements pursuant to subsection (a), the Commission shall complete a proceeding to allow any licensee providing commercial mobile service ... to transmit emergency alerts to subscribers to, or users of, the commercial mobile service provided by such licensee.”¹ Pursuant to this section, the Commission must “require any licensee providing commercial mobile service that elects, in whole or in part, under paragraph (2) [Election] not to transmit emergency alerts to provide clear and conspicuous notice at the point of sale of any devices with which its commercial mobile service is included, that it will not transmit such alerts via the service it provides for the device.”²

8. In its October 12, 2007 report, the CMSAAC recommended that carriers retain the discretion to determine how to provide specific information regarding (1) whether or not they offer wireless emergency alerts, and (2) which devices are or are not capable of receiving wireless emergency alerts, as well as how to tailor additional notice, if necessary, for devices offered at other points of sale.³ Nevertheless, the CMSAAC recommended specific language to be used by carriers that elect, in part or in whole, not to transmit emergency alerts.⁴ With respect to carriers who intend to transmit emergency alerts “in part,” the CMSAAC-recommended language reads as follows:

Notice Regarding Transmission of Wireless Emergency Alerts (Commercial Mobile Alert Service)

[[WIRELESS PROVIDER]] has chosen to offer wireless emergency alerts within portions of its service area, as defined by the terms and conditions of its service agreement, on wireless emergency

⁵ The Commercial Mobile Alert System, PS Docket No. 07-287, *Notice of Proposed Rulemaking*, 22 FCC Rcd 21975 (2007) (*CMAS NPRM*).

⁶ A list of the parties commenting on the *CMAS NPRM* is attached at Appendix B.

⁷ The Commercial Mobile Alert System, PS Docket No. 07-287, *First Report and Order*, 23 FCC Rcd 6144 (2008) (“*CMAS First Report and Order*”).

⁸ WARN Act, § 602(a).

⁹ The Commercial Mobile Alert System, PS Docket No. 07-287, *Second Report and Order and Further Notice of Proposed Rulemaking*, FCC 08-164 (rel. July 8, 2008) (“*CMAS Second Report and Order*”).

¹ WARN Act, § 602(b)(1).

² *Id.* at § 602(b)(1)(B).

³ CMSAAC Recommendations, § 3.4.1.

⁴ *Id.* at § 3.4.2.

alert capable devices. There is no additional charge for these wireless emergency alerts.

Wireless emergency alerts may not be available on all devices or in the entire service area, or if a subscriber is outside of the [[WIRELESS PROVIDER'S]] service area. For details on the availability of this service and wireless emergency alert capable devices, please ask a sales representative, or go to [[INSERT WEBSITE URL]].

Notice required by FCC Rule XXXX (Commercial Mobile Alert Service).

The CMSAAC recommended the following language for carriers that “in whole” elect not to transmit emergency alerts:

NOTICE TO NEW AND EXISTING SUBSCRIBERS REGARDING TRANSMISSION OF WIRELESS EMERGENCY ALERTS (Commercial Mobile Alert Service)

[[WIRELESS PROVIDER]] presently does not transmit wireless emergency alerts.

Notice required by FCC Rule XXXX (Commercial Mobile Alert Service).

In the *CMAS NPRM*, we sought comment on the CMSAAC recommendation and whether it sufficiently addressed the requirements of the statute.⁵ We also sought comment on the CMSAAC's suggestion that, because the WARN Act does not impose a notice requirement on CMS providers who have elected to participate in full, the Commission should not adopt a notice requirement for those providers.⁶ We also sought comment on the definition of “any point of sale,” which we specified as any means – retail, telephone, or Internet-based – by which a service provider facilitates and promotes its services for sale to the public.⁷ We suggested that third party, separately branded resellers also would be subject to point of sale notification requirements.⁸

9. We also requested comment on what constitutes clear and conspicuous notice at the point of sale. For example, we asked whether a general notice in the form of a statement attesting to the election not to provide emergency alerts would satisfy the statutory requirement and whether the statutory language requires the posting of a general notice in clear view of subscribers in the service provider's stores, kiosks, third party reseller locations, web site (proprietary or third party), and any other venue through which the service provider's devices and services are marketed or sold.⁹ We also asked what form the general notice should take.¹⁰ In addition, we asked whether a service provider meets the condition of clear and conspicuous notification if the service provider requires subscribers to read and indicate their understanding that the service provider does not offer emergency alerts.¹¹

⁵ *CMAS NPRM*, 22 FCC Rcd at 21984 ¶¶ 28-29.

⁶ *Id.*

⁷ *Id.* at 21984 ¶ 27.

⁸ *Id.*

⁹ *Id.* at 21984 ¶ 28.

¹⁰ For example, we asked whether service providers should be required to include a placard of a particular size at the point of sale, whether notification in the service provider's service subscription terms and conditions would provide sufficient notice or whether each device sold by the service provider should include a notice that emergency alerts are not included as a feature of the device or the service provider's service. *CMAS NPRM*, 22 FCC Rcd at 21984 ¶ 28.

¹¹ *Id.*

10. *Comments.* Many commenters supported the CMSAAC’s recommendation that CMS providers be afforded discretion in determining how best to provide notice at the point of sale.¹² For example, SouthernLINC argues that “general guidance from the FCC regarding suggested format and procedures for providing notice to subscribers would be sufficient to meet the requirements of the WARN Act,” but that we should “refrain from adopting specific requirements for each carrier, regardless of the carrier’s size, business model, or customer preferences.”¹³ CTIA agrees, stating that “a single type of notice is not appropriate in all situations,” and that different points of sale and business circumstances lend themselves more readily to particular notice solutions.¹⁴ CTIA further argues that, rather than focusing on the mechanics of the notice, the Commission should encourage wireless providers to “furnish customers with the information they need to make an informed decision.”¹⁵ CTIA argues that a “combination of business incentive and statutory requirements” will ensure that customers are given adequate notice at the point of sale.¹⁶ This is particularly the case, argues CTIA, where a wireless carrier intends to deploy the CMAS on a market-by-market basis, in which case a standardized message “may lead to confusion and dissatisfaction” among customers.¹⁷ MetroPCS argues that any discretion given to carriers with respect to the provision of “clear and conspicuous” notice also should extend to how carriers provide notice through their “indirect distribution channels,” and that since indirect distribution is not owned or operated by the carriers, “carriers should not be held responsible for the indirect distribution retail outlet’s failure to follow a carrier’s directives, provided that the provider has put the distributor on notice and took reasonable steps to ensure prompt compliance.”¹⁸

11. Other commenters from the wireless industry also expressed support for the CMSAAC’s recommended text language.¹⁹ MetroPCS supports the adoption of a “safe harbor” under which carriers that use the model text developed by the CMSAAC are deemed to have provided adequate notice.²⁰ Wireless industry commenters also agreed with the CMSAAC that CMS providers electing to participate in the CMAS should not be required to disclose such participation to subscribers.²¹ AAPC, for example, argues that such a requirement is unnecessary because participating CMS providers will have every incentive to advertise and promote the fact of their participation.²²

12. Other commenters argue that the Commission should adopt specific notice requirements. California Public Utilities Commission (CPUC) recommends that CMS providers be required to provide notice to and receive confirmations from new customers acknowledging their understanding that the service provider does or does not offer emergency alerts.²³ CPUC also recommends that notices be in

¹² See, e.g., RCA Comments at 5; AAPC Comments at 9; SouthernLINC Comments at 11; AT&T Comments at 11; MetroPCS Comments at 6; Alltel Reply Comments at 5.

¹³ SouthernLINC Comments at 12.

¹⁴ CTIA Comments at 11-12.

¹⁵ *Id.* at 12.

¹⁶ *Id.* at 11.

¹⁷ *Id.* at 12-13.

¹⁸ See MetroPCS Comments at 7.

¹⁹ See RCA Comments at 5; AT&T Comments at 12.

²⁰ MetroPCS Comments at 7.

²¹ See, e.g., MetroPCS Comments at 7.

²² AAPC Comments at 9.

²³ CPUC Comments at 22.

large print and placed prominently on placards or their equivalent and that each device sold by service providers should include a notice that emergency alerts are or are not included as a feature of the device or the service provider's service.²⁴ Wireless Rehabilitation Engineering Research Center argues that such procedures should also include audio and video procedures (*e.g.*, provision of CMAS information in large print, Braille and audio formats) so that persons with disabilities will be fully informed about the CMAS.²⁵ It also recommends that CMS providers be required to instruct subscribers that technical limitations might prevent alert message reception even in areas with signal coverage and that such no-alert areas should be detailed in coverage maps.²⁶

13. *Discussion.* As an initial matter, we find that the statute does not require CMS providers to provide notice in the event they elect to transmit alerts to all subscribers. For those carriers that have elected in whole or in part not to transmit emergency alerts, we find that the statute requires that they "provide clear and conspicuous notice at point-of sale" of their non-election or partial election to provide emergency alerts. Additionally, we find that the statute provides specific and limiting guidance. Therefore, we agree with commenters that a one-size-fits-all approach to notification may not adequately address the range of methods by which service providers communicate with their customers.²⁷ Nevertheless, the CMSAAC has crafted plain language notifications that we believe are consistent with the intent of the statute and which convey concisely a service provider's non-election or partial election at the point of sale. We find that this language will convey sufficient information and serve as the minimum standard for clear and conspicuous notice under the WARN Act. Our decision allows, but does not require, CMS providers to provide their customers with additional information relating to CMAS. Specifically, CMS providers electing to transmit alerts "in part" shall use the following notification, at a minimum:

Notice Regarding Transmission of Wireless Emergency Alerts (Commercial Mobile Alert Service)

[[CMS PROVIDER]] has chosen to offer wireless emergency alerts within portions of its service area, as defined by the terms and conditions of its service agreement, on wireless emergency alert capable devices. There is no additional charge for these wireless emergency alerts.

Wireless emergency alerts may not be available on all devices or in the entire service area, or if a subscriber is outside of the [[CMS PROVIDER'S]] service area. For details on the availability of this service and wireless emergency alert capable devices, please ask a sales representative, or go to [[CMS PROVIDER'S URL]].

Notice required by FCC Rule 47 C.F.R. § 10.240 (Commercial Mobile Alert Service).

CMS providers electing in whole not to transmit alerts shall use the following notification language, at a minimum:

NOTICE TO NEW AND EXISTING SUBSCRIBERS REGARDING TRANSMISSION OF WIRELESS EMERGENCY ALERTS (Commercial Mobile Alert Service)

[[CMS PROVIDER]] presently does not transmit wireless emergency alerts.

²⁴ *Id.* at 23.

²⁵ Wireless RERC Comments at 13.

²⁶ *Id.* at 13-14.

²⁷ *See, e.g.*, SouthernLINC Comments at 12; CTIA Comments at 11-12; MetroPCS Comments at 7.

Notice required by FCC Rule 47 C.F.R. § 10.240 (Commercial Mobile Alert Service).

14. We define the point of sale as the physical and/or virtual environment in which a potential subscriber judges the products and services of the service provider and the point at which the potential subscriber enters into a service agreement with the service provider. Thus, we adopt the CMSAAC recommended language as a minimum standard of necessary information for use by all service providers and their agents in point-of-sale venues, which shall include stores, kiosks, third party reseller locations, web sites (proprietary and third party), and any other venue through which the service provider's devices and services are marketed or sold. Section 601(b)(1)(2) specifically places the responsibility of notification on the CMS provider. Therefore, CMS providers are responsible for ensuring that clear and conspicuous notice is provided to customers at the point-of-sale, regardless of whether third party agents serve as the distribution channel.

15. We expect service providers selling through an indirect distribution channel may meet their statutory requirements through appropriate agency contract terms with their distribution partners or by other reasonable means. However, the statute assigns responsibility for conveying clear and conspicuous notice to CMS providers and, consistent with this statutory language, we decline to shift this burden onto a non-Commission licensed party. Therefore, CMS providers are solely responsible for ensuring that clear and conspicuous notice is provided to customers at the point-of-sale.

16. We decline at this time to adopt specific requirements, such as those put forth by CPUC (*e.g.*, certain sized posters, type-size, brochures) for displaying the notification, preferring instead to allow carriers to create and position notifications that are consistent with the marketing and service notification methodologies in use at any given time by the service provider. Similarly, with respect to Wireless RERC's concerns that procedures be mandated that include audio and video notifications so that persons with disabilities will be fully informed about a service provider's election in part or in whole not to transmit emergency alerts, we believe that service providers will make use of existing facilities and procedures to convey the necessary notification. The statute requires clear and conspicuous notification, which we interpret to include the provision of notification that takes into account the needs of persons with disabilities. Thus, clear and conspicuous notification for persons with disabilities would include enhanced visual, tactile or auditory assistance in conveying the required notification. However, we agree with commenters and the CMSAAC that wireless service providers are in the best position to determine the proper method of providing this notice and leave it to the discretion of providers to provide clear and conspicuous notice at the point-of-sale.²⁸ In addition, our decision allows, but does not require, additional information regarding the technical limitations of CMAS alerts, as requested by Wireless RERC (*i.e.*, that technical limitations might prevent alert message reception even in areas with signal coverage).

17. We disagree with the concerns raised by some commenters that, without a written acknowledgement from a subscriber, notification requirements under the WARN Act are not met.²⁹ The statute requires the CMS provider to provide clear and conspicuous notice, but does not require the Commission to mandate an affirmative response from customers. Service agreements usually define the carrier's and subscriber's rights and responsibilities and describe any limitations of the service or products offered. We expect that many CMS providers will provide clear and conspicuous notice in their service agreements. To the extent they do so, subscribers in effect acknowledge such notice by signing the agreement. However, we do not require that this notification be placed into a service agreement, nor do we require that CMS providers otherwise obtain subscriber acknowledgements. We find that by implementing the statutory requirement of clear and conspicuous notice at the point of sale, adopting an acknowledgment requirement would be unnecessary.

²⁸ See SouthernLINC Comments at 12; CTIA Comments at 11-12; MetroPCS Comments at 7.

²⁹ See, *e.g.*, CPUC Comments at 9

2. Notifications to Existing Subscribers

18. *Background.* Section 602(b)(1)(C) states that the Commission shall “require any licensee providing commercial mobile service that elects under paragraph (2) not to transmit emergency alerts to notify its existing subscribers of its election.”³⁰ In the *CMAS NPRM*, we asked whether CMS providers should be granted the discretion to determine how to provide notice of non-election, including the methods and duration of a service provider’s notification to existing subscribers of an election. We also asked about the use of existing marketing and billing practices for purposes of notification, and whether service providers should be required to notify existing subscribers by sending them a separate notice of a change in their terms and conditions of their service.³¹ In addition, we asked how service providers should notify pre-paid customers. We also asked whether service providers should be required to demonstrate to the Commission that they have met this requirement and, if so, how. Finally, we asked whether service providers should be required to maintain a record of subscribers who have acknowledged receipt of the service provider’s notification.³²

19. *Comments.* Wireless service providers generally argue that the Commission should provide CMS providers with flexibility regarding notice to existing subscribers, and oppose any requirement that CMS providers maintain records of subscriber acknowledgements of the notification.³³ RCA argues, for example, that a requirement to maintain records of subscriber acknowledgement exceeds the authority granted to the Commission by the WARN Act, which only requires the provision of notice.³⁴ SouthernLINC opposes “the imposition of any burdensome notice or record keeping requirements on regional and small, rural carriers.”³⁵ Further, SouthernLINC argues that it would be “unrealistic to expect every customer to affirmatively respond to notices and that it would be counterproductive for carriers to expend tremendous resources in tracking down customers that choose not to respond.”³⁶ MetroPCS argues that the need for flexibility is particularly necessary in the case of pre-paid carriers, who offer flat-rate service and who may not send written bills to their customers or keep current addresses of their customers on-file.³⁷ According to MetroPCS, it corresponds with its customers mainly through short message service (SMS) messages delivered to the handsets of its subscribers.³⁸

20. Wireless RERC argues that CMS providers should be required to “fully inform” subscribers about the alert capabilities of the service provider’s network and wireless devices, including pre-paid devices.³⁹ Further, it argues that labeling on wireless devices or packages of wireless devices should be available in alternative formats, such as large print to aid those with visual impairments, and the

³⁰ WARN Act, § 602(b)(1)(C).

³¹ *CMAS NPRM*, 22 FCC Rcd at 21984-85 ¶ 30. In this regard, we asked commenters to take into account that some service providers are offering their subscribers electronic billing and do not send a paper bill, and some service providers have opt-out programs allowing their subscribers to decline receiving any direct mailings from the service provider. *Id.*

³² *Id.*

³³ See, e.g., RCA Comments at 5-6; AAPC Comments at 9; SouthernLINC Comments at 13; AT&T Comments at 12; CTIA Comments at 12; MetroPCS Comments at 7.

³⁴ RCA Comments at 5-6.

³⁵ SouthernLINC Comments at 13.

³⁶ *Id.*

³⁷ MetroPCS Comments at 8.

³⁸ *Id.*

³⁹ Wireless RERC Comments at 14.

Commission should establish “CMAS standards of performance consistent with the Americans with Disabilities Act and other federal regulations regarding providing services to people with disabilities.”⁴⁰ CPUC urges the Commission to require, at a minimum, notification requirements similar to that required for VoIP providers for E911 service, recommending that any notice requirement be flexible so as to allow for the use of direct mailings, paper bills, emails and website notices.⁴¹ It argues that CMS providers should also be required to verify that acknowledgment was received from incumbent customers at a time and date designated by the Commission but prior to CMAS implementation, including requiring customers “to indicate their understanding that the service provider does not offer emergency alerts and should be required to sign a document (or otherwise demonstrate, such as through electronic acceptance) indicating that they have read and understood the notice [and] [t]his notice should in no case be combined with other direct mailings containing marketing materials.”⁴² In those cases where subscribers declined to receive direct mailings from service providers, CPUC suggests that carriers be required to demonstrate that they have taken reasonable steps to inform subscribers of the decision not to transmit alert messages.⁴³

21. CTIA disagrees with the CPUC’s notification recommendations (modeled after the Commission’s VoIP 9-1-1 notification requirements) arguing that, “such rules cannot serve as a guideline because they were created in response to a specific issue that is inapplicable to CMAS.”⁴⁴ CTIA argues that those notice requirements “were tailored to the notion that customers may have faulty assumptions about the availability of 911 services on their IP-enabled phones,” whereas that concern is not present for CMAS because clear and conspicuous notice will be given to customers at the point of sale.⁴⁵

22. *Discussion.* We again base our analysis on the explicit language of section 602(b)(1)(C), which requires any licensee providing commercial mobile service that elects not to transmit emergency alerts “to notify its existing subscribers of its election.” As an initial matter, we find that section 602(b)(1)(C) is not limited to CMS providers that elect not to provide emergency alerts in whole. Rather, we interpret section 602(b)(1)(C) in concert with section 602(b)(1)(B) to also require CMS providers that elect not to transmit emergency alerts in part to notify existing subscribers of their election. Thus, we require CMS providers to notify existing subscribers of their election, in whole or in part, not to transmit emergency alerts. Likewise, we require that this notice be “clear and conspicuous.” Additionally, as in the case of notice at point-of-sale, clear and conspicuous notification for persons with disabilities would include enhanced visual, tactile or auditory assistance in conveying the required notification.

23. Turning next to how CMS providers are to make such notifications, we find that the way CMS providers typically convey changes in terms and conditions to their subscribers to be sufficiently analogous. Thus, while an election not to transmit alerts, in whole or in part, is not necessarily a change in an existing term or condition, we require service providers to notify existing subscribers of their election by means of an announcement amending the existing subscriber’s terms and conditions of service agreement. We agree with commenters who suggest that service providers should be given discretion in determining how to provide such notice to existing subscribers.⁴⁶ Service providers regularly use various

⁴⁰ *Id.*

⁴¹ CPUC Comments at 24.

⁴² *Id.*

⁴³ *Id.* at 26.

⁴⁴ CTIA Reply Comments at 10.

⁴⁵ *Id.* at 10-11.

⁴⁶ *See, e.g.,* RCA Comments at 5-6; AAPC Comments at 9; SouthernLINC Comments at 13; AT&T Comments at 12; CTIA Comments at 12; MetroPCS Comments at 7.

means to announce changes in service to subscribers, including, for instance, direct mailing, bill inserts, and other billing-related notifications. In order to ensure that subscribers receive the necessary notification, we require service providers to use, at a minimum, the notification language recommended by the CMSAAC that we have adopted for use in point of sale notification.

24. At this time, we will not require service providers to obtain a written or verbal acknowledgement from existing subscribers. We conclude that Section 602(b)(1)(C) does not require an affirmative response from subscribers. Rather, it requires only that a provider notifies customers of its election not to participate. We agree with SouthernLINC that it would be unrealistic and unwarranted to require an affirmative response from every subscriber.⁴⁷ While we recognize that some service providers allow their subscribers to opt out of receiving any information from the service provider, this usually applies to additional marketing or advertising communications and not to communications relating to changes in the terms and conditions of service. Finally, we recognize that service providers with pre-paid subscribers generally do not send a monthly billing statement to them and in some cases limit any customer notification to SMS messages. Further, service providers may not maintain customer information that can be used to communicate a change to the terms and conditions of service. Accordingly, in order to ensure that pre-paid customers are notified of the carrier's election, we require carriers to communicate the election through any reasonable means at their disposal, including, but not limited to, mailings, text messaging, and SMS messaging.

3. Timing of Notification

25. *Background.* Under section 602(b)(2)(A), "within 30 days after the Commission issues its order under paragraph (1), each licensee providing commercial mobile service shall file an election with the Commission with respect to whether or not it intends to transmit emergency alerts."⁴⁸ As discussed above, carriers electing not to transmit, in part or in whole, are required to notify prospective and existing subscribers of their election, but the statute does not state that this notification shall be concomitant with the carrier's election on its intent to transmit emergency alerts. The record is silent on the timing of notification. Significantly, on May 30, 2008, the Department of Homeland Security's Federal Emergency Management Agency (FEMA) announced that it will perform the CMAS Alert Aggregator/Gateway role.⁴⁹ FEMA noted, however, that the Alert Aggregator/Gateway system has not yet been designed or engineered,⁵⁰ and did not indicate when it would make the Government Interface Design specifications available to the other CMAS participants. Further, the CMSAAC estimated that development, testing and deployment would require 18-24 months from standardization of the alerting protocol. Thus, a period of time will pass between the election filings and the commercial availability of CMAS.

26. *Discussion.* Accordingly, we find that it would not be in the public interest to require the commencement of customer notification upon the filing of elections with the Commission and well in advance of the commercial availability of CMAS. A principal goal of the customer notification requirement is to ensure that, upon the commercial availability of CMAS and the expected marketing of this service and supporting handsets by carriers that have elected to provide alerts, prospective and existing subscribers of carriers electing not to transmit alerts are fully informed of the limitations of that carrier's alerting capabilities and better able to make an informed decision about which carriers can provide critical public safety notifications. We believe the relevance of this decision may be lost if

⁴⁷ See SouthernLINC Comments at 13.

⁴⁸ WARN Act, § 602(b)(2)(A).

⁴⁹ Federal Emergency Management Agency, *FEMA to Assume Aggregator/Gateway Role for Nationwide Cell Phone Alert System* (press release), May 30, 2008.

⁵⁰ *Id.*

notification is delivered to prospective and existing subscribers too far in advance of CMAS' commercial availability. Further, by not tying the customer notification requirements to the 30-day election requirement, we provide time for CMS providers that may initially elect not to provide alerting capability to alter such decisions, particularly when the future availability and details of the CMAS Alert Aggregator/Gateway are made known. Because commercial availability of alerts is dependent upon the activation of the Alert Aggregator/Gateway system to support transmission of emergency alerts, we find it reasonable to require customer notification upon the availability of the transmission of emergency alerts. Thus, we will require CMS providers that have elected, in whole or in part, not to provide alerts to provide point of sale and existing subscriber notifications as described *supra* to be made no later than 60 days following an announcement by the Commission that the Alert Aggregator/Gateway system is operational and capable of delivering emergency alerts to participating CMS providers. We find that this policy is consistent with the WARN Act. Although section 602(b)(2)(A) of the WARN Act requires that CMS licensees file an election with the Commission within 30 days after the Commission issues this Third Report and Order, section 602(b)(1)(B) does not otherwise provide a specific deadline by which CMS providers must provide notice to subscribers regarding non-election.

B. Election Procedures

27. *Background.* Sections 602(b)(2)(A), (B), and (D) establish certain requirements for CMS providers electing to provide or not to provide emergency alerts to subscribers. In several instances, the statute requires service providers to submit notifications to the Commission indicating their election, non-election, or their withdrawal from providing emergency alerts. Section 602(b)(2)(A) requires that, "within 30 days after the Commission issues its order under [section 602(b)], each licensee providing commercial mobile service shall file an election with the Commission with respect to whether or not it intends to transmit emergency alerts."⁵¹ Similarly, under section 602(b)(2)(B), a service provider that elects to transmit emergency alerts must "notify the Commission of its election" and "agree to transmit such alerts in a manner consistent with the technical standards, protocols, procedures, and other technical requirements implemented by the Commission."⁵² Further, section 602(b)(2)(D) requires the Commission to establish procedures relating to withdrawal of an election and the filing of late election notices with the Commission.⁵³ Under section 602(b)(2)(D)(i), "the Commission shall establish a procedure for a commercial mobile service licensee that has elected to transmit emergency alerts to withdraw its election without regulatory penalty or forfeiture upon advance written notification of the withdrawal to its affected subscribers."⁵⁴ Finally, section 602(b)(2)(D)(ii) requires "the Commission to establish a procedure for a commercial mobile service licensee to elect to transmit emergency alerts at a date later than provided in subparagraph (A)."⁵⁵

28. In the *CMAS NPRM*, we sought comment on all of these filing requirements. Specifically, we asked for comment on the most efficient method for accepting, monitoring and maintaining service provider election and withdrawal information.⁵⁶ With respect to the initial election, we asked what CMS providers should provide in their filing if they indicate an intention to provide emergency alerts. For example, we sought comment on the CMSAAC's recommendation that, at a minimum, a CMS provider should explicitly commit to support the development and deployment of technology for the following:

⁵¹ WARN Act, § 602(b)(2)(A).

⁵² *Id.* at § 602(b)(2)(B).

⁵³ *Id.* at § 602(b)(2)(D).

⁵⁴ *Id.* at § 602(b)(2)(D)(i).

⁵⁵ *Id.* at § 602(b)(2)(D)(ii).

⁵⁶ *CMAS NPRM*, 22 FCC Rcd at 21986 ¶ 32.

the “C” interface,⁵⁷ the CMS provider Gateway,⁵⁸ the CMS provider infrastructure,⁵⁹ and the mobile device with CMAS functionality. Noting that the CMSAAC suggested that the required technology may not be in place for some time, we asked whether electing CMS providers should specify when they will be able to offer mobile alerting.⁶⁰

29. In addition, we sought comment about how service providers should notify the Commission and attest to their adoption of the Commission’s standards, protocols, procedures and other technical requirements. We asked whether we should require electronic filing of the submission and what CMS providers should submit in their report to the Commission if they indicate an intention to provide emergency alerts.⁶¹ Finally, we sought comment on the proper mechanism for service providers to file a withdrawal of election with the Commission. We identified two scenarios: first, where the service provider has elected to provide emergency alerts, but does not build the infrastructure, and second, where the service provider elects to provide emergency alerts and does so to all or some portion of its coverage area, but later chooses to discontinue the service. With respect to the latter scenario, we asked how much advance notification to subscribers the Commission should require prior to the service provider’s withdrawal. We also asked what methods service providers should use to notify all existing subscribers at the service provider’s various points of sale as well as whether the Commission should impose the same set of requirements considered under section 602(b)(1)(C) regarding notification to existing subscribers and potential subscribers that a service provider has elected not to provide emergency alerts.⁶²

30. *Comments.* Wireless stakeholders agreed with the CMSAAC’s recommendation regarding what notice service providers should include in their elections.⁶³ For example, MetroPCS argues that the most effective way to provide notice to the Commission of a carrier’s election should be through a written election provided at the time the election is required and, thereafter, within a reasonable time after the carrier decides to change its election.⁶⁴ For CMS providers commencing service after the initial election deadline, MetroPCS recommends the submission of elections within 90 days after the licensee begins to market service in the licensed area.⁶⁵ MetroPCS suggests that the election notice be on a license-by-license basis, but with the flexibility to consolidate elections over all or a portion of the CMS providers’ licenses.⁶⁶ MetroPCS recommends that service providers deciding to change their elections “should be required to provide written notice to the Commission within 30 days of effectuating the change in election.”⁶⁷

⁵⁷ The connection between the Alert Gateway and CMS provider Gateway.

⁵⁸ The mechanism(s) that supports the “C” interface and associated protocols between the Alert Gateway and the CMS provider Gateway, and which performs the various functions associated with the authentication, management and dissemination of CMAS Alert Messages received from the Alert Gateway.

⁵⁹ The mechanism(s) that perform functions associated with authentication of interactions with the Mobile Device and distribute received CMAS Alert Messages throughout the CMS provider’s network, including cell site/paging transceivers.

⁶⁰ *CMAS NPRM*, 22 FCC Rcd at 21986 ¶ 32.

⁶¹ *Id.* at 21986 ¶ 33.

⁶² *Id.* at 21986 ¶ 34.

⁶³ *See, e.g.*, RCA Comments 6.

⁶⁴ MetroPCS Comments at 8.

⁶⁵ *Id.* at 9.

⁶⁶ *Id.*

31. Some commenters suggest that the Commission maintain a register listing the carriers that elect to participate as well as those that do not.⁶⁸ CPUC argues that it is “essential” that states have access to CMS providers election notices and that such notices should include, at a minimum, the “C” reference point, the CMS provider Gateway, the CMS provider infrastructure, the mobile device with CMAS functionality and any geographic variations in the commitment to provide emergency alerts.⁶⁹ CPUC further argues that CMS providers should also be required to file a report attesting to their adoption of the Commission’s standards, protocols, procedures, and other technical requirements, and reporting on the CMS providers’ arrangements for working with the Alert Aggregator, their technical connections with the Alert Gateway, the links used to provide that connection and a description of their technical capability for providing state, regional and local alerts.⁷⁰ Verizon Wireless opposes any requirement to provide detailed information about its network capabilities, arguing that such information is competitively sensitive and highly confidential.⁷¹

32. *Discussion.* We find that the most efficient method for accepting, monitoring and maintaining service provider election and withdrawal information is to accept electronic submissions to the Commission. Accordingly, we require CMS providers to file electronically in PS Docket No. 08-146 a letter describing their election. Carriers electing, in part or in whole, to transmit emergency alerts shall attest that they agree to transmit such alerts in a manner consistent with the technical standards, protocols, procedures, and other technical requirements implemented by the Commission. Further, we accept the recommendation of the CMSAAC that a CMS provider electing to transmit, in part or in whole, emergency alerts, indicates its commitment to support the development and deployment of technology for the following: the “C” interface, the CMS provider Gateway, the CMS provider infrastructure, and mobile devices with CMAS functionality and support of the CMS provider selected technology. We require CMS providers to submit their letter of election within 30 days after the release of this Order.⁷² Due to the ongoing development of the Alert Aggregator/Gateway system and the Government Interface Design specifications, we do not require CMS providers electing to transmit, in part or in whole, emergency alerts to specify when they will be able to offer mobile alerting. With respect to commenters seeking the submission of detailed information about the links used to provide that connection and a description of their technical capability for providing state, regional and local alerts, we find that the statutory language does not require provision of this information. Further, we find that it would be unduly burdensome for carriers to provide such information and, therefore, reject those suggestions. We agree with Verizon Wireless that requiring such information could force providers to divulge competitively sensitive information.⁷³ Additionally, requiring such information imposes substantial administrative and technical burdens on providers that are inconsistent with the voluntary nature of the CMAS program.

33. Section 602(b)(2)(D)(i) requires the Commission to establish a procedure for a commercial mobile service licensee that has elected to transmit emergency alerts to withdraw its election without regulatory penalty or forfeiture upon advance written notification of the withdrawal to its affected subscribers. Thus, we require a CMS provider that withdraws its election to transmit emergency alerts to notify all affected subscribers 60 days prior to the withdrawal of the election. Carriers that withdraw their

⁶⁷ *Id.*

⁶⁸ *See, e.g.,* AAPC Comments at 9.

⁶⁹ CPUC Comments at 26.

⁷⁰ *Id.* at 26-27.

⁷¹ *See* Verizon Wireless Reply Comments at 21.

⁷² The Commission received pre-approval from OMB for this requirement. *See* Office of Management and Budget Action, Election Whether to Participate in the Commercial Mobile Alert System, Feb. 4, 2008.

⁷³ *See* Verizon Wireless Reply Comments at 21.

election to transmit alerts shall be subject to the notification requirements described in Paragraph 37. We also require carriers to notify the Commission of their withdrawal, including information on the scope of their withdrawal, at least 60 days prior to electing to do so. Such a requirement is consistent with the requirement under Section 602(b)(2)(D)(i) that we establish procedures for election withdrawal, and with the WARN Act's provision requiring providers to inform the Commission of their election to participate in the CMAS.

34. With respect to section 602(b)(2)(D)(ii), requiring that the Commission "establish a procedure for a commercial mobile service licensee to elect to transmit emergency alerts at a date later than provided in subparagraph (A)," we require such CMS licensees, 30 days prior to offering this service, to file electronically their election to transmit, in part or in whole, or to not transmit emergency alerts in the manner and with the attestations described above. This mirrors the Commission's rules for providers who elect immediately and provides a sufficient and fair amount of time for providers to elect to participate at a later date.

C. Other Issues

1. Subscriber Termination of Service

35. *Background.* Section 602(b)(2)(D)(iii) requires the Commission to establish a procedure "under which a subscriber may terminate a subscription to service provided by a commercial mobile service licensee that withdraws its election without penalty or early termination fee."⁷⁴ We sought comment on the procedures necessary to implement this provision. Specifically, we asked whether notification in the terms and conditions of service is sufficient to apprise subscribers of their right to discontinue service without penalty or termination fee, whether the Commission should prescribe specific procedures for subscribers and whether service providers should submit to the Commission a description of their procedure for informing subscribers of their right to terminate service.⁷⁵

36. *Comments.* CTIA argues that the Commission should "regulate sparingly in the area of customer termination of subscriber agreements in the event that a wireless provider withdraws its election to participate in the CMAS."⁷⁶ Further, it states that "heavy-handed regulation and oversight both consumes Commission resources and adds cost to the overall provision of service (and, in turn, adds to subscriber cost)" and "adopting a procedure that fits with a company's other procedures and policies will make the option more user-friendly for the customer familiar with the wireless provider."⁷⁷ CPUC states that the FCC should prescribe specific procedures for informing customers and accomplishing terminations rather than having providers design their own procedures.⁷⁸ CPUC argues the Commission should design a process that includes notice to customers in clear and explicit language citing the statute and that the notices should facilitate the ability of a customer to automatically respond and immediately discontinue service. CPUC adds that customer acknowledgement of this information should be required by signature and dating or some corresponding affirmative action as done for non-participating providers at the point of initial sale.⁷⁹

37. *Discussion.* We find that because Section 602(b)(2)(D)(iii), on its face, clearly provides rights specifically aimed at subscribers – that they may terminate service without penalty or early

⁷⁴ WARN Act, § 602(b)(2)(D)(iii).

⁷⁵ *CMAS NPRM*, 22 FCC Rcd at 21986-87 ¶ 35.

⁷⁶ CTIA Comments at 13.

⁷⁷ *Id.*

⁷⁸ See CPUC Comments at 28.

⁷⁹ See *id.*

termination fee if a provider withdraws its initial election to participate in CMAS – subscribers require individual notice of their rights under the WARN Act. We further find that carriers must notify each affected subscriber individually in clear and conspicuous language, citing the statute, of the subscriber’s right to terminate service without penalty or early termination fee should a carrier withdraw its initial election.⁸⁰ We do not otherwise adopt any specific methods or procedures for implementing this individualized notice, but rather leave it to CMS providers to determine how best to communicate these statutory rights to their customers.

2. Subscriber Alert Opt-Out

38. *Background.* Section 602(b)(2)(E) provides that “[a]ny commercial mobile service licensee electing to transmit emergency alerts may offer subscribers the capability of preventing the subscriber’s device from receiving such alerts, or classes of such alerts, other than an alert issued by the President.”⁸¹ The CMSAAC recommended that CMS providers should offer their subscribers a simple opt-out process.⁸² With the exception of Presidential messages, which are always transmitted, the CMSAAC recommended that the process should allow the choice to opt out of “all messages,” “all severe messages,” and AMBER Alerts.⁸³ The CMSAAC suggested that, because of differences in the way CMS providers and device manufacturers provision their menus and user interfaces, CMS providers and device manufacturers should have flexibility about how to present the opt-out choices to subscribers. In the CMAS First Report and Order, the Commission further defined these three alert classes as: (1) Presidential Alert, (2) Imminent Threat Alert, and (3) Child Abduction Emergency/AMBER Alert.⁸⁴ We sought comment on the recommendations of the CMSAAC with respect to three choices of message types that a subscriber should be allowed to choose to opt out of receiving.⁸⁵ Additionally, we sought comment on the CMSAAC recommendation that CMS providers and device manufacturers should have flexibility or whether the Commission should establish baseline criteria for informing subscribers of this capability and if any uniform standards for conveying that information to subscribers is required.⁸⁶ We also sought comment on whether more classes of alerts should be considered.⁸⁷

39. *Comments.* Many commenters who addressed this issue expressed support for the CMSAAC’s recommendations.⁸⁸ For example, T-Mobile argues that, given the different types of handsets and the wide array of menu interfaces offered by CMS providers, the Commission should not impose baseline standards or a uniform methodology for disabling alerts on this array of mobile handsets or

⁸⁰ *See id.*

⁸¹ WARN Act, § 602(b)(2)(E).

⁸² *See* CMSAAC Recommendations, § 5.5.3.

⁸³ *Id.* Under the CMSAAC’s recommendation, when the subscriber chooses to opt out of “all messages,” only “presidential” messages will be received. *Id.* When the subscriber chooses to opt out of “all severe messages,” only “extreme messages, AMBER Alerts and presidential messages will still be received.” *Id.* “Extreme” messages correspond to events of near-catastrophic proportions. *See* Federal Communications Commission, Transcript of July 18, 2007 CMSAAC Meeting, at pp 37-38, available at <http://www.fcc.gov/pshs/docs/advisory/cmsaac/pdf/meeting-transcript071807.pdf> (last viewed on June 24, 2008). In developing the recommendation, the Committee believed that it was important that subscribers who opt out of “severe” alerts should still be able to receive these “extreme” alerts. *See id.* at p. 38. Finally, when the subscriber chooses to opt out of AMBER alerts, all alerts aside from AMBER alerts will still be received. *See* CMSAAC Recommendations, § 5.5.3.

⁸⁴ *See CMAS First Report and Order*, 23 FCC Rcd at 6155 ¶ 26.

⁸⁵ *CMAS NPRM*, 22 FCC Rcd at 21987 ¶ 36.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *See, e.g.,* T-Mobile Comments at 10-12; AT&T Comments at 13; MetroPCS Comments at 9-10.

devices.⁸⁹ AAPC states that carriers should be permitted to manage subscriber opt-outs of alerts at the network terminal level and not just at the subscriber device level.⁹⁰ Wireless RERC argues that CMS providers should make it clear to the subscriber what opting-out means – that, for example, they will not receive tornado warnings.⁹¹ CPUC agrees, stating that CMS providers should be required to inform subscribers that they have the choice of opting out of alerts.⁹²

40. One party – PTT -- objected to the provision of any subscriber opt-out mechanism. PTT states that an opt-out capability will defeat the purpose of the program if a large number of potential users opt out due to concerns about battery usage. It states that if such a “requirement” moves forward, it would prefer that subscribers use the SMS filtering features of their own device to filter undesired messages, rather than making this a universal feature of the program.⁹³

41. *Discussion.* We agree with the CMSAAC proposed simple opt-out program. The process should allow the choice to opt out of “Imminent Threat Alert messages” and “Child Abduction Emergency/AMBER Alert messages.” This allows consumers the flexibility to choose what type of message they wish to receive while still ensuring that customers are apprised of the most severe threats as communicated by Presidential Alert messages, which are always transmitted. However, because of the differences in how CMS providers and device manufacturers provision menus and user interfaces, we afford CMS providers flexibility to provide opt-out choices consistent with their own system. While we assume, as proposed by the Wireless RERC, that providers would make clear to consumers what each option means, and provide examples of what types of messages the customer may not receive as a result of opting-out so that consumers can make an informed choice, we do not require providers to include such information because there is no corresponding requirement in the WARN Act.

42. We disagree with PTT’s argument that opt-out capability will defeat the purpose of the program. First, the WARN Act specifically grants providers the option to allow subscribers to opt-out of all but Presidential alerts. It would be inconsistent with the clear intent of Congress for the Commission to disallow this option. Secondly, the Alert Gateway used to transmit CMAS messages will most likely be separate and distinct from the SMS gateway. Therefore, subscribers may be unable to use their SMS filtering feature to filter CMAS messages.

3. Cost Recovery

43. *Background.* Section 602(b)(2)(C) states “[a] commercial mobile service licensee that elects to transmit emergency alerts may not impose a separate or additional charge for such transmission or capability.”⁹⁴ In the *Notice*, we asked whether Section 602(b)(2)(C)’s reference to “transmission or capability” should be read narrowly and sought comment whether this provision precludes a participating CMS provider’s ability to recover costs associated with the provision of alerts.⁹⁵ Noting, for example, that much of the alert technology will reside in the subscriber’s mobile device, we asked whether CMS providers should recover CMAS-related developmental costs from the subscriber through mobile device charges based on a determination that mobile devices lie outside the “transmission or capability” language

⁸⁹ T-Mobile Comments at 11.

⁹⁰ AAPC Comments at 10.

⁹¹ Wireless RERC Comments at 16.

⁹² CPUC Comments at 28.

⁹³ PTT Comments at 13.

⁹⁴ WARN Act, § 602(b)(2)(C).

⁹⁵ *CMAS NPRM*, 22 FCC Rcd at 21987-88 ¶ 38.

of the section.⁹⁶ We also asked about cost recovery in connection with CMAS-related services and technologies that are not used to deliver CMAS.⁹⁷

44. *Comments.* Many of those commenting on the issue argue that participating CMS providers should be allowed to recover development, maintenance and manufacturing costs from their subscribers.⁹⁸ AT&T urges the Commission to declare that costs incurred in the development of CMAS and in the provision of mobile emergency alerts are recoverable under the WARN Act and that cost recovery is consistent with the plain language of the Act.⁹⁹ AT&T argues that the statutory language concerning separate or additional charges “only addresses the appearance or presentation of charges on a subscriber’s bill for the emergency alert mandate,” “does not in any way limit a carrier’s ability to recover costs associated with CMAS implementation,” and “to limit cost recovery in this way would require the imposition of rate regulation and a regulatory accounting regime, which the Commission specifically has rejected for the competitive wireless industry.”¹⁰⁰ SouthernLINC argues that Section 602(b)(2)(C) should be interpreted to apply only to separate charges associated with the specific costs involved in transmitting each alert and that subscribers should not be charged a per-alert fee. It argues, however, that carriers should be permitted to recover costs associated with the implementation and ongoing system management and any vendor-imposed handset costs. Such an approach, SouthernLINC argues, would encourage greater carrier participation.¹⁰¹ T-Mobile agrees, stating that it is fair to consumers who choose to buy a more sophisticated handset to cover some or all of the costs of the handset’s development.¹⁰² On the other hand, Wireless RERC argues that CMS providers should be treated no differently than EAS participants who must bear the costs of their EAS participation. It states further that “since CMAS is starting as a voluntary system and CMS providers are not allowed to impose a separate or additional charge for such transmission or capability, the Commission should review its mobile services regulations to implement any incentives that might offset CMS expenses and encourage CMS providers to participate in CMAS.”¹⁰³

45. *Discussion.* We agree with those commenters who urge us to find that section 602(b)(2)(C) precludes CMS providers from imposing a “separate or additional charge” for the transmission of CMAS alerts or the capability to transmit such alerts, but that such language does not preclude recovery of CMAS-associated costs,¹⁰⁴ including costs related to the development of customer handsets.¹⁰⁵ Section 602(b)(2)(C) states that “[a] commercial mobile service licensee that elects to transmit emergency alerts

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ See e.g., AAPC Comments at 10; CellCast Technologies Comments at 52-53; SouthernLINC Comments at 9-10; Sprint Nextel Comments at 7-8; Motorola Comments at 8-9; T-Mobile Comments at 7-9.

⁹⁹ AT&T Comments at 18.

¹⁰⁰ *Id.* at 19.

¹⁰¹ SouthernLINC Comments at 9-10. See also Sprint Nextel Comments at 7-8.

¹⁰² T-Mobile Comments at 8.

¹⁰³ Wireless RERC Comments at 16-17.

¹⁰⁴ AT&T Comments at 18-20; Sprint Nextel Comments at 7-8; CTIA Comments at 10-11.

¹⁰⁵ SouthernLINC Comments at 9-10. See also MetroPCS Comments at 11 (supporting cost recovery for handset-related costs and for costs associated with CMAS-related services, such as traffic alerts, if CMS provider elects to provide such services). Cf. T-Mobile Comments at 7-8 (supporting cost recovery in connection with handset development but apparently opposing CMAS cost recovery generally). But see CellCast Comments at 26-27 (supporting recovery of initial implementation and infrastructure support costs, but opposing cost recovery for development of new CMAS-compatible handsets).

may not impose a *separate or additional charge* for such transmission or capability.”¹⁰⁶ We interpret this language to mean that CMS providers shall not separately or additionally charge customers for provided alerts. But nothing in this statutory language – and nothing in the statute’s legislative history – indicates an intention on the part of Congress to preclude recovery of, for example, CMAS-related development and implementation costs. In this regard, we note that Congress is well aware of this Commission’s Title III regulation of wireless carriers,¹⁰⁷ which provides for flexible recovery of costs through assessed rates and other means.¹⁰⁸ We conclude that, if Congress had wanted to preclude cost recovery, as opposed to merely prohibiting separate or additional charges for alert transmission or alert transmission capability, it would have said so. We also find that permitting recoverable costs associated with the provision of CMAS alerts would be consistent with the voluntary nature of the CMAS and our general policy to encourage participation in the CMAS.¹⁰⁹

46. Although we make clear that section 602(b)(2)(C) does not prevent recovery of CMAS-related costs by CMS providers, we do not mandate any particular method of cost recovery. CMS providers have the discretion to absorb service-related costs or to pass on all or portions of such costs to their customers pursuant to generally-developed service rates. We also find that, because CMS providers operate in a competitive marketplace, market forces will guide decisions by CMS providers in recovering costs. Finally, we find that the language of section 602(b)(2)(C) is, on its face, limited to charges for alert transmissions and the capability to provide such transmissions and, accordingly, does not prohibit cost recovery, as described here, for specially-designed or augmented customer handsets, or in connection with CMAS-related services that share use of common technology but are not themselves CMAS alerts, for example, for provision of traffic alerts.

4. CMAS Deployment Timeline

47. *Background.* In its recommendations, the CMSAAC proposed a timeline for implementation of the CMAS. According to the CMSAAC, it will take twelve months from the date of submission of the CMSAAC’s recommendations to complete an industry standardization process.¹¹⁰ Participating CMS providers would then need an additional twenty-four months from the date of completion of the standardization process for CMAS development and testing. Initial CMS provider testing and deployment would occur 18-24 months from the date the industry standardization process is completed.¹¹¹

48. The specifics of the timeline recommended by the CMSAAC are indicated in Figure 1 below.

¹⁰⁶ WARN Act, § 602(b)(2)(C) (emphasis added).

¹⁰⁷ 47 U.S.C. §§ 301 *et seq.*

¹⁰⁸ See Communications Assistance for Law Enforcement Act and Broadband Access and Services, *Second Report and Order and Memorandum Opinion and Order*, 21 FCC Rcd 5360, 5392 (2006) (stating that wireless carriers may recover costs related to CALEA-imposed regulatory mandates by absorbing such costs or, where appropriate, by charging customers).

¹⁰⁹ See Sprint Nextel Comments at 7-8.

¹¹⁰ CMSAAC Recommendations, § 12.2 and Figure 12-1.

¹¹¹ *Id.*

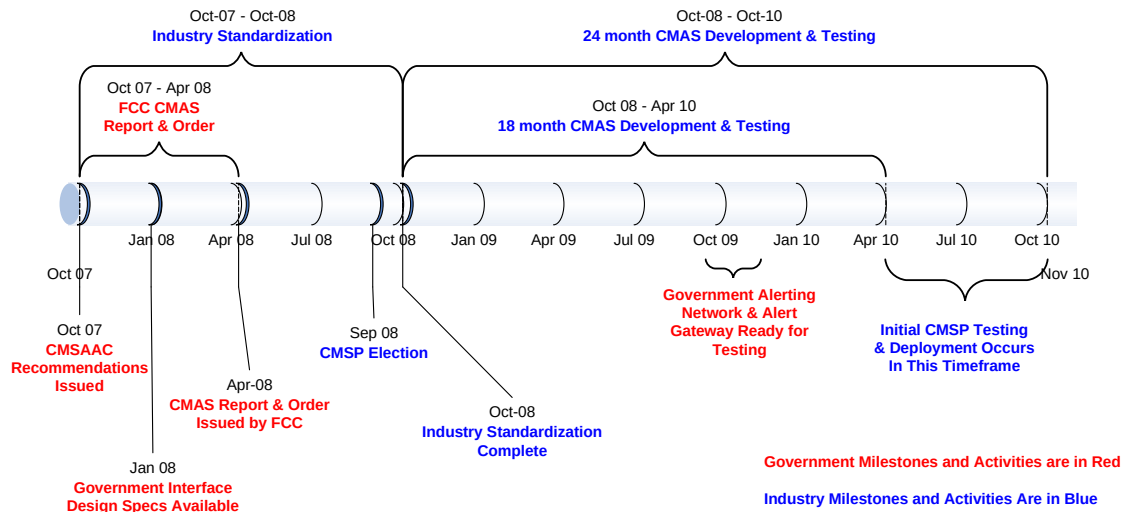


Figure 1¹¹²

49. The CMSAAC based its proposed deployment timeline upon the assumptions that (1) the CMSAAC recommendations would be accepted without any major technical change and (2) the government documentation and deliverables would be available at the milestone dates indicated on the timeline. As indicated in Figure 1, when creating this timeline, the CMSAAC assumed that the Federal Alert Aggregator and Gateway would provide the Government Interface Design specifications in January 2008.¹¹³ The CMSAAC also identified other factors it stated were outside of the CMS providers’ control that would influence the deployment and availability of the CMAS, such as manufacturer development cycles for equipment in the CMS provider infrastructure, manufacturer commitment to support the delivery technology of choice by the CMS provider, and mobile device manufacturer development of the required CMAS functionality on the mobile devices.¹¹⁴

50. As discussed above, on May 30, 2008, the Department of Homeland Security's Federal Emergency Management Agency (FEMA) announced that it will perform the CMAS Alert Aggregator/Gateway role.¹¹⁵ FEMA noted that the Alert Aggregator/Gateway system has not yet been designed or engineered,¹¹⁶ and did not indicate when it would make the Government Interface Design specifications available to the other CMAS participants. FEMA did note, however, that it would work with DHS Science and Technology scientists to finalize the technical solutions and with the Federal

¹¹² CMSAAC Recommendations, § 12.2.1, Figure 12.1.

¹¹³ The CMSAAC also assumed that the *CMAS First Report and Order* would be issued by the Commission in April 2008, six months from the date of the submission of the CMSAAC’s recommendations. The *CMAS First Report and Order* was adopted and released on April 9, 2008. Finally, the CMSAAC assumed that the government alerting network and Alert Gateway would be ready for testing approximately 24 - 27 months from the date the CMSAAC submitted its recommendations to the Commission (*i.e.*, October 2009 – January 2010).

¹¹⁴ CMSAAC Recommendations, § 12.2. The CMSAAC explained that CMS providers will have equipment from multiple manufacturers deployed in the CMS provider infrastructure. Multi-vendor environments require feature availability and deployment alignment, and require interoperability testing between the different manufacturers equipment. In addition, the CMSAAC stated that if a CMS provider chooses a particular technology to transmit alerts and the vendor with which the CMS provider has a relationship chooses not to develop the same capability, the CMS provider may be forced into not electing to transmit alerts (at least not “in whole”).

¹¹⁵ See discussion *supra* ¶ 24.

¹¹⁶ *Id.*

Communications Commission to make the Alert Aggregator system operational.¹¹⁷ We also note that the Alliance for Telecommunications Industry Solutions (ATIS) and the Telecommunications Industry Association (TIA) are currently developing standards related to the CMAS, particularly regarding the development of standards and protocols for the “C” interface.¹¹⁸

51. *Comments.* As we indicated in our *CMAS First Report and Order*, a majority of commenters that addressed the issue supported the CMSAAC’s proposed deployment timeline.¹¹⁹

52. *Discussion.* In our recent *Order on Reconsideration*, we noted our intent that our rules would be implemented in a manner consistent with the CMSAAC recommended timeline.¹²⁰ We agree with commenters who argued that the Alert Aggregator/Gateway must be a centralized, federal entity. As noted above FEMA has only recently indicated that it can serve as the Federal government entity that will provide the Alert Aggregator and Gateway functions, and has not stated when it would be able to provide the Government Interface specifications. However, in order to ensure that all Americans have the capability to receive timely and accurate alerts, warnings, and critical information regarding disasters and other emergencies irrespective of what communications technologies they use, we find that if FEMA has not issued its Government Interface specifications by December 31, 2008, the Commission will reconvene an emergency meeting of the CMSAAC to address the issuance of Government Interface specifications.

53. Because of this ambiguity and the need to ensure timely deployment of the CMAS, regardless of the federal entity serving as the Aggregator/Gateway, the CMAS timeline rules we adopt today do not implement the specific target dates recommended by the CMSAAC. Rather, as stated in our recent *Order on Reconsideration*, participating CMS providers must begin development and testing of the CMAS in a manner consistent with our new part 10 rules no later than ten months from the date that FEMA makes the Government Interface Design specifications available.¹²¹ As we noted in the *Order on Reconsideration*, this 10-month period corresponds to the interval recommended by the CMSAAC for the completion of industry standards necessary for CMAS development and testing. However, we further require that, at the end of this 10-month period, participating CMS providers shall begin an eighteen month implementation and deployment period before the CMAS can be made available to the public. We recognize that this is an accelerated deployment schedule compared to that recommended by the CMSAAC. Specifically, following the CMSAAC recommendations, the timeframe would be as long as twenty-four months following the 10-month industry standardization process, as compared to the eighteen months that we order today. Because of the important public safety considerations before us, including the need for the provision of timely and vital emergency information to an increasingly mobile society and our continuing mandate under the Communications Act to promote the safety of life and property through the use of wire and radio communications, we find that this accelerated schedule is in the public interest. Moreover, providing an eighteen month implementation and deployment period still allows more than twenty-four months from the date the Government Interface Design specifications are available for deployment to occur.

¹¹⁷ *Id.*

¹¹⁸ ATIS TIA Comments at 4 .

¹¹⁹ See *CMAS First Report and Order*, 23 FCC Rcd at 6177 ¶ 93. See also T-Mobile Comments at 2; 3G America Comments at 11; CTIA Comments at 19; TIA Comments at 10; AT&T Comments at 20; Ericsson Comments at 6; RCA Comments at 1-2.

[?] See, e.g., Verizon Wireless Comments at 6; Verizon Wireless Reply Comments at 2-3; RCA Comments at 2-4; Alltel Comments at 2.

¹²⁰ The Commercial Mobile Alert System, PS Docket No. 07-287, *First Order on Reconsideration and Erratum*, FCC 08-166 (rel. July 15, 2008) (*Order on Reconsideration*) at ¶ 4.

¹²¹ *Order on Reconsideration* at ¶ 6.

54. We also agree with the CMSAAC recommendations that during this development and deployment period, the Alert Gateway and Alert Aggregator should collaborate with participating CMS providers to test the CMAS. In light of what we expect to be a collaborative process, the considerable involvement of the carriers to date in the development of the CMAS system and operational parameters, and the compelling need to provide this capability to the public in a prompt fashion, we believe even this accelerated schedule provides a sufficient amount of time to CMS providers for deployment of the CMAS.

IV. PROCEDURAL MATTERS

A. Final Regulatory Flexibility Act Analysis

55. As required by section 604 of the Regulatory Flexibility Act (RFA), 5 U.S.C. § 604, the Commission has prepared a Final Regulatory Flexibility Analysis of the possible impact of the rule changes contained in this Report and Order on small entities. The Final Regulatory Flexibility Act Analysis is set forth in Appendix A, *infra*. The Commission's Consumer & Government Affairs Bureau, Reference Information Center, will send a copy of this Report and Order, including the Final Regulatory Flexibility Act Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

B. Final Paperwork Reduction Act of 1995 Analysis

56. The initial election that CMS providers must make pursuant to section 602(b)(2)(A) of the WARN Act, discussed above, has been granted pre-approval by OMB.¹ This Report and Order may also contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. If the Commission determines that the Report and Order contains collection subject to the PRA, it will be submitted to the Office of Management and Budget (OMB) for review under section 3507 of the PRA at the appropriate time and the Commission will publish a separate notice inviting comment. At that time, OMB, the general public and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we will seek specific comment on how the Commission might "further reduce the information collection burden for small business concerns with fewer than 25 employees."

C. Congressional Review Act Analysis

57. The Commission will send a copy of this Report and Order to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

D. Alternative Formats

58. Alternative formats (computer diskette, large print, audio cassette, and Braille) are available to persons with disabilities by sending an e-mail to FCC504@fcc.gov or calling the Consumer and Governmental Affairs Bureau at (202) 418-0530, TTY (202) 418-0432.

E. Filing Requirements

59. Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, parties shall file their election certifications on or before September 8, 2008. Elections shall be filed using: (1) the Commission's Electronic Comment Filing System (ECFS), which is accessible at the Commission's Web site, <http://www.fcc.gov/cgb/ecfs>, or (2) the Federal Government's eRulemaking Portal. *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 FR 24121 (1998).

- Electronic Filers: Comments shall be filed electronically using the Internet by accessing the ECFS: <http://www.fcc.gov/cgb/ecfs/> or the Federal eRulemaking Portal:

¹ The Commission received pre-approval from OMB for this requirement. *See* Office of Management and Budget Action, Election, Whether to Participate in the Commercial Mobile Alert System, Feb. 4, 2008.

<http://www.regulations.gov>. Filers should follow the instructions provided on the website for submitting comments.

- o For ECFS filers, filers must transmit one electronic copy of their elections to PS Docket No. 08-146. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. PS Docket No. 08-146 is a docket specially created to receive these election letters.

60. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (TTY).

V. EFFECTIVE DATE

61. The rules we adopt today requiring CMS providers to provide us with notice of their election to participate in the CMAS shall be effective upon the release date of this Order. The general rule under the Administrative Procedure Act (APA) is that the effective date of a rule in a Notice and Comment rulemaking must be at least 30 days following the publication of the rule in the Federal Register.¹ However, both the APA and the Commission's rules allow the Commission to adopt a shorter effective date upon a showing of "good cause."² For the reasons stated below, we conclude that sufficient good cause exists in this case for us to make these rules effective in less than thirty days from their publication in the Federal Register.

62. First, as we explain above, the WARN Act requires that within 30 days after we issue today's order, each CMS provider "shall file an election with the Commission with respect to whether or not it intends to transmit emergency alerts."³ In order for the Commission to satisfy this statutory mandate, it must have an enforceable order in place within the extremely tight statutory timeframe imposed by the WARN Act, *i.e.*, within thirty days of releasing today's order. This good cause is in no way diminished by any lack of notice to the affected CMS providers. To the contrary, the CMS providers have had sufficient notice that the Commission would be requiring them to elect whether to participate in the CMAS within 30 days of the release of an order implementing section 602(b) of the WARN Act. In the CMAS NPRM, the Commission put the CMS providers on notice of election requirements in section 602(b)(2) of the WARN Act in December 2007. This NPRM was subsequently published in the Federal Register on January 3, 2008. Thus all affected parties have been on notice of the short period of time mandated by the WARN Act between the release of today's order and the required election by the CMS providers.

63. There also are no procedural bars to having this rule effective immediately upon release. The rules we adopt under section 602(b) of the WARN Act constitute a "non-major" rulemaking. Although the CMAS First Report and Order constituted a Major Rulemaking, the incremental effects of the actions we take today in this CMAS Third Report and Order will not have a likely effect on the economy of \$100 million or more.⁴ Further, on February 4, 2008, OMB granted our request for pre-approval for the CMS provider election rules, thus obviating our need for us to wait for OMB approval of our CMAS election rules.⁵

¹ See 5 U.S.C. § 553(d).

² See 5 U.S.C. § 553(d)(3), 47 C.F.R. § 1.427(b).

³ See WARN Act, § 602(b)(2)(A).

⁴ In the case of a "Major" rulemaking, the effective date of a substantive rule must be at least 60 days after publication in the Federal Register, or 60 days after Congress's receipt of a Congressional Review Act report, whichever is later.

⁵ Those rules that contain information collections under the Paperwork Reduction Act may not become effective until OMB approval.

64. Given the statutory mandate imposed by the WARN Act, the notice that has been previously supplied to the affected CMS providers, and pre-approval of this election procedure by OMB, we conclude that good cause exists to truncate the standard 30 day period for rules to become effective. Accordingly, the rules set forth herein shall take effect immediately upon the release of this order.

VI. ORDERING CLAUSES

65. IT IS ORDERED, that pursuant to sections 1, 4(i), and (o), 201, 303(r), 403 and 706 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i) and (o), 201, 303(r) 403, and 606, as well as by sections 602(a), (b), (c), (f), 603, 604 and 606 of the WARN Act, this Report and Order IS hereby ADOPTED. This rules adopted in this Report and Order shall become effective immediately upon the release of this Order. Election to participate in CMAS must be made no later than 30 days after the release of this order, and must be filed in a manner consistent with the Report and Order and the rules adopted herein.

66. IT IS FURTHER ORDERED that the Commission's Consumer and Government Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analysis, to the Chief Council for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDIX A

Final Regulatory Flexibility Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),¹ an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the Notice of Proposed Rulemaking in PSHSB Docket 07-287 (*CMAS NPRM*). The Commission sought written public comments on the proposals in the *CMAS NPRM*, including comment on the IRFA. Comments on the IRFA were to have been explicitly identified as being in response to the IRFA and were required to be filed by the same deadlines as that established in section IV of the *CMAS NPRM* for other comments to the *CMAS NPRM*. The Commission sent a copy of the *CMAS NPRM*, including the IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).² In addition, the *CMAS NPRM* and IRFA were published in the Federal Register.³

A. Need for, and Objectives of, the Order

2. Section 602(b) of the WARN Act requires the Commission to “complete a proceeding – (A) to allow any licensee providing commercial mobile service ... to transmit emergency alerts to subscribers to, or users of, the commercial mobile service provided by such license; (B) to require any licensee providing commercial mobile service that elects, in whole or in part, ... not to transmit emergency alerts to provide clear and conspicuous notice at the point of sale of any devices with which its commercial mobile service is included, that it will not transmit such alerts via the service it provides for the device; and (C) to require any licensee providing commercial mobile service that elects ... not to transmit emergency alerts to notify its existing subscribers of its election.”⁴ Although the *CMAS NPRM* solicited comment on issues related to section 602(a) (CMS alert regulations) and 602(c) (Public Television Station equipment requirements), this *CMAS Third Report and Order* only addresses issues raised by section 602(b) of the WARN Act.⁵ Accordingly, this FRFA only addresses the manner in which any commenters to the IRFA addressed the Commission’s adoption of standards and requirements for the *CMAS* as required by section 602(b) of the WARN Act.

3. This *CMAS Third Report and Order* adopts rules necessary to allow any CMS provider to transmit emergency alerts to its subscribers; to require that CMS providers that elect, in whole or in part, not to transmit emergency alerts provide clear and conspicuous notice at the point of sale of any CMS devices that it will not transmit such alerts via that device; and to require CMS providers that elect not to transmit emergency alerts to notify their existing subscribers of their election.

¹ See 5 U.S.C. § 603. The RFA, see 5 U.S.C. §§ 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

² See 5 U.S.C. § 603(a).

³ 73 FR 546-01 (January 3, 2008).

⁴ WARN Act § 602(b).

⁵ As the First Report and Order in this docket indicated, the Commission will address the various provisions of the WARN Act and related issues in Orders within the deadlines established by the statute. See The Commercial Mobile Alert System, PS Docket No. 07-287, *First Report and Order*, 23 FCC Rcd 6144 ¶ 6 n. 16 (2008) (“*CMAS First Report and Order*”). Accordingly, pursuant to section 602(a) of the WARN Act, on April 9, 2008 (within 180 days of receipt of the Commercial Mobile Service Alert Advisory Committee’s (CMSAAC) recommendations) we released the *CMAS First Report and Order*, adopting technical standards, protocols, processes and other technical requirements “necessary to enable commercial mobile service alerting capability for commercial mobile service providers that voluntarily elect to transmit emergency alerts.” A Second Report and Order dealing with the provisions of section 602(c) of the WARN Act was adopted on July 8, 2008.

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

4. There were no comments filed that specifically addressed the IRFA. The only commenter that explicitly identified itself as a small business was Interstate Wireless, Inc., which supported the Commission's adoption of the Commercial Mobile Service Alert Advisory Committee's (CMSAAC) recommendations.⁶ Interstate Wireless did not comment specifically on the IRFA, nor did it comment on any issues directly relating to section 602(b) of the WARN Act.

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

5. The RFA directs agencies to provide a description of, and, where feasible, an estimate of, the number of small entities that may be affected by the rules adopted herein.⁷ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.⁹ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).¹⁰

6. Wireless Telecommunications Carriers (except Satellite). Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.¹¹ Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of "Paging" and "Cellular and Other Wireless Telecommunications."¹² Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.¹³ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.¹⁴ For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.¹⁵ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.¹⁶ Thus, using the

⁶ Interstate Wireless Comments at 1.

⁷ 5 U.S.C. § 603(b).

⁸ 5 U.S.C. § 601(6).

⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register." 5 U.S.C. § 601(3).

¹⁰ 15 U.S.C. § 632.

¹¹ 13 C.F.R. § 121.201, NAICS code 517210.

¹² 13 C.F.R. § 121.201, NAICS codes 517211, 517212.

¹³ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517211 (issued Nov. 2005).

¹⁴ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with "1000 employees or more."

¹⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 517212 (issued Nov. 2005).

prior categories and the available data, we estimate that the majority of wireless firms can be considered small.

7. Cellular Service. As noted, the SBA has developed a small business size standard for small businesses in the category “Wireless Telecommunications Carriers (except satellite).”¹⁷ Under that SBA category, a business is small if it has 1,500 or fewer employees.¹⁸ Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.¹⁹ Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of “Paging” and “Cellular and Other Wireless Telecommunications.”²⁰ Accordingly, the pertinent data for this category is contained within the prior Wireless Telecommunications Carriers (except Satellite) category.

8. Auctions. Initially, we note that, as a general matter, the number of winning bidders that qualify as small businesses at the close of an auction does not necessarily represent the number of small businesses currently in service. Also, the Commission does not generally track subsequent business size unless, in the context of assignments or transfers, unjust enrichment issues are implicated.

9. Broadband Personal Communications Service. The broadband Personal Communications Service (PCS) spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than \$40 million in the three previous calendar years.²¹ For Block F, an additional small business size standard for “very small business” was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than \$15 million for the preceding three calendar years.²² These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA.²³ No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the C Block auctions. A total of 93 “small” and “very small” business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F.²⁴ On March 23, 1999, the Commission reaucted 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.²⁵ On January 26, 2001, the Commission completed the auction of 422 C and F PCS licenses in Auction 35.²⁶ Of the 35 winning bidders in this auction, 29 qualified as “small” or

¹⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

¹⁷ 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 517210.

¹⁸ *Id.*

¹⁹ 13 C.F.R. § 121.201, NAICS code 517210.

²⁰ 13 C.F.R. § 121.201, NAICS codes 517211, 517212.

²¹ See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7850-7852 ¶¶ 57-60 (1996); see also 47 C.F.R. § 24.720(b).

²² See Amendment of Parts 20 and 24 of the Commission’s Rules – Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap, Report and Order, 11 FCC Rcd 7824, 7852 ¶ 60.

²³ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

²⁴ FCC News, “Broadband PCS, D, E and F Block Auction Closes,” No. 71744 (rel. January 14, 1997).

²⁵ See “C, D, E, and F Block Broadband PCS Auction Closes,” Public Notice, 14 FCC Rcd 6688 (WTB 1999).

“very small” businesses. Subsequent events concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant.

10. Narrowband Personal Communications Service. The Commission held an auction for Narrowband Personal Communications Service (PCS) licenses that commenced on July 25, 1994, and closed on July 29, 1994. A second commenced on October 26, 1994 and closed on November 8, 1994. For purposes of the first two Narrowband PCS auctions, “small businesses” were entities with average gross revenues for the prior three calendar years of \$40 million or less.²⁷ Through these auctions, the Commission awarded a total of forty-one licenses, 11 of which were obtained by four small businesses.²⁸ To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the *Narrowband PCS Second Report and Order*.²⁹ A “small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$40 million.³⁰ A “very small business” is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than \$15 million.³¹ The SBA has approved these small business size standards.³² A third auction commenced on October 3, 2001 and closed on October 16, 2001. Here, five bidders won 317 (MTA and nationwide) licenses.³³ Three of these claimed status as a small or very small entity and won 311 licenses.

11. Wireless Communications Services. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses in the 2305-2320 MHz and 2345-2360 MHz bands. The Commission defined “small business” for the wireless communications services (WCS) auction as an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” as an entity with average gross revenues of \$15 million for each of the three preceding years.³⁴ The SBA has approved these definitions.³⁵ The Commission auctioned geographic area licenses in the WCS service. In the auction, which commenced on April 15, 1997 and closed on

²⁶ See “C and F Block Broadband PCS Auction Closes; Winning Bidders Announced,” Public Notice, 16 FCC Rcd 2339 (2001).

²⁷ Implementation of section 309(j) of the Communications Act – Competitive Bidding Narrowband PCS, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196 ¶ 46 (1994).

²⁸ See “Announcing the High Bidders in the Auction of ten Nationwide Narrowband PCS Licenses, Winning Bids Total \$617,006,674,” Public Notice, PNWL 94-004 (rel. Aug. 2, 1994); “Announcing the High Bidders in the Auction of 30 Regional Narrowband PCS Licenses; Winning Bids Total \$490,901,787,” Public Notice, PNWL 94-27 (rel. Nov. 9, 1994).

²⁹ Amendment of the Commission’s Rules to Establish New Personal Communications Services, Narrowband PCS, Second Report and Order and Second Further Notice of Proposed Rule Making, 15 FCC Rcd 10456, 10476 ¶ 40 (2000).

³⁰ *Id.*

³¹ *Id.*

³² See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

³³ See “Narrowband PCS Auction Closes,” Public Notice, 16 FCC Rcd 18663 (WTB 2001).

³⁴ Amendment of the Commission’s Rules to Establish Part 27, the Wireless Communications Service (WCS), Report and Order, 12 FCC Rcd 10785, 10879 ¶ 194 (1997).

³⁵ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated December 2, 1998.

April 25, 1997, there were seven bidders that won 31 licenses that qualified as very small business entities, and one bidder that won one license that qualified as a small business entity.

12. 700 MHz Guard Bands Licenses. In the *700 MHz Guard Bands Order*, the Commission adopted size standards for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.³⁶ A small business in this service is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$40 million for the preceding three years.³⁷ Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.³⁸ SBA approval of these definitions is not required.³⁹ An auction of 52 Major Economic Area (MEA) licenses for each of two spectrum blocks commenced on September 6, 2000, and closed on September 21, 2000.⁴⁰ Of the 104 licenses auctioned, 96 licenses were sold to nine bidders. Five of these bidders were small businesses that won a total of 26 licenses. A second auction of remaining 700 MHz Guard Bands licenses commenced on February 13, 2001, and closed on February 21, 2001. All eight of the licenses auctioned were sold to three bidders. One of these bidders was a small business that won a total of two licenses.⁴¹ Subsequently, in the *700 MHz Second Report and Order*, the Commission reorganized the licenses pursuant to an agreement among most of the licensees, resulting in a spectral relocation of the first set of paired spectrum block licenses, and an elimination of the second set of paired spectrum block licenses (many of which were already vacant, reclaimed by the Commission from Nextel).⁴² A single licensee that did not participate in the agreement was grandfathered in the initial spectral location for its two licenses in the second set of paired spectrum blocks.⁴³ Accordingly, at this time there are 54 licenses in the 700 MHz Guard Bands.

13. 700 MHz Band Commercial Licenses. There is 80 megahertz of non-Guard Band spectrum in the 700 MHz Band that is designated for commercial use: 698-757, 758-763, 776-787, and 788-793 MHz Bands. With one exception, the Commission adopted criteria for defining two groups of small businesses for purposes of determining their eligibility for bidding credits at auction. These two categories are: (1) “small business,” which is defined as an entity that has attributed average annual gross revenues that do not exceed \$15 million during the preceding three years; and (2) “very small business,” which is defined as an entity with attributed average annual gross revenues that do not exceed \$40 million for the preceding three years.⁴⁴ In Block C of the Lower 700 MHz Band (710-716 MHz and 740-746 MHz), which was licensed on the basis of 734 Cellular Market Areas, the Commission adopted a third criterion for determining eligibility for bidding credits: an “entrepreneur,” which is defined as an entity

³⁶ See Service Rules for the 746-764 MHz Bands, and Revisions to Part 27 of the Commission’s Rules, Second Report and Order, 15 FCC Rcd 5299 (2000).

³⁷ *Id.* at 5343 ¶ 108.

³⁸ *Id.*

³⁹ *Id.* At 5343 ¶ 108 n.246 (for the 746-764 MHz and 776-704 MHz bands, the Commission is exempt from 15 U.S.C. § 632, which requires Federal agencies to obtain Small Business Administration approval before adopting small business size standards).

⁴⁰ See “700 MHz Guard Bands Auction Closes: Winning Bidders Announced,” Public Notice, 15 FCC Rcd 18026 (2000).

⁴¹ See “700 MHz Guard Bands Auctions Closes: Winning Bidders Announced,” Public Notice, 16 FCC Rcd 4590 (WTB 2001).

⁴² See In the Matter of Service Rules for the 698-746, 747-762 and 777-792 MHz Bands, WT Docket 06-150, Second Report and Order, 22 FCC Rcd 15289, 15339-15344 ¶¶ 118-134 (2007) (700 MHz Second Report and Order).

⁴³ *Id.*

that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁴⁵ The SBA has approved these small size standards.⁴⁶

14. An auction of 740 licenses for Blocks C (710-716 MHz and 740-746 MHz) and D (716-722 MHz) of the Lower 700 MHz Band commenced on August 27, 2002, and closed on September 18, 2002. Of the 740 licenses available for auction, 484 licenses were sold to 102 winning bidders. Seventy-two of the winning bidders claimed small business, very small business, or entrepreneur status and won a total of 329 licenses.⁴⁷ A second auction commenced on May 28, 2003, and closed on June 13, 2003, and included 256 licenses: five EAG licenses and 251 CMA licenses.⁴⁸ Seventeen winning bidders claimed small or very small business status and won 60 licenses, and nine winning bidders claimed entrepreneur status and won 154 licenses.⁴⁹

15. The remaining 62 megahertz of commercial spectrum is currently scheduled for auction on January 24, 2008. As explained above, bidding credits for all of these licenses will be available to “small businesses” and “very small businesses.”

16. Advanced Wireless Services. In the *AWS-1 Report and Order*, the Commission adopted rules that affect applicants who wish to provide service in the 1710-1755 MHz and 2110-2155 MHz bands.⁵⁰ The Commission did not know precisely the type of service that a licensee in these bands might seek to provide. Nonetheless, the Commission anticipated that the services that will be deployed in these bands may have capital requirements comparable to those in the broadband Personal Communications Service (PCS), and that the licensees in these bands will be presented with issues and costs similar to those presented to broadband PCS licensees. Further, at the time the broadband PCS service was established, it was similarly anticipated that it would facilitate the introduction of a new generation of service. Therefore, the *AWS-1 Report and Order* adopts the same small business size definition that the Commission adopted for the broadband PCS service and that the SBA approved.⁵¹ In particular, the *AWS-1 Report and Order* defines a “small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$40 million, and a “very small business” as an entity with average annual gross revenues for the preceding three years not exceeding \$15 million. The *AWS-1 Report and Order* also provides small businesses with a bidding credit of 15 percent and very small businesses with a bidding credit of 25 percent.

17. Common Carrier Paging. As noted, the SBA has developed a small business size standard for wireless firms within the broad economic census category of “Wireless Telecommunications Carriers

⁴⁴ See Auction of 700 MHz Band Licenses Scheduled for January 24, 2008, AU Docket No. 07-157, Notice and Filing Requirements, Minimum Opening Bids, Reserve Prices, Upfront Payments, and Other Procedures for Auctions 73 and 76, DA 07-4171 at ¶ 70 (WTB rel. Oct. 5, 2007); Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59), Report and Order, 17 FCC Rcd 1022, 1087-88 (2002).

⁴⁵ *Id.* at 1088.

⁴⁶ See Letter to Thomas Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission, from Aida Alvarez, Administrator, Small Business Administration, dated August 10, 1999.

⁴⁷ See “Lower 700 MHz Band Auction Closes,” Public Notice, 17 FCC Rcd 17272 (WTB 2002).

⁴⁸ See “Lower 700 MHz Band Auction Closes,” Public Notice, 18 FCC Rcd 11873 (WTB 2003).

⁴⁹ *Id.*

⁵⁰ Service Rules for Advanced Wireless Services in the 1.7 GHz and 2.1 GHz Bands, WT Docket No. 02-353, Report and Order, 18 FCC Rcd 25162 (2003) (AWS-1 Report and Order).

⁵¹ See Implementation of section 309(j) of the Communications Act -- Competitive Bidding, Third Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 10 FCC Rcd 175, 196 (1995); Implementation of section 309(j) of the Communications Act -- Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5581-5584 (1995); 47 C.F.R. §§ 24.320(b) and 24.720(b).

(except Satellite).⁵² Under this category, the SBA deems a business to be small if it has 1,500 or fewer employees. Since 2007, the SBA has recognized wireless firms within this new, broad, economic census category.⁵³ Prior to that time, the SBA had developed a small business size standard for wireless firms within the now-superseded census categories of “Paging” and “Cellular and Other Wireless Telecommunications.”⁵⁴ Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, we will estimate small business prevalence using the prior categories and associated data. For the first category of Paging, data for 2002 show that there were 807 firms that operated for the entire year.⁵⁵ Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more.⁵⁶ For the second category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year.⁵⁷ Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more.⁵⁸ Thus, using the prior categories and the available data, we estimate that the majority of wireless firms can be considered small. Thus, under this category, the majority of firms can be considered small.

18. In the Paging *Third Report and Order*, we developed a small business size standard for “small businesses” and “very small businesses” for purposes of determining their eligibility for special provisions such as bidding credits and installment payments.⁵⁹ A “small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding \$15 million for the preceding three years. Additionally, a “very small business” is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.⁶⁰ The SBA has approved these small business size standards.⁶¹ An auction of Metropolitan Economic Area licenses commenced on February 24, 2000, and closed on March 2, 2000.⁶² Of the 985 licenses auctioned, 440 were sold. Fifty-seven companies claiming small business status won. Also, according to Commission data, 365 carriers reported that they were engaged in the provision of

⁵² 13 C.F.R. § 121.201, NAICS code 517211.

⁵³ 13 C.F.R. § 121.201, NAICS code 517210.

⁵⁴ 13 C.F.R. § 121.201, NAICS codes 517211, 517210.

⁵⁵ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517211 (issued Nov. 2005).

⁵⁶ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

⁵⁷ U.S. Census Bureau, 2002 Economic Census, Subject Series: Information, “Establishment and Firm Size (Including Legal Form of Organization,” Table 5, NAICS code 517212 (issued Nov. 2005).

⁵⁸ *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is for firms with “1000 employees or more.”

⁵⁹ Amendment of Part 90 of the Commission’s Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service, PR Docket No. 89-552, Third Report and Order and Fifth Notice of Proposed Rulemaking, 12 FCC Rcd 10943, 11068-70, ¶¶s. 291-295, 62 FR 16004 (Apr. 3, 1997).

⁶⁰ See Letter to Amy Zoslov, Chief, Auctions and Industry Analysis Division, Wireless Telecommunications Bureau, FCC, from A. Alvarez, Administrator, SBA (Dec. 2, 1998).

⁶¹ Revision of Part 22 and Part 90 of the Commission’s Rules to Facilitate Future Development of Paging Systems, Memorandum Opinion and Order on Reconsideration and Third Report and Order, 14 FCC Rcd 10030, ¶¶s. 98-107 (1999).

⁶² *Id.* at 10085, ¶. 98.

paging and messaging services.⁶³ Of those, we estimate that 360 are small, under the SBA-approved small business size standard.⁶⁴

19. Wireless Communications Service. This service can be used for fixed, mobile, radiolocation, and digital audio broadcasting satellite uses. The Commission established small business size standards for the wireless communications services (WCS) auction.⁶⁵ A “small business” is an entity with average gross revenues of \$40 million for each of the three preceding years, and a “very small business” is an entity with average gross revenues of \$15 million for each of the three preceding years. The SBA has approved these small business size standards.⁶⁶ The Commission auctioned geographic area licenses in the WCS service. In the auction, there were seven winning bidders that qualified as “very small business” entities, and one that qualified as a “small business” entity.

20. Wireless Communications Equipment Manufacturers. While these entities are merely indirectly affected by our action, we are describing them to achieve a fuller record. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.” The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.⁶⁷ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year. Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999. Thus, under this size standard, the majority of firms can be considered small.⁶⁸

21. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: “This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment.”⁶⁹ The SBA has developed a small business size standard for Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, which is: all such firms having 750 or fewer employees.⁷⁰ According to Census Bureau data for 2002, there were a total of 1,041 establishments in this category that operated for the entire year.⁷¹

⁶³ FCC Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3., page 5-5 (Feb. 2007). This source uses data that are current as of October 20, 2005.

⁶⁴ *Id.*

⁶⁵ Public Notice, “Auction of Wireless Communications Services, Auction Notes and Filing Requirements for 128 WCS Licenses Scheduled for April 15, 1997,” DA 97-386, Feb. 21, 1997.

⁶⁶ SBA Dec. 2, 1998 Letter.

⁶⁷ NAICS code 334220.

⁶⁸ NAICS code 11210.

⁶⁹ U.S. Census Bureau, 2002 NAICS Definitions, “334220 Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing”; <http://www.census.gov/epcd/naics02/def/NDEF334.HTM#N3342>.

⁷⁰ 13 C.F.R. § 121.201, NAICS code 334220.

⁷¹ U.S. Census Bureau, American FactFinder, 2002 Economic Census, Industry Series, Industry Statistics by Employment Size, NAICS code 334220 (released May 26, 2005); <http://factfinder.census.gov>. The number of “establishments” is a less helpful indicator of small business prevalence in this context than would be the number of “firms” or “companies,” because the latter take into account the concept of common ownership or control. Any

Of this total, 1,010 had employment of under 500, and an additional 13 had employment of 500 to 999.⁷² Thus, under this size standard, the majority of firms can be considered small.

22. **Software Publishers.** While these entities are merely indirectly affected by our action, we are describing them to achieve a fuller record. These companies may design, develop or publish software and may provide other support services to software purchasers, such as providing documentation or assisting in installation. The companies may also design software to meet the needs of specific users. The SBA has developed a small business size standard of \$23 million or less in average annual receipts for the category of Software Publishers. For Software Publishers, Census Bureau data for 2002 indicate that there were 6,155 firms in the category that operated for the entire year. Of these, 7,633 had annual receipts of under \$10 million, and an additional 403 firms had receipts of between \$10 million and \$24,999,999. For providers of Custom Computer Programming Services, the Census Bureau data indicate that there were 32,269 firms that operated for the entire year. Of these, 31,416 had annual receipts of under \$10 million, and an additional 565 firms had receipts of between \$10 million and \$24,999,999. Consequently, we estimate that the majority of the firms in this category are small entities that may be affected by our action.

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

23. This Report and Order may contain new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. If the Commission determines that the Report and Order contains collection subject to the PRA, it will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA at an appropriate time. At that time, OMB, the general public, and other Federal agencies will be invited to comment on the new or modified information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.

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

24. The RFA requires an agency to describe any significant alternatives that it has considered in developing its approach, which may include the following four alternatives (among others): “(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities; (3) the use of performance rather than design standards; and (4) an exemption from coverage of the rule, or any part thereof, for such small entities.”⁷³

25. As noted in paragraph 2 above, this CMAS Third Report and Order deals only with the WARN Act section 602(b) requirement that the Commission adopt rules necessary to allow any CMS licensee to transmit emergency alerts to its subscribers; to require that CMS providers that elect, in whole or in part, not to transmit emergency alerts, provide clear and conspicuous notice at the point of sale of any CMS devices that it will not transmit such alerts via that device; and to require CMS providers that

single physical location for an entity is an establishment, even though that location may be owned by a different establishment. Thus, the numbers given may reflect inflated numbers of businesses in this category, including the numbers of small businesses. In this category, the Census breaks-out data for firms or companies only to give the total number of such entities for 2002, which was 929.

⁷² *Id.* An additional 18 establishments had employment of 1,000 or more.

⁷³ 5 U.S.C. § 603(c)(1) – (c)(4).

elect not to transmit emergency alerts, to notify their existing subscribers of their election. The entities affected by this order were largely the members of the CMSAAC. In its formation of the CMSAAC, the Commission made sure to include representatives of small businesses among the advisory committee members. Also, as we indicate by our treatment of the comments of Interstate Wireless in paragraph 4 above, the requirements and standards on which the Commission sought comment already contain concerns raised by small businesses. The WARN ACT NPRM also sought comment on a number of alternatives to the recommendations of the CMSAAC, such as the Digital EAS and FM sub-carrier based alerts.⁷⁴ In its consideration of these and other alternatives the CMSAAC recommendations, the Commission has attempted to impose minimal regulation on small entities to the extent consistent with our goal of advancing our public safety mission by adopting requirements and standards for a CMAS that CMS providers would elect to provide alerts and warnings to their customers. The affected CMS providers have overwhelmingly expressed their willingness to cooperate in the formation of the CMAS, and we anticipate that the standards and requirements that we adopt in this order will encourage CMS providers to work with other industry and government entities to complete and participate in the CMAS.

APPENDIX B

List of Commenters

Comments in PS Docket No. 07-287

Commenters

3G Americas
 Acision B.V. and One2Many B.V.
 Alliance for Telecommunications Industry Solutions
 Alltel Communications, LLC
 American Association of Paging Carriers
 America's Emergency Network
 Association of Public Television Stations
 AT&T Inc.
 Audemat-Aztec Inc.
 California Public Utilities Commission
 CellCast Technologies, LLC
 Cellular Emergency Alert Service Association – US Chapter
 CTIA – The Wireless Association
 DataFM, Inc.

Abbreviation

3G Americas
 Acision
 ATIS
 Alltel
 AAPC
 AEN
 APTS
 AT&T
 Audemat-Aztec
 CAPUC
 CellCast
 CEASA-US
 CTIA
 DataFM

⁷⁴ See *CMAS NPRM*, 22 FCC Rcd 21975, at ¶ 39.

Digital Alert Systems, LLC	DAS
Ericsson Inc.	Ericsson
Florida Association of Broadcasters	FAB
Global Security Systems, LLC	Global
Interstate Wireless Inc.	Interstate Wireless
Jacob Westfall	Westfall
Kendall Post	Post
Max Mayfield	Mayfield
MetroPCS Communications, Inc.	MetroPCS
Mississippi Association of Broadcasters	Mississippi Broadcasters
Mississippi Emergency Management Agency	MS-EMA
Mississippi Office of Homeland Security	MS-OHS
Motorola, Inc.	Motorola
National Association of Broadcasters	NAB
National Emergency Numbering Association	NENA
Nokia Inc. and Nokia Siemens Networks US LLC	Nokia
Pontotoc County Emergency Management Agency	Pontotoc EMA
Purple Tree Technologies	PTT
Rehabilitation Engineering Research Center for Wireless Technologies	Wireless RERC
Rural Cellular Association	RCA
Sheriff, Jefferson Davis Parish, Louisiana	Sheriff
SouthernLINC Wireless	SouthernLINC
Sprint Nextel Corporation	Sprint Nextel
SquareLoop, Inc.	SquareLoop
Telecommunications Industry Association	TIA
T-Mobile USA, Inc.	T-Mobile
Verizon Wireless	Verizon

Reply Commenters

Airadigm Communications - Einstein Wireless
Alltel Communications, LLC
American Association of Paging Carriers
Association of Public Television Stations
AT&T Inc.
CellCast Technologies, LLC
CTIA – The Wireless Association
Cox Radio, Inc.
DataFM, Inc.
FEMA, Director, Office of Nat'l Security Coordination
Global Security Systems, LLC
Interstate Wireless Inc.
King County, Washington
Motorola, Inc.
National Telecommunications Cooperative Association
NTI Group, Inc.
OnStar Corporation
Rural Cellular Association
SquareLoop, Inc.
T-Mobile USA, Inc.

Abbreviation

Airadigm
Alltel
AAPC
APTS
AT&T
CellCast
CTIA
Cox
DataFM
FEMA
Global
Interstate Wireless
King County
Motorola
NTCA
NTI
OnStar
RCA
SquareLoop
T-Mobile

Verizon Wireless

Verizon

Ex Parte Commenters

Abbreviation

American Association of Paging Carriers

AAPC

AT&T Inc.

AT&T

CTIA – The Wireless Association

CTIA

DataFM, Inc.

DataFM

Global Security Systems, LLC

Global

National Telecommunications Cooperative Association

NTCA

OnStar Corporation

OnStar

Rural Cellular Association

RCA

APPENDIX C**Final Rules****Subpart A—General Information**

Section 10.10 is amended to read as follows:

§ 10.10 Definitions

(x) *“C” Interface*. The interface between the Alert Gateway and CMS provider Gateway.

(x) *CMS provider Gateway*. The mechanism(s) that supports the “C” interface and associated protocols between the Alert Gateway and the CMS provider Gateway, and which performs the various functions associated with the authentication, management and dissemination of CMAS Alert Messages received from the Alert Gateway.

(x) *CMS provider infrastructure*. The mechanism(s) that distribute received CMAS Alert Messages throughout the CMS provider’s network, including cell site/paging transceivers and perform functions associated with authentication of interactions with the Mobile Device.

(x) *Mobile Devices*. The subscriber equipment generally offered by CMS providers that supports the distribution of CMAS Alert Messages.

Section 10.11 is amended to read as follows:

§ 10.11 CMAS Implementation Timeline

Notwithstanding anything in this part to the contrary, a participating CMS provider shall begin an 18 month period of development, testing and deployment of the CMAS in a manner consistent with the rules in this part no later than 10 months from the date that the Federal Alert Aggregator and Alert Gateway makes the Government Interface Design specifications available.

Add a new Subpart B to read as follows:

Subpart B—Election to Participate in Commercial Mobile Alert System**§ 10.210 CMAS Participation Election Procedures**

(a) A CMS provider that elects to transmit CMAS Alert Messages, in part or in whole, shall electronically file with the Commission a letter attesting that the Provider:

(1) agrees to transmit such alerts in a manner consistent with the technical standards, protocols, procedures, and other technical requirements implemented by the Commission; and

(2) commits to support the development and deployment of technology for the “C” interface, the CMS provider Gateway, the CMS provider infrastructure, and mobile devices with CMAS functionality and support of the CMS provider selected technology.

(b) A CMS provider that elects not to transmit CMAS Alert Messages shall file electronically with the Commission a letter attesting to that fact;

(c) CMS providers shall file their election electronically to the docket;

(d) CMS providers shall submit their letter within 30 days after the release of the Third Report and Order in PS Docket No. 08-146.

§ 10.220 Withdrawal of Election to Participate in CMAS

A CMS provider that elects to transmit CMAS Alert Messages, in part or in whole, may withdraw its election without regulatory penalty or forfeiture if it notifies all affected subscribers as well as the Federal Communications Commission at least sixty (60) days prior to the withdrawal of its election. In the event that a carrier withdraws from its election to transmit CMAS Alert Messages, the carrier must notify each affected subscriber individually in clear and conspicuous language citing the statute. Such notice must promptly inform the customer that he or she no longer could expect to receive alerts and of his or her right to terminate service as a result, without penalty or early termination fee. Such notice must facilitate the ability of a customer to automatically respond and immediately discontinue service.

§ 10.230 New CMS Providers Participation in CMAS

CMS providers who initiate service at a date after the election procedure provided for in §10.210(d) and who elect to provide CMAS Alert Messages, in part or in whole, shall file electronically their election to transmit in the manner and with the attestations described in § 10.210(a).

§ 10.240 Notification to New Subscribers of Non-Participation in CMAS

- (a) A CMS provider that elects not to transmit CMAS Alert Messages, in part or in whole, shall provide clear and conspicuous notice, which takes into account the needs of persons with disabilities, to new subscribers of its non-election or partial election to provide Alert messages at the point-of-sale.
- (b) The point-of-sale includes stores, kiosks, third party reseller locations, web sites (proprietary or third party), and any other venue through which the CMS provider's devices and services are marketed or sold.
- (c) CMS providers electing to transmit alerts "in part" shall use the following notification:

NOTICE REGARDING TRANSMISSION OF WIRELESS EMERGENCY ALERTS (Commercial Mobile Alert Service)

[[CMS provider]] has chosen to offer wireless emergency alerts within portions of its service area, as defined by the terms and conditions of its service agreement, on wireless emergency alert capable devices. There is no additional charge for these wireless emergency alerts.

Wireless emergency alerts may not be available on all devices or in the entire service area, or if a subscriber is outside of the [CMS provider] service area. For details on the availability of this service and wireless emergency alert capable devices, please ask a sales representative, or go to [[CMS provider's URL]].

Notice required by FCC Rule 47 C.F.R. § 10.240 (Commercial Mobile Alert Service).

- (d) CMS providers electing in whole not to transmit alerts shall use the following notification language:

NOTICE TO NEW AND EXISTING SUBSCRIBERS REGARDING TRANSMISSION OF WIRELESS EMERGENCY ALERTS (Commercial Mobile Alert Service)

[[CMS provider]] presently does not transmit wireless emergency alerts.

Notice required by FCC Rule 47 C.F.R. § 10.240 (Commercial Mobile Alert Service).

§ 10.250 Notification to Existing Subscribers of Non-Participation in CMAS

(a) A CMS provider that elects not to transmit CMAS Alert Messages, in part or in whole, shall provide clear and conspicuous notice, which takes into account the needs of persons with disabilities, to existing subscribers of its non-election or partial election to provide Alert messages by means of an announcement amending the existing subscriber's service agreement.

(b) For purposes of this section, a CMS provider that elects not to transmit CMAS Alert Messages, in part or in whole, shall use the notification language set forth in § 10.240 (c) or (d) respectively, except that the last line of the notice shall reference FCC Rule 47 C.F.R. § 10.250, rather than FCC Rule 47 C.F.R. § 10.240.

(c) In the case of prepaid customers, if a mailing address is available, the CMS provider shall provide the required notification via U.S. mail. If no mailing address is available, the CMS provider shall use any reasonable method at its disposal to alert the customer to a change in the terms and conditions of service and directing the subscriber to voice-based notification or to a website providing the required notification.

§ 10.260 Timing of Subscriber Notification

The provider notification requirements set forth in §§ 10.240 and 10.250 will become effective sixty (60) days following an announcement by the Commission that the Alert Aggregator/Gateway system is operational and capable of delivering emergency alerts to participating CMS providers.

§ 10.270 Subscribers' Right to Terminate Subscription

If a CMS provider that has elected to provide CMAS Alert Messages in whole or in part thereafter chooses to cease providing such alerts, either in whole or in part, its subscribers may terminate their subscription without penalty or early termination fee.

§ 10.280 Subscribers' Right to Opt-Out of CMAS Notifications

(a) CMS providers may provide their subscribers with the option to opt out of both, or either, the "Child Abduction Emergency/AMBER Alert" and "Imminent Threat Alert" classes of Alert Messages.

(b) CMS providers shall provide their subscribers with a clear indication of what each option means, and provide examples of the types of messages the customer may not receive as a result of opting-out.