

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

In the Matter of)
)
 Request for Waiver of Thumb Cellular LLC) CC Docket No. 94-102
)

ORDER

Adopted: February 21, 2006

Released: February 22, 2006

By the Commission:

I. INTRODUCTION

1. In this *Order*, we address a request for relief from the Commission’s wireless Enhanced 911 (E911) Phase II requirements filed by Thumb Cellular LLC (Thumb),¹ a Tier III wireless service provider.² Specifically, Thumb seeks a seven-month extension of time to comply with the requirement in Section 20.18(g)(1)(v) of the Commission’s Rules that carriers employing a handset-based E911 Phase II location technology must achieve 95% penetration, among their subscribers, of location-capable handsets by December 31, 2005.³

2. Timely compliance with the Commission’s wireless E911 rules ensures that the important public safety needs of wireless callers requiring emergency assistance are met as quickly as possible. In analyzing requests for extensions of the Phase II deadlines, the Commission has afforded relief only when the requesting carrier has met the Commission’s standard for waiver of the Commission’s rules.⁴ Where carriers have met the standard, the relief granted has required compliance with the Commission’s rules and policies within the shortest practicable time.⁵ We are also mindful of Congress’ directive in the ENHANCE 911 Act to grant waivers for Tier III carriers of the 95% penetration benchmark if “strict enforcement . . . would result in consumers having decreased access to emergency services.”⁶

¹ See Request for Waiver of the December 31, 2005 95% GPS Subscriber Penetration Requirement, CC Docket No. 94-102, filed Nov. 14, 2005 (Thumb Request). Thumb submitted its request using the Commission’s Electronic Comment Filing System on Friday, Nov. 11, 2005, which was a Federal holiday; therefore, the request was officially received on Monday, Nov. 14, 2005.

² Tier III carriers are non-nationwide Commercial Mobile Radio Service (CMRS) providers with no more than 500,000 subscribers as of the end of 2001. See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Phase II Compliance Deadlines for Non-Nationwide Carriers, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841, 14848 ¶ 22 (2002) (*Non-Nationwide Carriers Order*).

³ See 47 C.F.R. § 20.18(g)(1)(v).

⁴ See Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Phase II Compliance Deadlines for Tier III Carriers, CC Docket No. 94-102, *Order*, 20 FCC Rcd 7709, 7709-10 ¶ 1 (2005) (*Tier III Carriers Order*).

⁵ See *id.*

⁶ National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004). See also *infra* ¶ 8.

3. Pursuant to the ENHANCE 911 Act, and based on the record before us, we find that relief from the 95% penetration requirement is warranted subject to certain conditions described below. Specifically, we grant Thumb an extension until July 31, 2006, to achieve 95% penetration, among its subscribers, of location-capable handsets.⁷

II. BACKGROUND

A. Phase II Requirements

4. The Commission's E911 Phase II rules require wireless licensees to provide Public Safety Answering Points (PSAPs) with Automatic Location Identification (ALI) information for 911 calls.⁸ Licensees can provide ALI information by deploying location information technology in their networks (a network-based solution),⁹ or Global Positioning System (GPS) or other location technology in subscribers' handsets (a handset-based solution).¹⁰ The Commission's rules also establish phased-in schedules for carriers to deploy any necessary network components and begin providing Phase II service.¹¹ However, before a wireless licensee's obligation to provide E911 service is triggered, a PSAP must make a valid request for E911 service, *i.e.*, the PSAP must be capable of receiving and utilizing the data elements associated with the service and must have a mechanism in place for recovering its costs.¹²

5. In addition to deploying the network facilities necessary to deliver location information, wireless licensees that elect to employ a handset-based solution must meet the handset deployment benchmarks set forth in Section 20.18(g)(1) of the Commission's Rules, independent of any PSAP request for Phase II service.¹³ After ensuring that 100% of all new digital handsets activated are location-capable, licensees must achieve 95% penetration among their subscribers of location-capable handsets no later than December 31, 2005.¹⁴

B. Waiver Standards

6. The Commission has recognized that smaller carriers may face "extraordinary circumstances" in meeting one or more of the deadlines for Phase II deployment.¹⁵ The Commission

⁷ Because we find that relief from the 95% handset penetration requirement is warranted pursuant to the ENHANCE 911 Act, we need not determine whether Thumb has met the Commission's waiver standard.

⁸ See 47 C.F.R. § 20.18(e).

⁹ Network-based location solutions employ equipment and/or software added to wireless carrier networks to calculate and report the location of handsets dialing 911. These solutions do not require changes or special hardware or software in wireless handsets. See 47 C.F.R. § 20.3, *Network-based Location Technology*.

¹⁰ Handset-based location solutions employ special location-determining hardware and/or software in wireless handsets, often in addition to network upgrades, to identify and report the location of handsets calling 911. See 47 C.F.R. § 20.3, *Location-Capable Handsets*.

¹¹ See 47 C.F.R. §§ 20.18(f), (g)(2).

¹² See 47 C.F.R. § 20.18(j)(1).

¹³ See 47 C.F.R. § 20.18(g)(1).

¹⁴ See 47 C.F.R. § 20.18(g)(1)(v).

¹⁵ See *Tier III Carriers Order*, 20 FCC Rcd at 7714 ¶ 9; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14846 ¶ 20 ("wireless carriers with relatively small customer bases are at a disadvantage as compared with the large nationwide carriers in acquiring location technologies, network components, and handsets needed to comply with our regulations"); Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers, CC Docket No. 94-102, *Order to Stay*, 18 FCC Rcd 20987, 20994 ¶ 17 (2003) (*Order to Stay*) ("under certain conditions, small carriers may face

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previously has stated its expectations for requests for waiver of the E911 Phase II requirements. Waiver requests must be “specific, focused and limited in scope, and with a clear path to full compliance. Further, carriers should undertake concrete steps necessary to come as close as possible to full compliance . . . and should document their efforts aimed at compliance in support of any waiver requests.”¹⁶ To the extent that a carrier bases its request for relief on delays that were beyond its control, it must submit specific evidence substantiating the claim, such as documentation of the carrier’s good faith efforts to meet with outside sources whose equipment or services were necessary to meet the Commission’s benchmarks.¹⁷ When carriers rely on a claim of financial hardship as grounds for a waiver, they must provide sufficient and specific factual information.¹⁸ A carrier’s justification for a waiver on extraordinary financial hardship grounds may be strengthened by documentation demonstrating that it has used its best efforts to obtain financing for the required upgrades from available Federal, state, or local funding sources.¹⁹ The Commission also noted, in considering earlier requests for relief by Tier III carriers, that it

expects all carriers seeking relief to work with the state and local E911 coordinators and with all affected PSAPs in their service area, so that community expectations are consistent with a carrier’s projected compliance deadlines. To the extent that a carrier can provide supporting evidence from the PSAPs or state or local E911 coordinators with whom the carrier is assiduously working to provide E911 services, this would provide evidence of its good faith in requesting relief.²⁰

7. In applying the above criteria, the Commission has in the past recognized that special circumstances particular to smaller carriers may warrant limited relief from E911 requirements. For example, the Commission has noted that some Tier III carriers face unique hurdles such as significant financial constraints, small and/or widely dispersed customer bases, and large service areas that are isolated, rural or characterized by difficult terrain (such as dense forest or mountains), along with a corresponding reduced customer willingness to forgo existing handsets that may provide expanded range, but are not location-capable.²¹ In evaluating requests for waiver from Tier III carriers, the Commission, therefore, has considered challenges unique to smaller carriers facing these circumstances.

8. Finally, distinct from the Commission’s rules and established precedent regarding waivers of the E911 requirements, in December 2004 Congress enacted the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (ENHANCE 911 Act).²² The ENHANCE 911 Act, *inter alia*, directs the Commission to act on any petition filed by a qualified Tier III carrier requesting a

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extraordinary circumstances in meeting one or more of the deadlines for Phase II deployment and [] relief may therefore be warranted”).

¹⁶ Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442, 17458 ¶ 44 (2000) (*Fourth MO&O*).

¹⁷ *See Order to Stay*, 18 FCC Rcd at 20996-97 ¶ 25.

¹⁸ *See id.* at 20997 ¶ 29. We note that the Commission generally is disinclined to find that financial hardship alone is a sufficient reason for an extension of the E911 implementation deadlines. *Id.*

¹⁹ *See id.*

²⁰ *Order to Stay*, 18 FCC Rcd at 20997 ¶ 28.

²¹ *See Tier III Carriers Order*, 20 FCC Rcd at 7718, 7719, 7726, 7732, 7736-7737 ¶¶ 17, 19, 37, 57, 70.

²² National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004).

waiver of Section 20.18(g)(1)(v) within 100 days of receipt, and grant such request for waiver if “strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services.”²³

9. Pursuant to the ENHANCE 911 Act, and based on the record before us, we find that some relief from the 95% penetration requirement is warranted subject to certain conditions described below. We therefore grant Thumb an extension until July 31, 2006, to achieve 95% penetration, among its subscribers, of location-capable handsets.

C. Request for Waiver

10. Thumb is a Tier III carrier that is licensed to provide cellular service in one rural service area in Michigan and has deployed a handset-based E911 Phase II solution.²⁴ Thumb states that, as of October 31, 2005, 90.2% of its subscriber base possessed location-capable handsets, and because the rate of conversion among its subscribers is currently 0.3% per month, it did not expect to be able to meet the December 31, 2005 deadline by which handset-based carriers must achieve 95% penetration, among their subscribers, of location-capable handsets.²⁵ Thumb indicates that some of its subscribers who are resisting conversion are “pre-paid” subscribers who obtained their phones for emergency purposes only and who rarely use them.²⁶ Another group of subscribers with non-compliant handsets “will not change phones because they do not want to give up the range they have with the older analog phones.”²⁷ According to Thumb, the last 10% of its subscribers with non-compliant handsets “appear very reluctant to change to the new technology.”²⁸ Thumb adds that it has tried to encourage handset upgrades by offering free phones with contracts, termination of older contracts without penalty, new calling features requiring a location-capable phone, handsets at a range of price points, and short- and long-term subscriber contracts.²⁹ In addition, Thumb states that granting the relief from the handset penetration requirement it requests would not frustrate the Commission’s E911 objectives because Thumb has complied with various PSAP requests to provide Phase II service in a timely manner.³⁰ Because Phase II service is available in its market and because the only handsets it distributes are location-capable, Thumb reasons that granting the waiver will not delay any PSAP’s provision and use of E911 location services and will not delay any subscriber who chooses to subscribe to a service which provides the location function.³¹ As a result, Thumb asserts that grant of the limited waiver it requests would serve the public interest.³²

²³ *Id.* at § 107(a), 118 Stat. 3986, 3991. The ENHANCE 911 Act defines a “qualified Tier III carrier” as “a provider of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)) that had 500,000 or fewer subscribers as of December 31, 2001.” *Id.* at § 107(b), 118 Stat. 3986, 3991.

²⁴ *See* Thumb Request at 1.

²⁵ *See id.* at 1-2.

²⁶ *Id.* at 2.

²⁷ *Id.*

²⁸ *Id.* at 2-3.

²⁹ *Id.* at 2.

³⁰ *Id.* at 3.

³¹ *Id.*

³² *Id.* at 3-4.

III. DISCUSSION

11. We believe that it was critical for all handset-based carriers to meet the final implementation deadline of December 31, 2005 for 95% location-capable handset penetration, if at all possible, in order to allow all stakeholders (including carriers, technology vendors, public safety entities, and consumers) to have greater certainty about when Phase II will be implemented and ensure that Phase II is fully implemented as quickly as possible.³³ Absent Phase II location data, emergency call takers and responders must expend critical time and resources questioning wireless 911 callers to determine their location, and/or searching for those callers when the callers cannot provide this information. At the same time, however, the Commission has recognized that requests for waiver of E911 requirements may be justified, but only if appropriately limited, properly supported, and consistent with established waiver standards.³⁴ Accordingly, when addressing requests for waiver of the 95% handset penetration deadline, we remain mindful that delay in achieving the required handset penetration level could impair the delivery of safety-of-life services to the public. We must also remain mindful, however, of Congress' directive in the ENHANCE 911 Act to grant Tier III waivers if strict enforcement would result in consumers having decreased access to emergency services.³⁵

12. Consistent with that directive, we believe that, pursuant to the ENHANCE 911 Act, a limited grant of the requested waiver of the December 31, 2005 benchmark is warranted, subject to certain conditions and reporting requirements to permit effective monitoring of Thumb's progress towards full compliance with the Commission's location-capable handset penetration requirement.³⁶ Specifically, we find that certain of Thumb's customers using analog phones affording extended range would likely find it more difficult, and, at times, impossible to contact a PSAP in portions of its service area if those customers were forced to convert to digital handsets. It thus appears likely that strict enforcement of the December 31, 2005 deadline under these circumstances would impair the ability of certain 911 callers to reach emergency assistance, and "would result in consumers having decreased access to emergency services," within the meaning of the ENHANCE 911 Act, at least in some cases.³⁷ We therefore conclude that relief from the December 31, 2005 deadline is warranted pursuant to the ENHANCE 911 Act. We also note that Thumb's request is of limited duration. Accordingly, we grant the requested extension subject to certain conditions and reporting requirements so that the Commission can effectively monitor Thumb's progress in meeting the 95% handset penetration benchmark.³⁸ We emphasize that, in granting the full extension requested, we expect Thumb to achieve 95% penetration, among its subscribers, of location-capable handsets within the extended timeframe granted herein.

³³ See *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14853 ¶ 38.

³⁴ See *Tier III Carriers Order*, 20 FCC Rcd at 7709-10 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-43 ¶ 6.

³⁵ See *supra* ¶ 8.

³⁶ Although Thumb has not expressly argued that the requested relief should be granted pursuant to the ENHANCE 911 Act, we find it appropriate to apply the ENHANCE 911 Act standard *sua sponte*. The ENHANCE 911 Act does not require a qualified Tier III carrier to specifically invoke the ENHANCE 911 Act in order to obtain relief under the Act from the 95% penetration requirement. Rather, the Act states that the Commission shall grant relief from the 95% penetration requirement if "[the Commission] determines that strict enforcement of that section would result in consumers having decreased access to emergency services." See Pub. L. No. 108-494, § 107(a), 118 Stat. 3986, 3991.

³⁷ Pub. L. No. 108-494, § 107(a), 118 Stat. 3986, 3991.

³⁸ We note that the Commission has not received any objections from the public safety community specific to the instant request.

13. *Conditions.* As a condition of the relief granted herein, Thumb has an ongoing obligation, until it achieves a 95% handset penetration rate, among its subscribers, of location-capable handsets, to (1) notify its customers, such as by billing inserts, of the status of PSAP requests for Phase II service, to the effect that by upgrading their handsets they will have the ability to automatically transmit their location information, and (2) actively work with the PSAPs to keep them informed of its progress in achieving higher location-capable handset penetration rates.

14. *Reporting Requirements.* Finally, in order to monitor compliance in accordance with the relief of the December 31, 2005 95% handset penetration requirement granted herein, we will require Thumb to file status reports every February 1, May 1, August 1, and November 1, until August 1, 2007.³⁹ These reports shall include the following information: (1) the number and status of Phase II requests from PSAPs (including those requests it may consider invalid); (2) the dates on which Phase II service has been implemented or will be available to PSAPs served by its network; (3) the status of its coordination efforts with PSAPs for alternative 95% handset penetration dates; (4) its efforts to encourage customers to upgrade to location-capable handsets; (5) the percentage of its customers with location-capable phones; and (6) until it satisfies the 95% penetration rate, detailed information on its progress in achieving compliance and whether it is on schedule to meet the revised deadline. We emphasize that irrespective of the relief we grant in this *Order*, we fully expect Thumb to achieve compliance as quickly as possible.

IV. CONCLUSION

15. For the foregoing reasons and pursuant to the ENHANCE 911 Act, we conclude that Thumb is entitled to a limited extension of the December 31, 2005 requirement that it achieve 95% penetration among its subscribers of location-capable handsets. Specifically, we extend the date that Thumb must achieve 95% penetration until July 31, 2006. We further impose the conditions and reporting requirements described above to ensure that Thumb achieves full compliance with the Commission's E911 requirements.

V. ORDERING CLAUSES

16. IT IS ORDERED, pursuant to the ENHANCE 911 Act, Pub. L. No. 108-494, 118 Stat. 3986 (2004), and Sections 1.3 and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, that the foregoing *Order* IS ADOPTED.

17. IT IS FURTHER ORDERED, that the Request for Waiver of the December 31, 2005 95% GPS Subscriber Penetration Requirement filed by Thumb Cellular LLC IS GRANTED, subject to the conditions and reporting requirements specified herein. The deadline for compliance with Section 20.18(g)(1)(v) will be July 31, 2006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁹ We note that we are requiring Thumb to file status reports beyond the date on which we otherwise require it to achieve 95% penetration, among its subscribers, of location-capable handsets. We believe it is important to continue monitoring the progress of the Petitioner for an additional year following the revised deadline.