

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

In the Matter of)	
)	
Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems)	CC Docket No. 94-102
)	
Request for Waiver by East Kentucky Network, LLC d/b/a Appalachian Wireless)	
)	

ORDER

Adopted: November 2, 2006

Released: November 3, 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 July 27, 2006 by East Kentucky Network, LLC d/b/a Appalachian Wireless (Appalachian),¹ a Tier III wireless service provider.² Specifically, Appalachian seeks a six-month extension of time from its current June 30, 2006 deadline, until December 31, 2006, 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

¹ See Request for Additional Limited Waiver and Extension of the Handset Penetration Deadline of the Commission's Phase II E911 Rules, CC Docket No. 94-102, filed July 27, 2006 (Appalachian Request).

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). The Commission previously granted Appalachian waiver relief from the 95% handset penetration deadline until June 30, 2006. See Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Request for Waiver by North Carolina RSA 3 Cellular Telephone Company d/b/a Carolina West Wireless; Request for Waiver by East Kentucky Network, LLC d/b/a Appalachian Wireless; CC Docket No. 94-102, *Order*, 21 FCC Rcd 883, 887 ¶ 12 (2006) (*Appalachian Waiver Order*).

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, 7709-7710 ¶ 1 (2005) (*Tier III Carriers Order*).

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

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 Appalachian an extension until December 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

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.

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 Appalachian 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).

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 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,

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*) (stating that “under certain conditions, small carriers may face 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 *Id.* at 20997 ¶ 28.

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 waiver of Section 20.18(g)(1)(v) within 100 days of receipt, and to 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

C. Request for Additional Waiver

9. Appalachian is a Tier III carrier that operates a handset-based, CDMA network throughout its service area, while continuing to operate a legacy TDMA/analog network.²⁴ In January 2006, the Commission granted a prior request made by Appalachian for an extension of the 95% location-capable handset penetration deadline until June 30, 2006, pursuant to the ENHANCE 911 Act.²⁵ Appalachian now states, however, that it "has not met its projections of achieving a location-capable handset penetration rate among subscribers of 95% by June 30, 2006."²⁶

10. In support of its request for additional relief, Appalachian asserts that it "has been met with an unpredictable slowdown in the last stages of adoption."²⁷ Specifically, Appalachian reports that its initial rate of increased penetration of location-capable handsets (4.65% per month between April 2004 and March 2005) slowed to 3.7% per month between April 2005 and September 2005, 2% per month between October and December 2005, and about 1% per month during the months of 2006.²⁸ Total penetration at the time of Appalachian's Request stood at about 91.3%.²⁹ According to Appalachian, "[m]any subscribers adamantly insist upon keeping their TDMA and analog phones because the phones are more dependable, operate in a larger range, and are already programmed with favorite phone numbers and customized features."³⁰ Although Appalachian states it "has seen a summer slowdown in new handset sales," it now expects to reach a 95% location-capable handset penetration rate by December 31, 2006.³¹

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).

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 *Appalachian Request* at 2.

²⁵ See *Appalachian Waiver Order*, 21 FCC Rcd at 667 ¶ 12.

²⁶ *Appalachian Request* at 2.

²⁷ See *id.* at 6.

²⁸ See *id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

11. Appalachian also argues that if its present June 30, 2006 deadline is strictly enforced, Appalachian will have to “cease or mitigate analog and/or TDMA operations,” and “coverage will be denied to persons who depend upon outdated communications services in mountainous areas, and who rely upon their legacy TDMA and analog phones for safety,” including persons in “the most isolated and rugged service areas, and on remote farmland.”³² Appalachian adds that “[w]ithout their TDMA and 3-watt analog phones, the customers would be unable to place calls, including calls to 911 for basic and Phase I emergency services.”³³ Appalachian argues that, for these reasons, its request meets the standard for relief under the ENHANCE 911 Act as well as the Commission’s E911 waiver standards.³⁴

III. DISCUSSION

12. We believe that it was critical for all handset-based carriers to have met 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 would be implemented and would have ensured that Phase II would be fully implemented as quickly as possible.³⁵ 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.³⁶ 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.³⁷

13. We are concerned that Appalachian either was unable to accurately forecast location-capable handset penetration among its customers at the time of its original request for relief, fell short in promoting adoption of location-capable handsets, or both. Indeed, the Commission earlier cautioned Appalachian that in granting its original extension request in full, it expected Appalachian to achieve compliance with the 95% penetration requirement within the extended timeframe.³⁸ Nonetheless, consistent with the directive of the ENHANCE 911 Act, we find that certain of Appalachian’s customers using TDMA and analog phones would likely find it more difficult, and, at times, impossible to contact a PSAP in the “most isolated” parts of Appalachian’s service area if those customers were forced to convert to digital CDMA handsets. It thus appears likely that strict enforcement of Appalachian’s current June 30, 2006 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.³⁹ We therefore conclude that relief from the December 31, 2005 deadline is warranted pursuant to the ENHANCE 911 Act. We also note

³² *Id.* at 4.

³³ *Id.*

³⁴ *Id.* at 4-5.

³⁵ See *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14853 ¶ 38.

³⁶ See *Tier III Carriers Order*, 20 FCC Rcd at 7709-7710 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-14843 ¶ 6.

³⁷ See *supra* ¶ 8.

³⁸ See *Appalachian Waiver Order*, 21 FCC Rcd at 887-88 ¶ 12.

³⁹ Pub. L. No. 108-494, § 107(a), 118 Stat. 3986, 3991.

that the additional extension Appalachian seeks remains of limited duration. Accordingly, we grant the requested extension subject to certain conditions and reporting requirements so that the Commission effectively can monitor Appalachian's progress in meeting the 95% handset penetration benchmark.⁴⁰ We emphasize that, in again granting the full extension requested by Appalachian, absent Appalachian undertaking all necessary efforts to ensure timely compliance, Appalachian should not assume that the Commission would act favorably on any future request for relief based on the same grounds.

14. *Conditions.* As a condition of the relief granted herein, Appalachian 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.

15. *Reporting Requirements.* Finally, in order to monitor compliance in accordance with the relief granted herein, we will continue to require Appalachian to file status reports every February 1, May 1, August 1, and November 1, but extend these reporting requirements until December 31, 2007.⁴¹ These reports shall include the following information, as previously required: (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 status 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 Appalachian to achieve compliance as quickly as possible.

IV. CONCLUSION

16. For the foregoing reasons and pursuant to the ENHANCE 911 Act, we conclude that Appalachian 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 by which Appalachian must achieve 95% penetration to December 31, 2006. We further impose the conditions and reporting requirements described above to ensure that Appalachian achieves full compliance with the Commission's E911 requirements.

V. ORDERING CLAUSES

17. 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.

18. IT IS FURTHER ORDERED, that the Request for Additional Limited Waiver and Extension of the Handset Penetration Deadline of the Commission's Phase II E911 Rules by East Kentucky Network, LLC d/b/a Appalachian Wireless IS GRANTED, subject to the conditions and

⁴⁰ We note that the Commission has not received any objections from the public safety community specific to the instant request.

⁴¹ See *Appalachian Waiver Order*, 21 FCC Rcd at 888 ¶ 14. We note that we are requiring Appalachian 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 Appalachian's progress for an additional year following its revised deadline.

reporting requirements specified herein. The deadline for compliance with Section 20.18(g)(1)(v) will be December 31, 2006.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary