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
	)	
T-Mobile USA, Inc. Amended Request	)	
For Limited Modification of E911 Phase II	)	
Implementation Plan	)	

APPLICATION FOR REVIEW

I. Introduction

Pursuant to sections 1.104(b) and 1.115 of the Commission's rules,[1] T-Mobile USA, Inc. ("T-Mobile," formerly VoiceStream Wireless Corporation) requests that the Commission review an order of the Wireless Telecommunications Bureau ("Bureau") [2] summarily dismissing T-Mobile's *Amended Request for Limited Modification of E911 Phase II Implementation Plan*.[3] Because only one portion of the *Amended Request* was addressed, the Commission should reinstate and review the remainder of the request. Further, because the *Amended Request* establishes that the modifications are in the public interest and satisfy the waiver standards articulated in section 1.3 and the *E911 Fourth*

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1 47 C.F.R. §§ 1.104(b), 1.115.

2 *T-Mobile USA, Inc. Amended Request for Limited Modification of E911 Phase II Implementation Plan*, Order, CC Docket No. 94-102, DA 02-3451 (Wireless Telecommunications Bureau, rel. Dec. 13, 2002) ("*Order*").

3 VoiceStream Wireless Corporation Amended Request for Limited Modification of E911 Phase II Implementation Plan, CC Docket No. 94-102 (filed Feb. 28, 2002) ("*Amended Request*").

Memorandum Opinion and Order,[4] the Commission should grant the remaining proposed modifications.[5]

The Bureau's order discusses solely T-Mobile's request for a December 31, 2002 date by which to implement its Phase II E-OTD solution for PSAP requests pending as of June 30, 2002. Although the order acknowledges – in a footnote – that T-Mobile further requested a limited modification of its NSS deployment deadline and its E-OTD handset benchmarks, these requests are neither discussed nor resolved. The factual basis for the Bureau's dismissal of the entire *Amended Request* – that T-Mobile subsequently informed the Commission that it no longer anticipated meeting the proposed date for E-OTD deployment – has no bearing on the other portions of the request. To the contrary, during the year of its pendency, the *Amended Request's* proposed benchmark dates for NSS deployment and E-OTD handset introduction came and went, and T-Mobile successfully met those conditions as proposed.

The Bureau's failure to address two of the three requested modifications clearly is prejudicial procedural error warranting reversal and the Commission's review. A well-established string of cases has explored the scope of analysis and the depth of explanation required of an agency reviewing a waiver request, but it is not debatable that an agency

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4 *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17464 (¶ 67) (2000) ("*E911 Fourth Memorandum Opinion & Order*").

5 In the alternative, the Commission should reinstate the *Amended Request* and remand to the Bureau for further consideration with instructions.

must, somehow, address the request. T-Mobile's *Amended Request* did not receive the "hard look" required by *WAIT Radio*.[6] It received "no look."

II. Background

A. The Existing Waiver

The genesis of T-Mobile's existing waiver, and the *Amended Request for Limited Modification* presently at issue, lies in the T-Mobile's decision to implement a hybrid network-handset solution for Phase II. T-Mobile's implementation plan contains two components. First: the implementation of a network-based NSS solution covering all network users, regardless of PSAP request, to be accurate within 1000 meters. Second: the introduction of E-OTD-capable handsets combined with an upgrade of network infrastructure technology for more precise location estimates.

One of T-Mobile's predecessor companies, Aerial Communications, initiated the request in February 1999, when it sought waiver of the rules to implement a handset-based technology.[7] After the Commission amended its rules to permit the use of handset-based solutions, Aerial renewed its request, seeking approval to implement a hybrid solution. VoiceStream continued to pursue the request after it acquired Aerial in 2000.[8] As part of the waiver, VoiceStream agreed to deploy NSS throughout its coverage area

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6 *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (stating that a waiver request "stated with clarity and accompanied by supporting data, [is] not subject to perfunctory treatment, but must be given a 'hard look.' ").

7 Aerial Communications, Inc. Petition to Waive Section 20.18(e) of the Commission's Rules, CC Docket No. 94-102 (filed Feb. 5, 1999).

8 Letter from Robert A. Calaff, Corporate Counsel, VoiceStream Wireless, to Magalie Roman Salas, Secretary, FCC, CC Docket. No. 94-102, June 22, 2000; Letter from Robert A. Calaff, Corporate Counsel, VoiceStream Wireless, to Magalie Roman Salas, Secretary, FCC, CC Docket. No. 94-102, July 31, 2000.

without need for a PSAP request, thereby benefiting all network users, including roamers and those with legacy handsets.

The Commission granted the waiver in September 2000. Scrutinizing technological development to date, the Commission recognized that, as the only major U.S. carrier then committed to a GSM platform, T-Mobile "faced special circumstances."[9] The Commission also found that the "NSS/E-OTD approach may be the only method available to GSM carriers for compliance with Phase II for some time."[10]

The Commission imposed several conditions on the waiver. With respect to NSS, the Commission imposed an accuracy requirement of 1000 meters, or better, for 67 percent of calls, and required that NSS deployment be completed by December 31, 2001.[11] With respect to E-OTD, the Commission maintained the requirement in section 20.18(g)(1)(v) that T-Mobile attain 95 percent penetration of ALI-capable handsets among its subscribers no later than December 31, 2005. And the Commission required that all new E-OTD handsets activated on or after October 1, 2003, comply with the mandated accuracy requirement of section 20.18(h)(2) (accuracy to 50 meters for 67 percent of calls, and 150 meters for 95 percent of calls).[12] However, the Commission imposed a slightly relaxed E-OTD accuracy standard for the first two years of its

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9 *E911 Fourth Memorandum Opinion & Order* at 17461-2 (¶ 56).

10 *Id*.

11 *Id*. at 17463 (¶ 61).

12 *Id*. at 17463 (¶ 64).

deployment (accuracy to 100 meters, 67 percent of the time and 300 meters, 95 percent of the time).[13]

A set of waiver requirements was keyed to the Commission's expectation that carriers would begin Phase II service by October 1, 2001.[14] The Commission's rules require carriers to begin selling ALI-capable handsets by October 1, 2001, to ensure their availability as soon as PSAPs could receive and use Phase II information. The conditions of T-Mobile's waiver actually accelerated the schedule for handset introduction and penetration: T-Mobile was required to ensure that 50 percent of its newly activated handsets as of October 1, 2001, and 100 percent as of March 31, 2002, were ALI capable.[15]

B. The Request for Limited Modification

Although T-Mobile has continued to work diligently since its waiver was issued in September 2000, the challenges of developing, procuring, testing and implementing both NSS and E-OTD proved to be more difficult and time consuming than T-Mobile and its infrastructure vendors initially anticipated. T-Mobile updated the Commission with respect to these difficulties in July 2001,[16] and in its October 2001 Semi-Annual Report,

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13 *Id.* at 17463 (¶ 63).

14 The Commission's rules require T-Mobile, like other carriers, in the absence of a waiver, to implement the necessary network or infrastructure upgrades and begin providing Phase II location information by October 1, 2001, or within six months of a PSAP request, whichever is later. 47 C.F.R. § 20.18(f), (g).

15 *E911 Fourth Memorandum Opinion & Order* at 17463 (¶ 62). The general rule for handset-based solutions requires the following: introduction of one entry-level handset with ALI capability by October 1, 2001; 25 percent of handset activations with ALI capability by December 31, 2001; 50 percent of activations by June 30, 2002; and 100 percent of activations by December 31, 2002. 47 C.F.R. § 20.18(g)(1).

16 *Ex Parte* Presentation of VoiceStream Wireless, CC Docket No. 94-102 (filed Jul. 6, 2001).

which provided details on its revised deployment plans.[17] The Commission acknowledged these difficulties when it granted a waiver to Cingular Wireless in October 2001 that would allow it to deploy a hybrid network and handset Phase II solution. Because of challenges and delays that became apparent in the intervening year since the grant of T-Mobile's waiver, the Commission allowed Cingular an extra six months – until June 30, 2002 – to deploy its network "safety net" solution.

On December 21, 2001, T-Mobile filed a *Request for Limited Modification* of its waiver to reflect the fact that NSS infrastructure equipment was not anticipated to be ready for commercial deployment prior to the December 31, 2001 deadline, E-OTD infrastructure equipment was not anticipated to be ready for commercial deployment until the spring of 2002, and E-OTD handsets could not be tested and approved for commercial distribution until a live E-OTD network was operating using actual commercial equipment.[18] Subsequently, on February 28, 2002, T-Mobile amended its request to reflect a further intervening delay with respect to critical infrastructure software and to address technical issues caused by a unique configuration of network equipment in portions of the Philadelphia and New York MTAs.[19]

T-Mobile requested that the Commission grant the following specific, focused and limited modifications to the deployment benchmarks originally set in September 2000:

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17 Third Semi-Annual Report of VoiceStream Wireless Corporation on Its E911 Implementation Plan, CC Docket No. 94-102 (filed Oct. 1, 2001).

18 VoiceStream Wireless Corporation Request for Limited Modification of E911 Phase II Implementation Plan, CC Docket No. 94-102 (filed Dec. 21, 2001).

19 *Amended Request.*

- T-Mobile would deploy NSS throughout its network, without necessity for a PSAP request, by July 31, 2002 (except for those portions of the New York and Philadelphia MTAs that currently are being served by a combination of Nortel Base Station Controller ("BSC") and Ericsson Mobile Switching Center ("MSC") equipment); in those portions of the New York and Philadelphia MTAs, T-Mobile will deploy NSS by December 31, 2002, without necessity for a PSAP request;

- By December 31, 2002, T-Mobile would implement E-OTD for all valid PSAP requests pending as of June 30, 2002, and, after June 30, 2002, would satisfy valid PSAP requests for Phase II service within six months of receipt, in full compliance with Commission rules; and

- By September 1, 2002, T-Mobile would approve at least one model of E-OTD handsets for commercial distribution. T-Mobile would ensure that 50 percent of new handsets activated after February 28, 2003, and 100 percent of new handsets activated after June 30, 2003, are E-OTD capable.[20]

T-Mobile did not request any other changes to the benchmarks in its original waiver.

C. Subsequent Events

Since the *Request* and *Amended Request* were filed, T-Mobile successfully deployed its NSS system nationwide by the date it had proposed – July 31, 2002.[21] And T-Mobile beat the proposed date for commercial approval of its first E-OTD capable handset. On October 1, 2002, however, T-Mobile informed the Commission that

> [b]ecause of delays in the final development of E-OTD solutions across all its infrastructures and because of continued delays in LEC ALI database upgrades, among other factors, T-Mobile no longer anticipates that it will complete deployment by December 31, 2002 for all PSAPs that had made valid Phase

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[20] *Id*. at 3. Cingular proposed an identical handset schedule in its Petition for Reconsideration of the order granting its waiver. Cingular Wireless LLC Petition for Reconsideration, CC Docket 94-102 (filed Nov. 13, 2001). On December 13, 2002, Cingular notified the Commission that it had decided to deploy U-TDOA as its Phase II solution, rather than E-OTD. The Commission accordingly severed that portion of Cingular's reconsideration petition proposing a revised handset benchmark schedule and dismissed it as moot. Cingular Wireless LLC's Petition for Reconsideration, *Order*, CC Docket. No. 94-102 (Wireless Telecommunications Bureau, rel. Dec. 13, 2002).

[21] Those portions of the New York and Philadelphia MTAs that required interworking between Nortel and Ericsson equipment were tested during the first week of 2003. The NSS solution performed successfully and these areas are now being finalized for deployment.

> II requests on or before June 30, 2002. T-Mobile is currently assessing the time needed to complete the FOAs and the projected completion of LEC ALI database upgrades, and anticipates that it will file a further modification to its *Amended Request for Limited Modification* in the near future.[22]

Without more, on December 13, the Bureau dismissed the entire *Amended Request*. Relying on the delay affecting E-OTD deployment, the Bureau concluded:

> Because T-Mobile has informed the Commission that it will not be able to meet the terms of the schedule set out in its pending waiver request, we find that it is no longer appropriate to address T-Mobile's Amended Request for Limited Modification, and we therefore dismiss that Amended Request as moot.[23]

The Bureau also referred to the Enforcement Bureau "issues regarding T-Mobile's compliance with its Phase II obligations under its existing compliance plan."[24]

III. The Bureau's Summary Dismissal of T-Mobile's Amended Request Was Prejudicial Procedural Error

The Bureau's failure to address the proposed modifications to the NSS deployment and handset approval benchmarks is plain error. Other than identifying them in a footnote, the *Order* does not discuss these requests, and the stated rationale for the dismissal – that T-Mobile "will not be able to meet the terms of the schedule set out in its pending waiver request"[25] – is clearly erroneous if applied to the NSS and handset benchmark requests. In the same filing discussing the reasons for delay in implementing E-OTD infrastructure, T-Mobile reported that it had successfully completed installation

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22 T-Mobile USA, Inc. October 2002 Semi-Annual Report on E911 Implementation Plan, CC Docket No. 94-102 (filed Oct. 1, 2002) at 3.

23 *Order* at ¶ 4.

24 *Id*.

25 *Id*.

of NSS in all switches nationwide by July 31, 2002, as proposed in the *Amended Request*.[26] T-Mobile also reported that it had approved its first E-OTD capable handset for commercial distribution on August 16, 2002, also consistent with its proposal in the *Amended Request*.

It is black letter law that agencies are expected to explain their decisions and to state a rational connection between the facts found and the choice made.[27] Furthermore, because of the important "safety valve" function that waivers address, it is well settled that requests for waiver must be given a "hard look."[28] In some instances courts have had to judge the line between the "tolerably terse" and the "intolerably mute."[29] Here, however, the line was nowhere approached. The *Order* simply does not discuss two of the three proposed modifications,[30] nor does it provide a possible rationale for their dismissal.[31]

The dismissal is highly prejudicial to T-Mobile. While ignoring the requests, the *Order* directs the Enforcement Bureau to assess T-Mobile's compliance with its Phase II

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26 T-Mobile USA, Inc. October 2002 Semi-Annual Report on E911 Implementation Plan, CC Docket No. 94-102 (filed Oct. 1, 2002) at 1.

27 *See, e.g., Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

28 *WAIT Radio*, 418 F.2d at 1157.

29 *Id.*

30 Compare this treatment with the Commission's decision under review in *Ill. Pub. Telecom. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on reh'g*, 123 F.3d 693 (D.C. Cir. 1997), *cert. denied* 118 S.Ct. 1361 (1998). Vacating and remanding a portion of the order, the court indicated "the FCC . . dismissed the argument with two words – 'We disagree'– and never provided any reasons for its 'disagreement.' The FCC's *ipse dixit* conclusion coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking." (internal citations omitted). *Id.* at 564.

31 Nor can the Bureau's dismissal of the request to modify the handset benchmarks be likened to its dismissal of the same request by Cingular. As explained above, that request was mooted by Cingular's announcement that it would no longer deploy an E-OTD solution.

obligations *"under its existing compliance plan*."[32] Certainly this instruction is ambiguous as to whether the "existing compliance plan" refers to the plan as revised by T-Mobile in its February 2002 *Amended Request for Modification*, or to the plan as adopted by the Commission in September 2000. If the latter, this effectively closes the door to consideration of the merits underlying T–Mobile's request, including requests similar to relief already granted other carriers and which T-Mobile already has satisfied.

[32] *Order* at ¶ 4 (emphasis added).

IV. Conclusion

T-Mobile is entitled to meaningful consideration of the modifications proposed, and the Commission must review them in light of its well-articulated standards for waiver. As supported in the *Amended Request*, the proposed modifications to the NSS and handset benchmarks are in the public interest and should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Karen L. Gulick, do hereby certify that a copy of the foregoing Application for Review was served this 13th day of January, 2003, via electronic transmission, upon the following parties:

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