B. SN Has Taken, and Will Continue to Take, Specific Steps to Encourage Adoption of GPS-Enabled Handsets

SN takes the December 2005 Benchmark seriously and has devoted substantial resources to maximize its GPS handset penetration rate by that date. Prior to the merger with Sprint, to increase that penetration rate as much as possible, Nextel implemented a number of marketing and promotional campaigns, including discounted equipment, to further drive upgrades among the embedded customer base. These efforts, moreover, were in addition to the extraordinary efforts taken to address the effects of the GPS software problem discussed below.

For example, on a regular basis over a period of several months, Nextel printed advertisements on the first page of USA Today's Life section that promoted location-enhanced services offered on its GPS-enabled handsets, thus providing consumers a commercial incentive to upgrade to a GPS-capable handset.[50]

To further drive new GPS-capable handsets into customers' hands, Nextel made investments unprecedented in its history to upgrade customer phones. Specifically, the 2004 marketing budget for handset upgrades was *double* the amount Nextel typically spent annually to market new phones. This increased investment, which continued into 2005, resulted in impressive gains in total penetration of GPS iDEN phones until the July 2004 GPS software glitch.

SN has and will continue to run promotions to encourage its subscribers to replace older iDEN units with GPS handsets. Currently, SN is running a promotion that offers iDEN customers a new, GPS capable model i205 handset for free with a service

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[50] Given the complexities of Phase II availability and the lack of ready PSAPs throughout the country, carriers have generally not advertised the availability of location-based emergency service to encourage customers to buy GPS-capable handsets.

contract.[51] SN also offers a promotional program that permits customers with iDEN handsets that are 12 to 24 months old, or older, to upgrade or replace their handset at the lowest promotional price offered on new iDEN handsets. SN similarly offers GPS handsets for free on its CDMA network with a service contract, specifically the Samsung VI660, the LG VI-5225, and the Nokia 6016i.[52] SN also offers discounted handset pricing to its CDMA customers that have held a handset for more than 18 months.

SN encourages the donation of older phones, and will provide customers with a donation receipt when they donate older iDEN models.[53] Considering the tax deduction from the donation program, coupled with the availability of a free GPS-capable handset (the i205), today customers can actually receive a net benefit from upgrading from a non-GPS-capable handset to a GPS-capable handset.

As discussed in Section V below, SN plans additional steps to further increase GPS handset penetration.

C. SN Has Taken Extraordinary Steps to Re-flash Units Affected by the Software Glitch.

Within days of developing the software necessary to correct the iDEN handset glitch, SN began reflashing handsets within its control. SN and Motorola then delivered—via Federal Express—self-reflash kits consisting of a CD-ROM containing the software updates and a data cable to the approximately 2.14 million customers with affected handsets (many customers have multiple units that may be reprogrammed by a

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51 *See* http://www.sprint.com/, visited on September 23, 2005.

52 *See* http://www.sprint.com/, visited on August 23, 2005.

53 Older phone models processed through Nextel benefit the American Red Cross and the Armed Services. *See* http://www.nextelbuyback.com/, visited on May 6, 2005.

single kit).[54] The kits enable customers to reflash their handsets at their home or office at no charge, with no need to visit an SN store or service center. To SN's knowledge, providing these self-reflash kits directly to all affected customers is unprecedented in this—or any—industry.[55]

Subsequently, SN continued to contact these customers through direct mailings to encourage the reflashing of handsets. SN attempted at least two written contacts with each affected customer. In fact, SN and Motorola went so far as to initiate a sweepstakes program that offered, among other prizes, twenty Cadillac Escalades with a value of $53,000 each to customers that upgraded their defective software. The total value of the prizes offered exceeded $1.2 million.

SN also made attempts to directly replace affected handsets in the hands of PSAP personnel and certain targeted customer groups that potentially relied upon GPS-enabled services. Soon after the GPS glitch was uncovered, Nextel offered to replace 37,000 handsets held by large customer groups for free and via direct mail. Disappointingly, only 3,095 chose to accept these direct replacements.

In addition, SN significantly changed its business practices in order to "touch" as many customers affected by the GPS software glitch as possible. For example, any customer may walk in to any Nextel store or authorized dealer and ask that his or her

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[54] As of July 2005, approximately 3.5 million active Nextel customers possessed GPS handset models that were affected by the software glitch and could be reflashed.

[55] Providing customers with self-reflash kits is one part of SN's ongoing communications and information campaign concerning the handset glitch. Since the day the issue surfaced, Nextel has continually updated its customers through a special website created solely for this issue: www.nextel.com/gpsupdates. SN has reached out repeatedly to the Commission and to the PSAPs, directly contacting all Phase II-capable PSAPs on multiple occasions to inform them that our customers' GPS capabilities were impacted and to detail the steps SN was taking to address the issue.

handset be reflashed with new software on the spot.[56] Nextel's large corporate customers received software upgrades on site. Also, whenever a customer calls Nextel's customer care number, for whatever reason, he or she is urged to reflash his or her handset.

Finally, SN's web site provides customers with instructions on self-reflashing their handsets at no charge, as does Motorola's web site. All of Nextel's stores and service centers are set up to reflash customer handsets, and, as a matter of course, whenever a customer brings a handset in for any reason, SN updates its software at no cost to the customer, as does Motorola for units it receives. Independent dealerships that carry Nextel handsets are also capable of reflashing customer handsets, and Motorola has put in place an incentive program for dealers to reflash a handset brought in for any reason. SN is further investigating efforts to equip former Sprint CDMA stores with the ability to conduct reflashing of handsets.

Although SN and its iDEN vendor Motorola have expended and continue to expend significant efforts to convince our customers to update their handsets, it simply would be impossible to achieve 95% penetration in the 17 months between July 17, 2004, and December 31, 2005. Based on current trends of customer GPS reflashing and handset upgrades, however, SN believes its combined CDMA and iDEN handset base will reach 80% by December 31, 2005.[57]

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[56] Nextel authorized dealers are also provided an incentive payment of $15 for each handset they successfully reflash.

[57] As the wireless marketplace continues to evolve and competition continues to flourish, SN cannot predict the future with certainty. As we have learned since the Commission's decision establishing Nextel's Phase II benchmarks in 2001, changes in the economy, in world events, and in any number of other factors can quickly impact the assumptions underlying SN's projections.

The Commission has held that milestone extensions and waivers are appropriate when non-compliance is due to "matters outside [the petitioners] control."[58] As the Commission has recognized, and as the results of subsequent incentive offers have confirmed, there are some customers who are unwilling to trade in their existing phone under any circumstance. SN submits that given the extraordinary steps taken with respect to meeting all prior E911 milestones, a temporary waiver of the December 2005 Benchmark is appropriate.

IV. THE PUBLIC INTEREST IS NOT HARMED BY GRANTING THE WAIVER

SN submits that rigid enforcement of the Benchmark will not serve the public interest, and grant of the requested waiver would not undermine the policy underlying the E911 rules.[59] Both Sprint and Nextel have been leaders in the public safety sphere, and SN continues to provide PSAPs a dedicated team to deploy E911 Phase II at PSAPs throughout the country. Moreover, SN's GPS solution is generally much more accurate than network-based solutions,[60] providing public safety personnel with more reliable, and thus more useful, location information.[61] It is not for lack of commitment that SN is seeking the current waiver.

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[58] *South Central Bell,* 4 FCC Rcd 1044 ¶8 (1988). *See also E911 Phase II Waiver Reconsideration Order*, 18 FCC Rcd 21813 at ¶ 19 (2003); *Fourth Memorandum Opinion and Order,* 15 FCC Rcd at 17458 ¶ 45.

[59] *See WAIT Radio*, 418 F.2d at 1157.

[60] *See* 47 C.F.R. § 20.18(h) (setting forth the differences in E911 location accuracy requirements for handset-based and network-based solutions).

[61] *See WAIT Radio*, 418 F.2d at 1159 (agencies must consider whether waivers would provide "more effective implementation of overall policy"); *see also Westgate Communications LLC*, WC Docket No. 05-69, Order, DA 05-2269 (rel. Aug. 11, 2005) at

A. The Lack of Ready PSAPs Minimizes the Impact of Granting SN's Waiver Request

As noted above, SN has deployed Phase I service to 2,631 PSAPs and Phase II service to 1,730 PSAPs and, along the way, has continued to provide PSAPs additional functionalities.[62] Yet, despite these deployment efforts, there continue to be literally thousands of PSAPs from whom SN has received neither a Phase I nor a Phase II request.[63] As a result, and despite the distribution of tens of million of GPS handsets by SN alone, the availability of E911 service is sharply curtailed by the lack of readiness of many PSAPs throughout the country.[64] Although SN remains committed to working with public safety to address the deployment hurdles they face and to deploy valid PSAP requests in a timely manner, this delay in public safety deployment has real world consequences for the overall FCC E911 implementation plan.

As the FCC is aware,[65] deploying Phase I and Phase II E911 requires a cooperative and coordinated effort by numerous parties, including the wireless carrier, local exchange carriers ("LECs"), location technology vendors, ALI database vendors,

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¶ 7 (granting waiver based on the "more effective implementation" factor established in *WAIT Radio*).

[62] *Supra* n. 9.

[63] *See generally* Communications Daily, September 23, 2005, "NENA: 50% of PSAPs not E-911 Phase II-Capable" (only 39% of counties currently accepting Phase II calls).

[64] According to the most exhaustive study to date (and one commissioned by NENA), *fewer than half of all PSAPs* (covering an estimated 62% of the United States' population) are likely to be capable of receiving and using Phase II ALI by December 31, 2005. The study finds that fewer than 70% of PSAPs will be capable of receiving and using Phase II ALI by year-end 2007.

[65] *See generally* Hatfield Report.

and the PSAP. The Commission's strategy for deploying Phase II service has been to mandate requirements on the wireless industry even though wireless carriers' Phase II capabilities and the provision of services are dependent on other parties to complete a deployment. To comply with the Phase II E911 requirements, both Sprint and Nextel have invested hundreds of millions of dollars, and SN will continue to invest millions of dollars to test and deploy Phase II service to additional PSAPs with Phase II capability as soon as possible.

This significant investment to provide Phase II location information, however, in most cases remains stranded since the majority of PSAPs have not upgraded their facilities and cannot use ALI.[66] Indeed, in recent Quarterly Reports, Sprint has noted that in spite of expending "huge amounts of capital" and aggressively marketing its GPS-enabled handsets, due to the state of PSAP E911 Phase II deployment, it is "likely that a large number of Phase II capable handsets sold by Sprint to date will become obsolete and will be discarded before Phase II services are ever available."[67]

The Commission has previously acknowledged that, in the long run, Phase II E911 would only be effective if PSAPs upgraded their systems. In 1999, the Commission stated "the benefits of ALI to public safety will be realized only to the extent that PSAPs upgrade their systems to receive and use the additional information

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[66] As noted herein, since 1999 fewer than half of the PSAPs throughout the country have upgraded their systems to receive E911 Phase II location information; thus, the benefits of wireless carrier handset deployments have gone widely unrealized by the general public.

[67] *See, e.g.*, Sprint Corporation Tenth Quarterly E911 Implementation Report, CC Docket 94-102, filed May 3, 2004, at 3.

ALI provides for 911 calls."[68] Unfortunately, the FCC's assumption that PSAP deployment would naturally follow on the heels of carriers' Phase II readiness has not materialized.

In November 2003, the United States General Accounting Office issued a report, "Uneven Implementation of Wireless Enhanced 911 Raises Prospect of Piecemeal Availability for Years to Come" ("GAO Report"), that examined the state of wireless E911 deployment throughout the country. The GAO Report found that the majority of PSAPs will not be Phase II-capable by year-end 2005, with "the prospect that E911 implementation will be piecemeal both within states and across the nation for an indefinite number of years to come."[69] Furthermore, the GAO Report stated:

> [c]urrently, all wireless carriers that have chosen to deploy a handset-based location solution remain under a deadline of having handsets containing location technologies in use by 95 percent of subscribers by December 31, 2005. Yet, despite this deadline, Phase II service is not assured in any area by any specific date. . . . PSAPs, however, are under no federal deadlines to ever request wireless E911 services. Thus, the full rollout of wireless E911 services nationwide

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[68] *Third Report and Order* at ¶ 40.

[69] GAO Report at 12 (emphasis added). *See also* GAO Report at 17. Specifically, the GAO Report found

> [i]n our survey of state 911 contacts (which included the District of Columbia), we asked respondents to provide us with an estimate of when they believed their state would have wireless Phase II E911 fully in place for a least one wireless carrier per PSAP. Twenty-four of 51 respondents said they thought Phase II would be fully in place in their state by 2005, the last year for which there is any specific FCC deadline on wireless carriers. Six of those 24 respondents said they would be ready by 2003. Contacts in other states were either unwilling to commit to any specific year, given their current level of implementation, or estimated a date in 2006 or beyond.

Id. at 16.

> depends in great part on the implementation efforts of the more than 6,000 PSAPs.[70]

An analysis prepared by Nextel showed that, as of June 2005, based on the zip code of its subscribers, only 37% of its iDEN subscribers resided in areas of the country served by a Phase II-capable PSAP. Internal projections indicated that, at most, 44% of Nextel subscribers would be living in an area covered by a Phase II-capable PSAP by the Benchmark date. Taking the software glitch into account, which would have placed Nextel at approximately 67% GPS handset penetration by December 31, 2005, only about 29% of its customers would have benefited from both possessing a GPS capable handset and residing in an area served by a Phase II-capable PSAP.

SN respectfully submits that the Commission expected that the state of PSAP Phase II deployment would be significantly further along by December 2005 than current projections predict it will be. Without a ready PSAP, the safety benefits of having a GPS handset are not realized.[71] Given these realities, the public interest will not be harmed by a waiver of the December 2005 Benchmark as it applies to SN.

B. Forcing Customers to Replace Satisfactory, Safe, and Functioning Handsets is Not in the Public Interest and is Not Supported by Precedent in Any Industry

As discussed above, despite having multiple GPS handsets available to them for several years, many wireless users do not wish to trade in their existing handsets. A certain percentage of customers are very unwilling to upgrade to new handsets, regardless of the various incentives to do so. In fact, in the context of addressing the GPS software

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[70] *Id.* at 11.

[71] Indeed, a factor in the Commission's decision to grant relief to non-nationwide carriers was the lack of PSAP Phase II deployment in the areas served by these carriers. *See Non-Nationwide Carrier Order* at ¶ 15.

problem, Nextel and Motorola, in a few instances, offered new free handsets to our customers in possession of handsets affected by the software problem. To date, the results of these efforts have been lackluster at best.

For example, concerned that PSAP personnel might be using a number of i58sr or i88s models (these were Nextel's first GPS-capable units placed on the market), Nextel and Motorola offered to all Phase II-capable PSAPs using i58srs or i88s the option of an advance exchange for new handsets. That is, free of charge, PSAPs were offered to swap out these older models with newer and more feature-rich i730 model handsets. This effort led to the exchange of only 48 handsets. PSAP personnel apparently were not motivated to accept new GPS handsets free of charge. This experience suggests that the Commission should not assume that consumers necessarily want to change out their existing handsets even when offered them free of charge or at a substantial discount.

The resistance of some customers to the exchange of their handsets is further exemplified by a larger effort by Nextel and Motorola to target approximately 37,000 handsets in the possession of its customers with large user groups who specifically depend on GPS commercial services. Soon after the GPS glitch was uncovered, Nextel offered these customers—*free of charge* and via direct mail—the option of trading their malfunctioning GPS-enabled handsets with brand new, reflashed handsets. Only 3,095 brand new GPS-capable handsets were distributed to these customers: a take rate of less than 10%.

There are numerous reasons why customers may choose not to replace handsets. For example, many of our customers use older model "base" and "mobile" iDEN units that were often installed in automobiles or in fixed locations. Some of these older units

are capable of transmitting at 1 or even 3 watts peak power, and thus may have a greater range--especially in rural areas where cell towers tend to be spaced at greater distances than in urban and suburban areas. Forcing these customers to give up these units in favor of A-GPS units (all A-GPS units have a 0.6 watt peak power) could actually make it more difficult to call 911 in very rural areas.

The SWAT Research Paper finds only limited examples of consumers being *forced* to replace or retrofit existing products, concluding that "a review of regulatory analogies demonstrates that in the great preponderance of instances, the federal government does not require businesses or consumers to replace or retrofit products or goods."[72] It suggests several reasons why regulators historically have favored grandfathering changes rather than requiring retrofitting or replacement:

> (1) The cost of retrofitting places **a high cost burden on consumers and manufacturers...**
>
> (2) Mandated retrofitting **threatens the established interests of businesses and consumers** and interferes with free-market activity and decisions...
>
> (3) When a consumer or business sells...a **product in good faith of existing regulations**, he or it should not be punished because of further retroactive regulation...
>
> (4) A business may **no longer be in possession of a good it sold or manufactured**. The consumer who has assumed ownership of the product at the point of purchase can voluntarily pay to retrofit a good or product or pay for the replacement costs to gain the benefit of the new regulations.[73]

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[72] SWAT Research Paper at 46.

[73] *Id.* at 48 (numbers added).

Given the strong desire demonstrated by many consumers to maintain their current equipment and the public policy issues discussed above, SN suggests it would not be in the public interest to force handset conversions.

V. SN HAS ESTABLISHED A CLEAR PATH TO FULL COMPLIANCE

Despite the undertakings detailed above, SN recognizes that additional activities will be required to further increase the adoption of GPS-enabled handsets by legacy customers and to meet the Benchmark of 95% penetration of SN's embedded customer base. To that end, SN is pursuing a number of activities to encourage further reflashing of handsets affected by the software glitch and to encourage its users to upgrade from non-GPS-enabled handsets to GPS-enabled units. Among these activities are the following:

Prior to the merger, Nextel implemented a substantial percentage budget increase for upgrade activity for the current fiscal year. This increased funding allows SN to take additional concrete steps to convert non-GPS iDEN handsets such as: 1) permitting existing customers to purchase GPS-enabled devices at promotional discounts, including at least one free GPS-enabled handset, with a two year contract; 2) engaging in direct mailings to the existing customer base that advertises new GPS capable products; 3) broader advertising which highlights GPS handset capabilities and service benefits encouraging the existing customer base to upgrade to GPS-enabled handsets, including television advertising; and 4) between April and October of this year, promoting the launch of seven new GPS-enabled iDEN handsets with attractive new features and price points. SN will continue these, or similar activities, through 2006 and 2007.

SN is developing a targeted marketing campaign aimed at its customers whose handsets are not GPS-capable to upgrade to GPS-enabled handsets. Many of these customers may see benefits in a switch to a GPS-enabled handset as SN is considering favorable price plan offerings for customers who switch handsets. By targeting existing SN customers for potential handset upgrades, many of whom are corporate, small business, and government users who tend to be unwilling to upgrade older handsets without a perceived economic basis for doing so, SN expects to realize an increase in GPS handset penetration.

SN is discussing with Motorola an upgrade incentive to encourage customers with non-GPS enabled handsets to upgrade to GPS-enabled devices. SN is further pursuing with Motorola the possibility of cash payments to customers to reflash handsets subject to the GPS glitch which Motorola solely caused.

SN is in the process of launching its high speed data network, EvDO, on its CDMA network. The new handsets and added features of this network will encourage customers to convert to new GPS-enabled CDMA handsets. In addition, because the merger is expected to result in quicker deployment of new technologies, new handsets will be more attractive to consumers than the current offerings of either Sprint or Nextel individually, which should increase the churn of older, non-GPS capable handsets. For example, SN is actively exploring the offering of new handsets for its iDEN network with dual mode capabilities that will be an attractive alternative for existing customers.

Finally, the sales momentum of SN is expected to increase with the expanded scale of the new company, and that is also projected to increase the rate of customer purchases of GPS-capable handsets.

Through a combination of these efforts, continued growth of the SN customer base and continued promotion of its re-flash efforts, SN has set forth a program that satisfies the requirement, under the Commission's E911 waiver standard, that it establish a "clear path to full compliance" with the rule.[74] Given the unique challenges faced by SN's iDEN network, even with the extraordinary efforts described above, SN will require additional time to satisfy the 95% penetration Benchmark. Thus, the Commission should grant a waiver permitting SN until December 31, 2007, to achieve full compliance.

CONCLUSION

For the foregoing reasons, SN requests grant of its waiver request as specified herein.

Respectfully submitted,

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[74] *See Fourth Memorandum Opinion and Order* at ¶ 44.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 29th day of September 2005, copies of Sprint Nextel Corporation's Request for Limited Waiver in CC Docket No. 94-102 were sent by electronic mail to the parties listed below.

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