

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)
)
Revision of the Commission’s Rules To) **CC Docket No. 94-102**
Ensure Compatibility with Enhanced 911)
Emergency Calling Systems)
)
Request for Temporary Waiver or)
Temporary Stay of Section 20.18(g)(1)(v) of)
the Commission’s Rules)

To: Chief, Wireless Telecommunications Bureau

PETITION FOR TEMPORARY WAIVER OR TEMPORARY STAY

North Dakota Network Company (“NDNC”), by its attorneys and pursuant to Sections 1.3 and 1.925 the Commission’s Rules, hereby requests a nine (9) month temporary waiver (or temporary stay), up to and including September 30, 2006, of the requirements of Section 20.18(g)(1)(v) of the Rules, within which to ensure that penetration of location-capable handsets among its subscribers reaches 95 percent. Rule Section 20.18(g)(1)(v) specifies that the 95 percent penetration level be reached no later than December 31, 2005. In support hereof, the following is shown:

I. BACKGROUND

NDNC is a wholly owned subsidiary of SRT Communications, Inc. ("SRT"), a rural telephone cooperative that provides wireline local exchange telephone and other telecommunications services in and around Minot, North Dakota. NDNC is licensee of broadband PCS stations KNLH232 and KNLH234 in the Minot, North Dakota BTA. The Company currently operates a CDMA network having 38 cells (and serving approximately 7,200 square miles) within the State. Because it has fewer than 500,000 subscribers, NDNC is classified as a Tier III Commercial Mobile Radio Service (“CMRS”) provider, as defined

in the Commission's *Non-Nationwide Carriers Order*.¹

There are four Public Safety Answering Points ("PSAPs") in NDNC's ten-county service area, including: Bottineau County, McLean County, ND State Radio and Ward County which are all E911 Phase II compliant as of October 25, 2005. Since initiating its provision of broadband PCS service in 1999, NDNC has been diligent in its pursuit of enhanced 911 (or "E911") capability for its customers. In this regard, the Company has coordinated its E911 implementation with each of these various PSAPs and representatives of the Company have worked closely with and attended quarterly meetings of the North Dakota Association of Counties' wireless 911 project. At present, NDNC provides E-911 Phase II Service to all of the PSAPs in its service area and it has done so since October 25, 2005.

NDNC has demonstrated a long history of compliance with the Commission's E911 regulatory requirements. In November of 2000, NDNC advised the Commission's staff that it planned to deploy E911 Phase II capability through the use of handset-based automatic location information ("ALI") technology.² In spite of some initial delays – resulting from the company's need to purchase and deploy a new wireless switch and a lack of availability of ALI-capable handsets that plagued small wireless carriers generally – NDNC has met or exceeded all of the handset-based deployment benchmarks for Tier III wireless carriers. The Company began selling and activating ALI-capable wireless handsets in May of 2003, and reached the 100 percent location-capable benchmark for new

¹ Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers, *Order to Stay*, CC Docket No. 94-102, FCC 02-210, 17 FCC Rcd 14841 (July 26, 2002) ("*Non-Nationwide Carriers Order*").

² See Wireless E911 Phase II ALI Technology Report of NDNC, CC Docket No. 94-102, filed November 9, 2000.

handset activations four months in advance of the November 30, 2004 deadline. NDNC also met the intermediate ALI-capable handset activation benchmark requirements codified in Sections 20.18(g)(1)(i) – (iv) (*i.e.*, the 25 percent, 50 percent activation benchmarks) in timely fashion. Accordingly, the relief requested herein is confined to the December 31, 2005 ninety-five percent ALI-capable handset penetration deadline specified in Rule Section 20.18(g)(1)(v).

In addition to its sale and activation of location capable handsets, NDNC has advertised the need for its customers to replace non-ALI-capable handsets by displaying posters in retail store, advertising handset capable handsets on website, and television and newspaper advertising. While NDNC has repeatedly advised its customers (through these various means) of the need to replace their non-ALI-capable handsets with ALI-capable ones, NDNC nevertheless cannot compel the customers to change out their handsets until they are ready and willing to do so. The Commission has acknowledged that rural subscribers historically have tended to hold onto their wireless handsets for much longer than customers in larger, metropolitan markets, and that this is a unique challenge to meeting the 95 percent ALI-capable handset penetration requirement.³

As of November 1st of this year, approximately 85% percent of the handsets used by NDNC's customers are ALI-capable. Therefore, NDNC has achieved substantial compliance; and due to circumstances that are clearly beyond the Company's control, NDNC finds itself unable to meet the requirement that 95 percent of the handsets its system be ALI-capable by December 31, 2005. The additional time requested is needed to meet

³ See *E911 Compliance Deadlines for Tier III Carriers*, 20 FCC Rcd. 7709, Para. Nos. 37, 68, 70, 79 n. 203, and 101 (2005) (the "2005 E-911 Tier III Carriers Compliance Deadlines Order").

the 95 percent penetration requirement, which NDNC plans to do by promoting location-capable handsets via posters, bill inserts, newsletters, television and newspaper advertising, and featuring the handsets on the NDNC's website. Also, NDNC continues to offer free upgrade location-capable handsets to customers upon their request.

II. NDNC HAS DEMONSTRATED A COMMITMENT TO ACHIEVING COMPLIANCE

As noted above, NDNC has demonstrated its good faith commitment to achieving compliance with the Commission's E911 rules. In November of 2000, the Company notified the FCC that it planned to deploy a handset-based E911 Phase II ALI solution. Since then, it has constructed an all-digital wireless network that is capable of providing E911 Phase II service in portions of five North Dakota counties (including a number of rural areas where there was no wireless service previously, and areas where only analog service was available); it began activating ALI-capable handsets immediately after such devices became available to it, and NDNC ensured that 100 percent of all new wireless handsets activated on its system were ALI-capable more than four months before the FCC's deadline for Tier III carriers. Most importantly, NDNC has received one system-wide for E911 Phase II service request from the North Dakota Association of Counties, and the Company has fulfilled this request through the provision of Phase II service in timely fashion.

In addition to meeting the benchmark requirements set forth in the Commission's Rules, NDNC has been attempting to replace all pre-existing handsets with ALI-capable ones since May of 2003. In this regard, NDNC has advised its existing customers (through bill inserts, posters, website and television and newspaper advertising) of the need to replace their non-ALI-capable handsets with ALI-capable ones. However, to date, a relatively small percentage of customers (just 15 percent) have failed to purchase upgrades. In

practice, the impediments to achieving compliance with the Rule Section 20.18(g)(1)(v) 95% penetration requirement are, ironically, those imposed by the customers themselves who (for whatever reason) are unwilling to change out their existing handsets for ALI-capable ones. NDNC cannot compel its customers to replace their handsets until they are ready and willing to do so. Thus, NDNC is committed to achieving compliance with Rule Section 20.18(g)(1)(v), but its efforts to achieve compliance with the regulation's requirements have been stymied by circumstances beyond its control.

III. TEMPORARY WAIVER OR STAY REQUEST

Accordingly, NDNC requests a temporary waiver, or temporary stay, up to and including September 30, 2006, of the 95 percent ALI-capable handset penetration requirement set forth in Section 20.18(g)(1)(v) of the Commission's Rules.

IV. WAIVER STANDARDS

The general waiver standards are codified in Sections 1.3 and 1.925(b)(3) of the Commission's Rules. Section 1.3 of the Commission's Rules states, in relevant part, that "[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefore is shown." Section 1.925(b)(3) of the Rules states that the "Commission may grant a waiver request if it is shown that: (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative." The courts have held that a rule waiver is appropriate "if special circumstances warrant a deviation from the general rule and such deviation will serve the

public interest.”⁴ Under WAIT Radio and Northeast Cellular Telephone Co., a rule waiver “may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.”⁵

In its *E-911 Fourth Memorandum Opinion and Order*, the Commission indicated that the Phase II rules are intended to be applied in a manner that takes into account the practical and technical realities.⁶ Recognizing that practical and technical realities might delay Phase II implementation, the Commission established a general approach to dealing with possible requests for waiver of the Phase II requirements.⁷ Thus, the Commission provided that its rules may be waived for good cause shown, consistent with Section 1.3 of the Rules.⁸ It recognized, in the case of E-911, that there could be instances where technology-related issues or exceptional circumstances may mean that deployment of Phase II may not be possible by the established deployment deadlines.⁹ The Commission cautioned that waiver requests should be specific, focused and limited in scope, with a clear path to full compliance and should document the efforts aimed at compliance.¹⁰

⁴ Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) *citing* WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

⁵ See In the Matter of Section 68.4 (a) of the Commission’s Rules Governing Hearing Aid-Compatible Telephones, *Order on Reconsideration and Further Notice of Proposed Rulemaking*, WT Docket No. 02-309, FCC 05-122 (*rel.* June 21, 2005) at Para. 50 n. 158.

⁶ 15 FCC Rcd. 17442 (2000) at Para. 22.

⁷ *Id.* at Paras. 42-45.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

In addition, Section 107 of the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (the “ENHANCE 911 Act”)¹¹ directed the Commission to grant qualified Tier III carriers’ requests for relief of the December 31, 2005 ninety-five percent penetration deadline for ALI-capable handsets if “strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services.”

V. NDNC HAS MET THE WAIVER STANDARDS

As shown above, NDNC has met the Commission's standards for obtaining the requested temporary waiver (or temporary stay) of the 95 percent penetration rate for ALI-capable handsets on the system, specified in Section 20.18(g)(1)(v) of the Commission’s Rules. Clearly, in view of the unique or unusual factual circumstances present here, application of the December 31, 2005 deadline would be inequitable, unduly burdensome or contrary to the public interest. In addition, NDNC has no reasonable alternative but to request the instant waiver. Furthermore, grant of the requested relief would serve the public interest.

As the Commission is aware, NDNC is a small Tier III CMRS carrier that is licensed to provide broadband PCS service in two relatively small BTA markets, including many rural counties. The Company has elected to use a handset-based E-911 solution and it has constructed CDMA facilities that are fully Phase II compliant. One hundred percent of all new handsets activated on its network are ALI-capable and NDNC met this requirement at least four months ahead of the November 30, 2004 deadline applicable to Tier III carriers. In addition, NDNC has endeavored to replace its customers’ pre-existing handsets with ALI-capable ones since May of 2003. In this regard, NDNC has taken steps to advise its

¹¹ 118 Stat. 3986, 3991 (2004).

customers (through bill inserts, telephone calls, newspaper advertisements, and radio broadcast and cable television advertisements) of the need to replace their non-ALI-capable handsets with ALI-capable ones, but to date only a relatively small percentage of customers have failed to do so.

Thus, NDNC has been diligent in its efforts to secure compliance with all applicable E911 requirements of the Commission's Rules, including the December 31, 2005 ninety-five percent ALI-capable handset penetration requirement. Moreover, NDNC has shown a clear path to achieving full compliance and its efforts are well-documented by the showings contained herein. Indeed, the benchmark relief requested herein is minimal, as it is confined to one discrete regulatory requirement. A request for minimal relief warrants the grant of relief especially where, as here, the applicant has shown a plan to achieve full compliance.¹²

Equally as compelling, NDNC has kept the PSAPs in its service area apprised of its E-911 implementation plans through its attendance and participation in meetings of the North Dakota Association of Counties' wireless 911 project, and the Company has timely fulfilled all PSAP requests for E-911 Phase II service. The Commission has indicated that these factors warrant temporary relief from the E-911 obligations codified in the Rules.¹³

In addition, the inability to meet the December 31, 2005 ninety-five percent handset penetration deadline is clearly due to circumstances beyond NDNC's control; and, therefore, the delay in achieving compliance with the requirement is simply unavoidable.

¹² 2005 E-911 Tier III Carriers Compliance Deadlines Order at Para. Nos. 47, 50, and 63.

¹³ 2005 E-911 Tier III Carriers Compliance Deadlines Order at Para. Nos. 29, 34, 44, 50 and 86.

VI. THE REQUIREMENTS OF THE ENHANCE 911 ACT HAVE BEEN SATISFIED

The relief requested by NDNC is fully consistent with the requirements of Section 107 of the ENHANCE 911 Act. That statutory provision directs the Commission to grant qualified Tier III carriers' requests for relief of the Rule Section 20.18(g)(1)(v) December 31, 2005 ninety-five percent penetration deadline for ALI capable handsets if "strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services."

Absent grant of the requested relief, NDNC would be forced to devote its limited capital resources to the task of tracking down those pre-existing customers who (for whatever reason) have voluntarily elected to retain their non-ALI-capable handsets, and subsidizing 100% of the cost of a replacement handset *that the customer may not want and may not even use* in order to achieve compliance with the ninety-five percent penetration requirement. NDNC submits that these scarce resources would be better spent in continuing to extend the reach of its wireless network into rural and unserved (or underserved) areas, where access to any type of wireless telephone service (and basic 911 service) would not otherwise be available. Alternatively, requiring strict compliance with the ninety-five percent penetration requirement could put carriers such as NDNC in the untenable position of having to terminate service to those customers who voluntarily retained their non-ALI-capable handsets in order to achieve compliance with the Rule. While NDNC would never willingly taking any course of action that would limit its customers' access to wireless service, either case described above would result in the affected "consumers having decreased access to emergency services," in direct contravention of the ENHANCE 911 Act, because they would be denied access to any

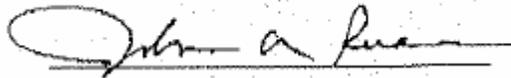
type of wireless phone service. Clearly, such a result would disserve the public interest; and, therefore, strict application of the Rule's requirement could produce a result that runs counter to the policy objectives that underlie the Commission's E911 Rules – namely extending the availability of emergency services to wireless consumers.

VII. CONCLUSION

In view of the foregoing, the waiver herein requested is in the public interest and should be granted.

Respectfully submitted,
North Dakota Network Co.

By:



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