

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Alltel Corporation Petition for Limited)	WT Docket No. 05-287
Waiver of Location-Capable Handset)	
Penetration Rule)	

To: The Commission

PETITION FOR RECONSIDERATION

Alltel Corporation (“Alltel”), pursuant to Section 1.106 of the Commission’s rules, 47 C.F.R. § 1.106, hereby respectfully submits this petition for reconsideration of the Commission’s order¹ denying Alltel’s request for limited waiver of the E911 95 percent rule.² Alltel shares the Commission’s commitment to E911 and reluctantly files this petition. The Commission, however, could have more fully considered Alltel’s request for waiver, which Alltel believes met the E911 waiver standard. The *Order* did not align with the Commission’s previous commitment to consider Alltel’s Tier II status. It did not adequately consider Alltel’s “reluctant” customer base, and it was less than precise in accounting for the efforts Alltel has – and continues to – undertake to meet the 95 percent penetration rate.

¹ *Alltel Corporation Petition for Limited Waiver of Location-Capable Handset Penetration Rule*, WT Docket No. 05-287, Order, FCC 06-64 (rel. Jan. 5, 2007) (“*Order*”).

² Alltel Corporation Petition for Limited Waiver of Section 20.18(g)(1)(v) of the Commission’s Rules, WT Docket No. 05-287 (filed Sept. 30, 2005) (“*Petition*”). Section 20.18(g)(1)(v) (“the 95 percent rule”) requires CMRS providers using a handset-based E911 Phase II technology to ensure that 95 percent of their subscribers have automatic location information (“ALI”)-capable handsets by December 31, 2005. 47 C.F.R. § 20.18(g)(1)(v).

For the reasons described below, the Commission should reconsider the *Order* and find that waiver is warranted in Alltel's case. In any event, referral to the Enforcement Bureau is unwarranted.

I. INTRODUCTION

Alltel is a "Tier II" CMRS carrier deploying CDMA technology and an assisted GPS ("A-GPS") handset-based E911 Phase II solution. Alltel historically has provided service principally to rural areas and has grown, largely through acquisition of existing systems serving rural areas. Although Alltel's network covers approximately 55 percent of the geographic area of the continental United States, it covers only approximately 25 percent of the U.S. population. Alltel serves approximately 10 million subscribers.

In November 2000, Alltel selected an A-GPS handset-based E911 Phase II solution in large part because it was a preferable ALI solution, as it promised to provide greater accuracy in rural markets. Alltel diligently and successfully met or exceeded each of the interim E911 deadlines. For example, Alltel first began to offer an ALI-capable handset 11 months before the March 1, 2003 deadline and has been in substantial compliance with the 100 percent new digital handset activations benchmark since November 2003 – six months ahead of the 100 percent benchmark deadline. Alltel also has an exemplary record of responding to PSAP requests and providing timely deployment of Phase I and Phase II solutions.

On September 30, 2005, Alltel filed its request for waiver of the December 31, 2005 deadline to meet the 95 percent rule. In contrast to previous E911 benchmark obligations, which involved carriers' proactive efforts to acquire and deploy Phase I and Phase II solutions and obtain and distribute compliant handsets, the 95 percent rule is

inexorably tied to consumer choice. Ultimately, it is the consumer's decision as to whether and when to replace an existing handset. Alltel's request contained ample evidence of concrete efforts undertaken to come as close as possible to the 95 percent penetration rate.

Since filing the waiver, Alltel's penetration rate has risen substantially, from 84 percent as of December 31, 2005 to 92.3 percent as of December 31, 2006.

On January 5, 2007, the Commission released nine orders denying requests to waive the December 31, 2005 deadline. Of those, six petitions had been denied in May 2006 – including Alltel's petition – and the remaining three were denied in November and December 2006.

II. DISCUSSION

A. The *Order* Did Not Fully Consider the Waiver Request, Which Satisfied the Commission's E911 Waiver Standard

WAIT Radio requires the Commission both to provide a meaningful "safety valve" to enforcement of strict compliance with its rules and to consider fully, through a "hard look," the specific circumstances supporting any request for waiver.³ The Commission's E911 decisions released in January 2006 denied each of the pending waivers petitions, but in Alltel's case, the Commission could have taken a harder look at the request. Much of the *Order's* discussion and analysis is duplicated in the other E911 decisions released in January, without regard to the specific facts at issue – indeed, the facts appear to be an afterthought to the analysis. As discussed below, the *Order* departed from the Commission's previous commitment to consider the individualized circumstances facing Tier II carriers like Alltel, and it did not fully address the steps

³ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

Alltel has undertaken to meet, or come as close as possible to, the 95 percent penetration rate.

Alltel satisfied the Commission's E911 waiver standard.⁴ First, the request was "specific, focused and limited in scope."⁵ It was not an open-ended, indefinite waiver of the 95 percent penetration requirement. Rather, Alltel submitted an unambiguous, time-limited request until June 2007. Further, Alltel demonstrated it undertook "concrete steps necessary to come as close as possible to full compliance"⁶ – it met or exceeded every interim handset benchmark; its marketing and education campaigns to encourage subscribers to replace non-compliant handsets began well in advance of the December 31, 2005 deadline; and its offers and incentives largely met or exceeded other carriers. Alltel's ongoing efforts represent a "path to full compliance" as customers with non-compliant handsets ("non-compliant customers") continue to upgrade to ALI-capable handsets.⁷ Alltel's handset deployment strategy *will* achieve the 95 percent penetration rate, but consumer resistance dictates that additional time is required to satisfy the benchmark.

B. The *Order* Did Not Fully Consider Alltel's Tier II Status and its Individualized Showing Regarding its "Reluctant" Customer Base

The *Order* did not fulfill the Commission's commitment to consider a carrier's Tier II status in the context of an E911 Phase II waiver request. In a 2003 E911 decision, the Commission found that Tier II carriers such as Alltel "may present different factual

⁴ See *Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Fourth Memorandum Opinion and Order, 15 FCC Rcd 17442, 17458 (2000).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

circumstances that may warrant some differences in their treatment.”⁸ The Commission observed further that, with respect to E911 Phase II obligations (including the December 31, 2005 deadline):

[T]he schedules for those carriers were not specifically tailored for them or embodied in individual compliance plans. We expect to take these factors into account in assessing any waiver requests or enforcement actions concerning smaller carriers.⁹

Here, the *Order* did not contain analysis of Alltel as a Tier II carrier or its unique circumstances – namely, the nature of its “reluctant” non-compliant customer base, as described in the request for waiver.

Like Tier III carriers, Alltel’s geographic coverage is predominantly rural – but on a larger scale. As noted above, Alltel’s network covers approximately 55 percent of the geographic area of the continental United States, but it covers only about 25 percent of the U.S. population. As a result, Alltel serves a significantly rural customer base.

Alltel demonstrated that a significant percentage of its non-compliant customers are low-volume customers who have retained their non-ALI-capable handsets in spite of Alltel’s substantial efforts and outreach to encourage upgrades.¹⁰ Indeed, more than 85 percent of its non-compliant customers are below its average customer’s minutes of use (“MOU”) – and 66 percent have an average MOU *less than one-third of the average customer’s MOU*.¹¹ Further, these customers are typically long-term subscribers – a vast majority are out-of-contract and they make up a small percentage of Alltel’s customer

⁸ *Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems et al.*, Order, 18 FCC Rcd 21838, 21845 (2003) (“*Phase II Waiver Final Order*”).

⁹ *Id.*

¹⁰ Petition at 8-9.

¹¹ Letter to Marlene H. Dortch, Secretary, FCC, from Richard N. Massey, General Counsel, Alltel, WT Docket No. 05-287, at 2 (Oct. 12, 2006) (“Alltel Ex Parte Letter”).

churn. Alltel has also found that these customers rely on wireless service almost exclusively for voice rather than data applications, and this likely contributes to their inclination to hold onto their existing handset rather than upgrading, which would require learning a new device that may also contain data capability in which they have little interest. Alltel also noted that some non-compliant customers use analog handsets and they are reluctant to switch to lower-powered digital devices.¹²

The *Order* did not address Alltel’s detailed evidence regarding the nature of its reluctant customer base and the “different factual circumstances” confronting Alltel.¹³ Rather, it suggests that if Alltel’s claims were to be “fully credited,” the rationale would lead to the conclusion that the deadline “would be extended indefinitely,” thereby undercutting Alltel’s “clear path to full compliance” claim.¹⁴ This reasoning is belied by the facts in the record. Since Alltel submitted its request for waiver, it has shown penetration rate increases – from 79 percent as of August 31, 2005 to 84 percent as of December 31, 2005 to 90.5 percent as of September 30, 2006, and up to 92.3 percent as of December 31, 2006. It is undeniable that Alltel has a “clear path to full compliance” – the difference is that, with Alltel’s customer base, the rate is slower than the Commission expected. The Commission’s finding cannot be sustained.

C. The *Order* Did Not Fully Consider and Account for Alltel’s Efforts

The *Order* concluded that Alltel’s efforts were insufficient – but it inaccurately described those efforts, and its findings must therefore be reconsidered. Some misstatements include:

¹² Petition at 9.

¹³ *Phase II Final Waiver Order*, 18 FCC Rcd at 21845.

¹⁴ *Order* at ¶ 24.

- “[Alltel’s] efforts to market location-capable phones appear indistinguishable from its efforts to convince subscribers to buy camera phones, a feature prominently promoted in the Alltel marketing literature that accompanied its petition.”¹⁵

The *Order* does not account for Alltel’s E911-specific marketing material accompanying its petition. Alltel has highlighted the E911 benefits of compliant handsets and urged customers to take steps to determine whether their handsets are compliant through bill inserts, bill messages, in-store displays, and its website.¹⁶ APCO expressly observed the “affirmative steps” Alltel has taken “to encourage its customers to upgrade their handsets,” and to “highlight[] the E9-1-1 benefits of handset replacement” and went on to encourage other carriers to engage in undertakings similar to Alltel’s.¹⁷ The conclusion that Alltel’s efforts to market compliant handsets are no different than efforts to market camera phones is inaccurate.

- “To the extent Alltel offered free or reduced-price location-capable phones as an inducement to its subscribers to upgrade non-location capable handsets, Alltel could have eliminated any requirement that such customers also accept as a condition of receipt of compliant phones a renewed or extended service contract, which would likely have improved the effectiveness of its efforts.”¹⁸

Alltel’s petition clearly stated, “Alltel offers certified, refurbished A-GPS handsets that all customers, including low-volume customers, may obtain without entering a new contract in its directly owned retail outlets.”¹⁹ These refurbished phones were, of course, sold at reduced prices. Alltel has also test-marketed other reduced rate options with no service commitment. For example, Alltel conducted a trial in three Florida markets offering out-of-contract customers with non-compliant handsets a choice of three certified (refurbished), warranted handsets – two available for \$0.01 and one available for \$20.²⁰ Less than seven percent of the customers opted for one of the no-contract options – and more customers responded to the campaign instead by choosing to upgrade to other handsets available at promotional prices *with a two-year contract*. The trial reflects that even free (\$0.01), no commitment offers do not spur Alltel’s non-compliant customers to turn in their existing handsets, and a contract requirement does not impose a barrier to handset upgrade campaigns. The assertion that Alltel did not make reduced-price, no-contract offers is untrue.

¹⁵ *Id.* ¶ 19.

¹⁶ Petition at 12-13.

¹⁷ APCO Comments, WT Docket No. 05-287, at 6 (filed Oct. 21, 2005).

¹⁸ *Order* at ¶ 19.

¹⁹ Petition at 13.

²⁰ Alltel Ex Parte Letter at 4. With no contract requirement, the fact that the phone is refurbished is of little relevance.

- “Alltel’s claim that some of its customers resist upgrading because they rely on the use of higher-power analog phones in areas where they may not be able to receive wireless service with a digital, location-capable phone, is notably non-specific. For example Alltel does not specify how many of its customers rely on the use of higher-power phones, or whether it can take any steps to reduce the need for such phones in certain portions of its service area.”²¹

Alltel’s petition expressly stated the company has 10 million subscribers²² and observed, “approximately [] percent of Alltel’s total subscribers have analog handsets” – the percentage was provided in the unredacted version filed with the Commission.²³ Further, beginning in April 2006, Alltel began a contract renewal program for analog subscribers, notifying them of the availability of the Motorola M800 digital bagphone – a replacement for analog phones that is an E911 compliant device.²⁴ The finding that Alltel’s analog claim is “notably non-specific” is inaccurate, and Alltel marketed the digital bagphone cited to in the *Order*.²⁵

Finally, the *Order* is critical of Alltel for the “limited nature” of its undertakings and identifies two examples of “more aggressive efforts that Alltel could have taken to ensure timely compliance with the 95% requirement.”²⁶ It should be noted that one of two the carriers cited recently submitted a request for extension of waiver²⁷ – evidence that the Commission’s own examples of “more aggressive” efforts do not necessarily achieve timely compliance with the 95 percent rule. Further, it is questionable as to whether the Commission’s comparison of the circumstances confronting a carrier with 10 million or more customers to those of a carrier with less than 7,000 customers²⁸ is legitimate, as the circumstances underlying each carrier’s waiver request vary greatly and

²¹ *Order* at ¶ 22.

²² *Petition* at 6.

²³ *Id.* at 9.

²⁴ Alltel Ex Parte Letter at 4.

²⁵ *Order* at ¶ 22 n.72.

²⁶ *Order* at ¶ 23.

²⁷ *See* LL License Holdings, Inc. – Expedited Action Requested, Request for Extension of Time to Meet Handset Penetration Rate, CC Docket No. 94-102 (filed Dec. 22, 2006) (Great Lakes of Iowa, cited in the *Order*, subsequently assigned its licenses to LL License Holdings).

²⁸ *See id.* at Exhibit 1.

the Commission cannot base its judgments on what may essentially be an apples to oranges comparison.

Ultimately, any Commission effort to parse among various offers and incentives is necessarily subjective and comes dangerously close to the “we-know-it-when-we-see-it” standard admonished in *Northeast Cellular*.²⁹ Instead, the Commission should focus attention on a carrier’s individualized special circumstances, including the nature of its customer base, and its good faith efforts to meet the requirement or come as close as reasonably possible.³⁰ Given the evidence set forth in the record, Alltel’s efforts meet the standard. The Commission should act on reconsideration to grant the waiver or, at a minimum, reverse the referral to the Enforcement Bureau.

²⁹ *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1164, 1167 (D.C. Cir. 1990).

³⁰ *Revision of the Commission's Rules To Ensure Compatibility With Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd 7709, 7772 (2005) (looking at Tier III carriers’ good faith efforts with respect to the interim benchmarks, and with respect to future compliance, holding that Enforcement Bureau referral may be warranted where “carriers fail to take the concrete steps necessary to implement, *in good faith*, any revised deployment schedule”) (emphasis added).

IV. CONCLUSION

For the foregoing reasons, Alltel seeks reconsideration of the order denying its request for waiver of Section 20.18(g)(1)(v) of the rules. The Commission should grant Alltel's request for a limited waiver, through June 30, 2007, to meet the requirement that 95 percent of its subscribers have ALI-capable handsets.

Respectfully submitted,

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February 5, 2007

CERTIFICATE OF SERVICE

I, Karla E. Huffstickler, hereby certify that the foregoing Petition for Reconsideration was served this 5th day of February, 2007 by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

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