

REDACTED VERSION FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Revision of the Commission's Rules To Ensure) CC Docket No. 94-102
Compatibility With Enhanced 911 Emergency)
Calling Systems)
)
Request for Limited Waiver of Washington)
RSA No. 8 Limited Partnership)

To: The Commission

**WASHINGTON RSA NO. 8 LIMITED PARTNERSHIP
PETITION FOR RECONSIDERATION**

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REDACTED VERSION FOR PUBLIC INSPECTION

SUMMARY

Washington RSA No. 8 Limited Partnership (“WA8LP”) petitions the Commission to reconsider paragraph 15 of its *Order* only partially granting WA8LP’s Request for Limited Waiver of Section 20.18(g)(1)(v) of the Commission’s rules. The Commission concluded that while an extension was warranted under the ENHANCE 911 Act, WA8LP had not established a “clear path to full compliance” and granted an extension only through August 8, 2007.

WA8LP is a Part 22 cellular Tier III carrier that serves a large, sparsely populated area characterized by rugged and variable terrain. WA8LP took to heart the FCC’s admonition to carriers to detail their path to compliance and began substantial efforts well before it filed its waiver request. WA8LP addressed the challenges in its market via a comprehensive, multi-pronged approach that included multiple promotional rate plans to motivate subscribers to upgrade handsets, including *free* ALI-capable handsets, calling *every* analog and digital non-ALI subscriber to offer new upgraded handsets, and constructing additional CDMA base stations to enhance its digital coverage.

WA8LP’s increased efforts, however, which continued through 2006 and today, coincided with a *slowing* of the rate at which existing customers upgrade their handsets as many of its subscribers remain reluctant to switch handsets, in a significant number of cases because they prefer the coverage capabilities of the analog bag phone. Furthermore, subscribers residing in WA8LP’s service areas in Idaho appeared reluctant to switch to an ALI-capable handset in part because E911 Phase II has not been implemented by the PSAPs in most of those markets. Thus, after assessing WA8LP’s 2006 efforts, WA8LP devised and implemented several new ALI-handset offerings specifically targeted at subscribers that currently have analog handsets or digital non-ALI-capable handsets. WA8LP estimates that penetration would continue to improve by approximately 1 percent per month and, thus, the Commission’s extension period is insufficient.

The Commission summarily rejected WA8LP’s waiver request in a single paragraph, asserting simply that WA8LP did not do enough in the past and was not planning to do enough in the future to encourage customers to upgrade their handsets. The rationale provided in the *Order* for declining to grant the full extent of the requested waiver was both insubstantial and at odds with the Commission’s own guidance. Most notably, the Commission suggested that WA8LP should have undertaken the same steps as the Tier III carriers it lauded in denying Sprint Nextel’s waiver – one of which was *WA8LP itself*, and all of whose efforts WA8LP has substantively met or exceeded. WA8LP also offers high-power “digital bag phones,” which the Commission has supported. The Commission also suggests that offering a free ALI-capable handsets without a renewed or extended service contract may be a significant factor going forward, which WA8LP began to offer last month. In addition, starting in February, WA8LP increased discounts on ALI-handsets and began offering 500 free minutes to subscribers who upgrade to ALI-capable handset irrespective of whether they extend their contracts.

The Commission’s conclusory analysis did not account for the structural factors rendering WA8LP’s compliance particularly challenging, nor did the Commission address the challenges WA8LP is facing by virtue of the absence of Phase II-capable PSAPs in many of its markets, notably in Idaho.

REDACTED VERSION FOR PUBLIC INSPECTION

WA8LP has provided an empirical analysis of predicted future penetration rates based on both its and its affiliate's experience. These demonstrable trends have continued since WA8LP filed its Waiver Petition. WA8LP has provided the very kind of outreach and marketing incentives the Commission has cited favorably as measures demonstrating that further progress will be made. In this manner, WA8LP has demonstrated a clear path to full compliance.

Finally, the Commission's decision to not extend WA8LP's requested waiver through October 31, 2007 is inconsistent with the ENHANCE 911 Act. In reaching its determination, the Commission relied on factors that are not relevant to the statutory standard for granting relief. Further, the factual determinations underlying the Commission's decision with respect to the sufficiency of WA8LP's compliance efforts are erroneous.

REDACTED VERSION FOR PUBLIC INSPECTION

TABLE OF CONTENTS

SUMMARY ii

TABLE OF CONTENTS..... iv

I. BACKGROUND 2

 A. The FCC’s Waiver Standard..... 2

 B. The ENHANCE 911 Act 4

 C. WA8LP’s Showing 4

 1. Progress toward achieving the 95 percent milestone..... 4

 2. WA8LP’s pre- February 2007 path to full compliance efforts..... 5

 3. Additional compliance efforts began in February 2007 6

 4. Barriers to WA8LP’s subscribers’ acceptance of ALI-capable
 handsets..... 7

 D. The Commission’s Order..... 8

II. DISCUSSION 9

 A. The Commission Failed to Explain its Reasoning for Denying WA8LP’s
 Requested Relief in Light of the Record and WA8LP’s Particular
 Circumstances 9

 B. WA8LP’s Compliance Efforts Met or Exceeded Those of the Other Tier
 III Carriers the Commission Cited as a Basis for Additional Relief..... 10

 C. The Commission Did Not Address the Specific Obstacles Facing WA8LP 13

 D. The Uncontroverted Record Demonstrates that WA8LP Has Provided a
 Clear Path to Full Compliance..... 14

 E. Pursuant to the ENHANCE 911 Act’s Criteria WA8LP’s Extension
 Should be Granted in Full..... 15

III. CONCLUSION..... 17

REDACTED VERSION FOR PUBLIC INSPECTION

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**WASHINGTON RSA NO. 8 LIMITED PARTNERSHIP
PETITION FOR RECONSIDERATION**

Pursuant to Section 405(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 405(a), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, Washington RSA No. 8 Limited Partnership ("WA8LP"), by its attorneys, hereby petitions the Commission to reconsider paragraph 15 of its *Order* which only partially granted WA8LP's Request for Limited Waiver of Section 20.18(g)(1)(v) of the Commission's rules, 47 C.F.R. § 20.18(g)(1)(v) (the "95 percent milestone").¹ WA8LP sought a one-year extension from its October 31, 2006 deadline to comply with the 95 percent milestone. The Commission concluded that while an extension was warranted, WA8LP had not established a "clear path to full compliance" and thus granted an extension only until August 8, 2007.² WA8LP does not seek reconsideration of the Commission's *Order* insofar as it granted WA8LP an extension through August 8, 2007³

¹ See *Revision of the Commission's Rules to Ensure Compatibility with ENHANCE 911 Emergency Calling Systems*, CC Docket No. 94-102, *Order*, FCC 07-9, at ¶ 15 (rel. Feb. 8, 2007) ("*Order*"); Request of Washington RSA No. 8 Limited Partnership for Limited Waiver, CC Docket No. 94-102 (filed Oct. 31, 2006) ("2006 Waiver Request").

² *Order* at ¶ 15.

³ See *id.* at ¶ 14.

REDACTED VERSION FOR PUBLIC INSPECTION

pursuant to the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004.⁴ WA8LP seeks reconsideration of the Commission's decision to not grant the full extent of the relief sought in the 2006 Waiver Request through October 31, 2007. As the Commission implicitly acknowledged, further relief may be warranted under the ENHANCE 911 Act beyond the current August 8, 2007 extension date.⁵ In fact, under the ENHANCE 911 Act, Congress made it clear that relief is mandatory if the factual circumstances warrant it – *i.e.*, “[t]he Commission *shall grant the waiver* ... if strict enforcement of the requirements ... would result in consumers having decreased access to emergency services.”⁶

WA8LP's experience in working toward compliance, together with a comparison to the efforts of other Tier III carriers that the Commission has touted, confirms that WA8LP did, in fact, provide a clear path to full compliance with the 95 percent milestone. Reconsideration of the *Order* and grant of the full extent of WA8LP requested relief is warranted in light of these factors.⁷

I. BACKGROUND

A. The FCC's Waiver Standard

The Commission's rules may be waived for good cause shown -- where special circumstances warrant a deviation from the general rule, and such deviation serves the public interest.⁸ Further, the Commission has determined that waivers may be warranted for E911

⁴ Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004, Pub. L. No. 108-494, 118 Stat. 3986 (2004) (“ENHANCE 911 Act”).

⁵ *See id.* at ¶ 14.

⁶ ENHANCE 911 Act, at § 107(a), 118 Stat. 3986, 3991.

⁷ *See* 47 C.F.R. §§ 1.106(b)(2), (c)(1).

⁸ *See id.* at § 1.3; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) *citing* *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969). Further, waiver may be warranted if “(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 (continued on next page)

REDACTED VERSION FOR PUBLIC INSPECTION

Phase II handset milestones, and clarified how this standard would be applied in the E911 context, finding that requests for waiver should be “specific, focused and limited in scope, and with a clear path to full compliance.”⁹ Carriers must also “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.”¹⁰

The Commission has recognized that smaller carriers in particular may face “extraordinary circumstances” in meeting the deadlines for Phase II deployment.¹¹ The Commission has also clarified that it did not intend that its waiver standard impose any sort of “strict liability” on carriers and that individualized circumstances would be accounted for:

[T]he non-nationwide Tier II and Tier III carriers may present different factual circumstances that may warrant some differences in their treatment.... If the smaller carriers work actively and effectively during this additional time, we expect that they will be able to comply with the deadlines, except perhaps in extraordinary circumstances. On the other hand, the 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. If a Tier II or Tier III carrier believes that it cannot meet its Phase II deadline, it may seek a waiver, as we indicated in the Non-Nationwide Carrier Order. Any such waiver requests will be expected to comply with the Phase II waiver standards.¹²

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.” 47 C.F.R. § 1.925(b)(3).

⁹ *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) (“*E911 Fourth MO&O*”).

¹⁰ *Id.*

¹¹ See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Order, 20 FCC Rcd 7709, 7714 (2005) (“*Tier III Carriers Order*”); *Phase II Compliance Deadlines for Non-Nationwide CMRS Carriers*, Order to Stay, 17 FCC Rcd. 14841, 14846 (2002) (“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”); *E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers*, Order to Stay, 18 FCC Rcd. 20987, 20994 (2003) (“*Tier III Stay Order*”) (“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”).

¹² See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems et al.*, Order, 18 FCC Rcd. 21838, 21845 (2003).

REDACTED VERSION FOR PUBLIC INSPECTION

The Commission thus committed itself to accounting for individualized circumstances in reviewing Tier III carriers' waiver requests.

B. The ENHANCE 911 Act

Congress enacted the ENHANCE 911 Act in part out of concern that Tier III carriers' ability to provide subscribers access to emergency services could be adversely affected if the FCC denied requests for waiver of the 95 percent milestone without first considering the impact of a denial on the availability of emergency services to consumers. Congress mandated that the FCC act on Tier III petitions within 100 days of request and grant the request if "strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services."¹³

C. WA8LP's Showing

1. Progress toward achieving the 95 percent milestone

As explained in its 2005 Waiver Request, WA8LP is a Part 22 cellular Tier III carrier that serves a large, sparsely populated area characterized by rugged and variable terrain.¹⁴ Since that filing, WA8LP has submitted numerous reports updating its progress towards the 95 percent milestone, detailing both its efforts and the challenges it faces:¹⁵

- WA8LP's October 1, 2006 penetration data reflected that approximately 83.2 percent of WA8LP's customers had ALI-capable handsets, with ■ percent of its subscribers

¹³ ENHANCE 911 Act, at § 107(a), 118 Stat. 3986, 3991.

¹⁴ See Request of Washington RSA No. 8 Limited Partnership for Limited Waiver, CC Docket No. 94-102, at 3 (filed Dec. 9, 2005) ("2005 Waiver Request"). In March 2006 the Commission granted WA8LP an extension of the 95 percent milestone through October 31, 2006. See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Order*, 21 FCC Rcd. 2833, 2840 (2006) ("2006 Waiver Order").

¹⁵ On October 31, 2006 WA8LP filed its 2006 Waiver Request detailing the status of its efforts and progress towards reaching the 95 percent milestone. WA8LP apprised the Commission of its ALI penetration rate and its path to compliance in its Quarterly E911 Status Reports filed in May 2006, August 2006, November 2006 and February 2007.

REDACTED VERSION FOR PUBLIC INSPECTION

stubbornly holding onto analog handsets and ■ percent keeping their digital non-ALI handsets.¹⁶

- In the November 1, 2006 Quarterly Status Report, WA8LP reported that the ALI penetration rate had increased to 84.6 percent.¹⁷
- The February 1, 2007 Quarterly Status Report utilized the then most current available data (December 31, 2006) and stated that the ALI penetration rate had risen to 87.1 percent. This represented a 2.5 percent increase over a two-month period.
- The latest handset data confirms WA8LP's predicted penetration rate and the necessity for WA8LP to receive the entire requested extension. As of February 28, 2007 analog handsets accounted for ■ percent of subscribers' handsets, and digital non-ALI handsets accounted for an additional ■ percent. Thus, ALI-capable handsets represent ■ percent of WA8LP's subscribers' handsets.

2. WA8LP's pre- February 2007 path to full compliance efforts

WA8LP took to heart the FCC's admonition to carriers to detail their path to compliance.¹⁸ In its 2006 Waiver Request, the subject of the underlying *Order* here, WA8LP recounted its substantial efforts to address these challenges via a comprehensive, multi-pronged approach. These efforts continued through 2006 and are ongoing. They include:

- Multiple promotional rate plans to motivate subscribers to upgrade handsets, including *free* ALI-capable handsets with a two-year contract, up to 500 free additional minutes with a handset upgrade and two-year contract, a significant handset discount (up to \$120) for feature-rich models, and a \$35 discount for any handset upgrade *with no contract required*, which effectively makes a new handset available for any new and existing customer for as low as \$24.95;
- Bill inserts describing the public safety benefits of having E911 ALI capability;
- Direct mailers explaining the public safety benefits of E911-related ALI capability;
- Calling *every* analog and digital non-ALI subscriber to offer new upgraded handsets and explain the public safety benefits of having E911 ALI capability;
- Educational ALI materials on WA8LP's website explaining the public safety benefits of having E911 ALI capability;

¹⁶ This data was reported as part of the 2006 Waiver Request.

¹⁷ The November 1, 2006 Quarterly Report utilized the then most current data, which was through October 26, 2006.

¹⁸ See, e.g., *Order* at ¶ 6 n.15.

REDACTED VERSION FOR PUBLIC INSPECTION

- Newsletters on the public safety benefits of ALI-capable handsets;
- Point-of-purchase informational pamphlets explaining the public safety benefits of having E911 ALI capability; and
- Introduction of a digital bag phone into WA8LP's handset offerings.¹⁹

To the extent that increasing WA8LP's digital 'footprint' will encourage analog subscribers to transition to digital handsets, WA8LP's digital build-out efforts are germane. WA8LP has engaged in a significant facilities buildout campaign to construct additional CDMA base stations that will enhance its digital coverage. WA8LP constructed an additional 12 digital sites by year end 2006.²⁰ WA8LP still expects to have its digital overlay complete in 2007. At the time of its 2006 Waiver Request, WA8LP's digital overlay covered over 98 percent of the POPs in its CGSA and 99 percent of its existing subscribers – and its coverage is even more extensive today.²¹

3. Additional compliance efforts began in February 2007

After assessing WA8LP's 2006 efforts, WA8LP devised and implemented several new ALI-handset offerings specifically targeted at subscribers that currently have analog handsets or digital non-ALI-capable handsets.²² Specifically, WA8LP began offering:

- A *free* Motorola V120e ALI-capable handset to any subscriber wishing to upgrade, with no contract required or a \$50.00 discount off any other ALI-capable handset;
- The 500 bonus minutes offer to subscribers who upgrade without a new contract;
- A choice of receiving *for free* any one of 4 ALI-capable handset models if the subscriber upgrades and signs a new 2 year contract;

¹⁹ 2006 Waiver Request at 6.

²⁰ See Washington RSA No. 8 Limited Partnership Quarterly E911 Status Report, CC Docket No. 94-102, at 4 (filed Feb. 1, 2007).

²¹ In its 2006 Waiver Request, WA8LP explained that "Given the extent of WA8LP's digital coverage, WA8LP believes that the absence of digital coverage in the limited remaining areas contributes to analog customers' resistance to upgrading their handsets in only a very limited way because of the continued limitations of low power digital handsets in remote areas." 2006 Waiver Request at 4.

²² We note that these new offerings went into effect February 9, 2007, but were in planning before the Order was released.

REDACTED VERSION FOR PUBLIC INSPECTION

- A new incentive to subscribers that wish to upgrade and obtain a feature-rich ALI-capable handset. Previously such subscribers could obtain a \$120.00 discount on their handset. Now, the discount has been increased to \$170.00.

4. Barriers to WA8LP's subscribers' acceptance of ALI-capable handsets

In requesting relief through October 31, 2007, WA8LP evaluated the effectiveness of its marketing campaign and reached a number of conclusions that formed the basis of WA8LP's request for relief:

- A significant number of subscribers remained reluctant to switch handsets because they prefer the coverage capabilities of the analog bag phone (which WA8LP documented in its 2006 Waiver Request). At the time, over ■ percent of WA8LP's subscribers had an analog bag phone, and bag phones accounted for ■ percent of all analog phones then in use by WA8LP's subscribers. Thus, even if all WA8LP subscribers with analog handsets (other than bag phones) and non-ALI-capable digital handsets upgraded to an ALI-capable handset, there is still a core percentage of analog bag phone customers who must also purchase upgrades or discontinue service if WA8LP is to comply.
- Subscribers residing in WA8LP's service areas in Idaho (Idaho 1(B)(2) RSA and Idaho 2(B)(2) RSA) appeared reluctant to switch to an ALI-capable handset in part because E911 Phase II has not been implemented by the PSAPs in most of those markets. ■ percent of all WA8LP subscribers with non-ALI-capable handsets live in areas of Idaho that have no Phase II service. Because ■ percent of WA8LP's total subscribers with non-ALI-capable handsets live in areas in which Phase II cannot be accessed, an ALI-capable handset's ability to support Phase II service provides little, if any, incentive for a non-ALI capable handset user to "trade up" to a digital ALI-capable mode handset. In contrast, WA8LP's affiliated neighbor in the adjacent WA 5 RSA, with similar terrain and demographics, was able to attain 95 percent penetration using the same campaign as WA8LP. A significant difference appears to be that ESRLP's entire service area has had Phase II service for almost two years.²³ Based on WA8LP's customers' reluctance to upgrade their handsets, WA8LP believes that there is a strong correlation between customer unwillingness to transition to new ALI-capable handsets and areas where Phase II service is unavailable.
- Many customers simply do not want to switch their handsets. WA8LP's subscribers without ALI-capable handsets have been directly contacted multiple times. These efforts

²³ WA8LP noted that ESRLP's penetration level was at a higher level than WA8LP's at the end of 2005 (90 percent versus 73 percent). Unlike WA8LP's markets, in ESRLP's market the PSAPs were Phase II-capable by the spring of 2005, and the exact same marketing efforts, which began well in advance of the December 31, 2005 deadline, enabled ESRLP to exceed the 95 percent milestone by July of 2006. Finally, ESRLP's digital overbuild is not yet complete, thus underscoring that digital coverage is only a very limited factor in customers' willingness to upgrade handsets. *See* 2006 Waiver Request at 6-7 n.8.

REDACTED VERSION FOR PUBLIC INSPECTION

are now becoming counterproductive as subscribers are increasingly expressing aggravation toward WA8LP's multiple calls and mailings to them.

- Most significantly, customer acceptance "flattened out" despite WA8LP's marketing efforts that were proven to be successful by its affiliate, ESRLP. At the time of the WA8LP's 2005 Waiver Request, it had achieved 73 percent penetration, and, as of the end of September 2006, the company had reached 83.2 percent.

Based on these trends, WA8LP estimated that penetration would continue to improve by approximately 1 percent per month and the eleven months of penetration data amassed to date confirms this assessment. The first month's data reflects an initial atypical "spike" of 3.7 percent. Although there have been fluctuations in subsequent months, the penetration rate has been, on average, 1.09 percent during the subsequent 10 months. Based on these figures, WA8LP determined that an additional period through October 31, 2007 would be needed to ensure compliance with the 95 percent milestone and the extension granted in the *Order* is insufficient.²⁴

D. The Commission's Order

In its *Order*, the Commission expressed "concern[] that [WA8LP] 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."²⁵ With respect to WA8LP's waiver showing, in one paragraph the Commission concluded that WA8LP "has not established a 'clear path to full compliance'" and "does not demonstrate with sufficient specificity that [its] efforts will achieve a 95 percent penetration rate by its requested deadline."²⁶ The Commission asserts that WA8LP's efforts as "described in its

²⁴ This would leave at most a one month "cushion" for WA8LP to meet the 95 percent milestone. WA8LP will strive to meet the milestone before the October 31, 2007 date, but notes that an unforeseen downturn in handset penetration, irrespective of WA8LP's marketing efforts, may necessitate a request for further relief.

²⁵ *Order* at ¶ 14.

²⁶ *Id.* at ¶ 15. While the *Order* stated that it "need not determine whether [WA8LP]'s Request satisfies the Commission's E911 waiver criteria," (*id.* at ¶ 14 n.42), the Commission did, in fact, make such a determination.

REDACTED VERSION FOR PUBLIC INSPECTION

quarterly updates have remained substantially the same over the past year, and [WA8LP] has not indicated that it plans to adopt a more aggressive approach in the future.”²⁷

While the Commission does not explain what (if any) efforts would have been deemed *per se* sufficient to warrant the full extent of WA8LP’s requested relief, it cites favorably to the efforts of other Tier III carriers as referenced in the Commission’s *Order* denying Sprint Nextel’s request for relief from the 95 percent milestone (which was adopted while the 2006 Waiver Request was still pending).²⁸ WA8LP addresses the Commission’s conclusions in this regard in more detail below, but those efforts touted in the *Sprint Order* include, among others, *WA8LP’s own efforts*.²⁹ The Commission also suggests that WA8LP might offer existing subscribers free handsets “without requiring a renewed or extended service contract” but otherwise offers little concrete guidance.³⁰

II. DISCUSSION

A. The Commission Failed to Explain its Reasoning for Denying WA8LP’s Requested Relief in Light of the Record and WA8LP’s Particular Circumstances

In considering WA8LP’s request for relief, the Commission is required to give it a “hard look” and “examine the relevant data and articulate a satisfactory explanation for its action” via a reasoned explanation based on the record.³¹ Even where, as here, the Commission is confronted with factual uncertainties and must necessarily make a predictive policy judgment, the

²⁷ *Id.* at ¶ 15.

²⁸ See *id.* at ¶ 17 n.46 (citing *Request for Waiver of Location-Capable Handset Penetration Deadline by Sprint Nextel Corporation*, WT Docket No. 05-286, *Order*, FCC 06-183, ¶ 32 (rel. Jan. 5, 2007) (“*Sprint Order*”).

²⁹ See *Sprint Order* at ¶ 32 n.104 (citing Washington RSA No. 8 Limited Partnership Quarterly E911 Status Report, CC Docket No. 94-102, at 2-3 (filed Aug. 1, 2006) (“August 2006 E911 Quarterly Status Report”).

³⁰ *Order* at ¶ 17 n.47.

³¹ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks and citation omitted); *WAIT Radio*, 418 F.2d at 1157.

REDACTED VERSION FOR PUBLIC INSPECTION

Commission must “so state and go on to identify the considerations it found persuasive.”³² The Commission, however, summarily rejected WA8LP’s request in a single paragraph, asserting in essence (and without explanation) simply that WA8LP did not do enough in the past and was not planning to do enough in the future to encourage customers to upgrade their handsets.

WA8LP provided compelling evidence that it continued to make progress toward the 95 percent milestone in the face of very difficult structural challenges. As described below, that the Commission did not adequately address the merits of WA8LP’s petition is evident from the scant reasoning it did provide. Thus, the *Order* instead reflects the very “perfunctory treatment” of a waiver request that the court cautioned against in *WAIT Radio*, particularly in light of the standard the Commission established for itself in reviewing requests for waiver of the 95 percent milestone.³³ Such brusque consideration also runs contrary to Congress’ directive expressed in the ENHANCE 911 Act that the Commission consider the impact of a denial of such a request on subscribers’ ability to access emergency services.

B. WA8LP’s Compliance Efforts Met or Exceeded Those of the Other Tier III Carriers the Commission Cited as a Basis for Additional Relief.

The rationale provided in the *Order* for declining to grant the full extent of the requested waiver was both insubstantial and at odds with the FCC’s previous evaluations of commendable carrier efforts.³⁴ Most notably, the Commission obliquely suggested that WA8LP should have undertaken the same steps as the Tier III carriers it lauded in the *Sprint Order* – one of which was *WA8LP itself*.³⁵

³² See *Melcher v. FCC*, 134 F.3d 1143, 1152 (D.C. Cir. 1998) (citation omitted).

³³ See *WAIT Radio*, 418 F.2d at 1157.

³⁴ See *Sprint Order* at ¶ 32.

³⁵ *Id.* at ¶ 32 n.104.

REDACTED VERSION FOR PUBLIC INSPECTION

The following comparison between the Tier III carriers' efforts favorably cited in the *Order* (by its reference to the *Sprint Order*) and WA8LP's own efforts, further indicates that there are, at most, marginal differences between the two, and in many instances WA8LP effectively exceeded those efforts. As a threshold matter, the Commission failed to explain its reasoning as to why WA8LP's efforts fell short.

Other Cited Tier III Carriers' Efforts	WA8LP's Parallel Efforts
<p><u>Verizon Wireless Puerto Rico</u> (<i>Sprint Order</i> at ¶ 32)</p> <ul style="list-style-type: none"> • Called all customers with non-ALI handsets and offered: <ol style="list-style-type: none"> (1) A choice between two free handsets with contract renewal. (2) One year contract term rather than two years. (3) 100 free minutes per month for three months. 	<p>WA8LP:</p> <ul style="list-style-type: none"> • Called all customers with non-ALI handsets multiple times, coupled with direct mailings and bill inserts and offered: <ol style="list-style-type: none"> (1) A choice of at least two free ALI-capable handsets with a two year contract. (2) \$35 discount for any handset upgrade with no contract required, making a new handset available for as low as \$24.95 with no contract. (3) Up to 500 free additional minutes with a handset upgrade and two year contract.
<p><u>Great Lakes of Iowa, now LL License Holdings</u> (<i>Sprint Order</i> at ¶ 32).</p> <ul style="list-style-type: none"> • Called all customers with non-ALI handset and offered free new phone and month of free service. • Offered to waive two year contract term. 	<p>WA8LP:</p> <ul style="list-style-type: none"> • Called all customers with non-ALI handsets multiple times, coupled with direct mailings and bill inserts. • Offered a \$35 discount for any handset upgrade with no contract required, making a new handset available for as low as \$24.95 with no contract.
<p><u>Cable & Communications Corporation</u> (<i>Sprint Order</i> at ¶ 32 n.104)</p> <ul style="list-style-type: none"> • Free phone, activation and 10 percent discount on accessory purchases with two year contract. 	<p>WA8LP:</p> <ul style="list-style-type: none"> • Offered choice of at least two free ALI-capable handsets with a two year contract. Also offered up to 500 free additional minutes with a handset upgrade and two year contract.

REDACTED VERSION FOR PUBLIC INSPECTION

The Commission has also cited favorably to the offering of high-power digital bag phones.³⁶ Although they were difficult for WA8LP to obtain due to WA8LP's inability to deal directly with handset manufacturers,³⁷ WA8LP has offered these as well and found that they were not embraced by WA8LP's subscribers because they do not have a range equivalent to that of analog bag phones. The Commission also suggests that offering free ALI-capable handsets without a renewed or extended service contract may be a significant factor going forward.³⁸ As discussed above, however, pre-February 2007 WA8LP offered existing customers a significant handset discount without any new contract such that a new ALI-capable handset is available for as low as \$24.95. In addition, pre-February 2007 WA8LP offered a significant handset discount of up to \$120 for feature-rich models. Nowhere does the Commission explain why it believes the differences between the Tier III plans touted in the *Sprint Order* and the other measures suggested in the *Order* are so materially significant as to demonstrate that they represent "a clear path to full compliance" and WA8LP's efforts do not.³⁹ Measured by the Commission's previous evaluations of carrier efforts, WA8LP submits that its existing inducements were sufficient to meet that standard.⁴⁰

³⁶ 2006 Waiver Order, 21 FCC Rcd at 2837 n.34.

³⁷ Washington RSA No. 8 Limited Partnership Quarterly E911 Status Report, CC Docket No. 94-102, at 3 (filed May 1, 2006); August 2006 Quarterly E911 Status Report, at 3.

³⁸ *Order* at ¶ 17 n.47.

³⁹ Indeed, one of those parties recently submitted a request to further extend its waiver of the 95 percent milestone, thus demonstrating that such efforts in themselves are not always sufficient to ensure compliance. See Request of LL License Holdings, Inc. for Extension of Time to Meet Handset Penetration Rate, CC Docket No. 94-102 (filed Dec. 22, 2006).

⁴⁰ The *Order* does not explain why offering free ALI-capable phones to analog bag phone subscribers would motivate them to accept the ALI-capable handsets. As WA8LP's experience with digital bag phones has demonstrated, analog bag phone users retain their handsets because they believe that analog bag phones provide superior range. Thus, it is not realistic to expect WA8LP's analog bag phone subscribers to accept handsets that will not meet their needs simply because the ALI-handset is free. Indeed, even if WA8LP were to mail each of these subscribers an ALI-capable handset unsolicited, there is no guarantee that they would activate the handsets. In any case, WA8LP is unaware of any instance in which the Commission has mandated that a carrier provide customers free cellular phones without any other conditions in order to reach the 95 percent milestone.

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Further, as of February 2007, WA8LP began offering free ALI-capable handsets to its subscribers without a renewed or extended service contract. In addition, as discussed in Section I(C)(3) above, additional discounts on ALI-capable handsets and free minutes of use are now offered to subscribers without contracts as well as subscribers that choose to extend their contracts for two years.

C. The Commission Did Not Address the Specific Obstacles Facing WA8LP

Nor did the Commission's conclusory analysis account for the structural factors rendering WA8LP's compliance particularly challenging. The Commission has expressly recognized customers' unwillingness to forgo existing handsets that may provide expanded range, but are not ALI-capable.⁴¹ The Commission has consistently acknowledged that carriers' ability to meet handset penetration requirements is dependent in part on consumer demand,⁴² and that for a variety of reasons "the actual pace of ALI-capable handset deployment could lag and may take several years" as "[s]ome customers will undoubtedly elect to economize by keeping their handsets for much longer than average, despite the advantages of ALI-capable handsets."⁴³ Unless the Commission can explain on reconsideration why it reached the conclusions it did in light of WA8LP's documented experience with a resistant customer base, as well as the Commission's departure from its previous acknowledgement that customer reluctance may prove prohibitive, the Commission's reasoning can only reflect the impermissibly subjective "we know it when we see it" rationale the D.C. Circuit rejected in *Northeast Cellular*.⁴⁴

⁴¹ See *Tier III Carriers Order*, 20 FCC Rcd at 7736-7737.

⁴² See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Third Report and Order*, 14 FCC Rcd 17388, 17412-13; *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442, 17456 (2000).

⁴³ See *Third Report and Order*, 14 FCC Rcd at 17412.

⁴⁴ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d at 1166.

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The Commission similarly did not address the challenges WA8LP is facing by virtue of the absence of Phase II-capable PSAPs in many of its markets, notably in Idaho. WA8LP did not argue that relief was warranted merely because PSAPs in many markets were not yet Phase II capable. WA8LP fully acknowledges that there are public interest benefits for a customer to have an ALI-capable handset irrespective of whether the PSAP is Phase II-capable.⁴⁵ Rather, WA8LP provided evidence indicating that the lack of PSAP capability in specific markets (Idaho 1(B)(2) RSA and Idaho 2(B)(2) RSA) creates an obstacle that hinders WA8LP's marketing efforts. For this reason as well, the Commission did not adequately address WA8LP's particular circumstances.

D. The Uncontroverted Record Demonstrates that WA8LP Has Provided a Clear Path to Full Compliance

WA8LP has provided an empirical analysis of predicted future penetration rates based on its experience and demonstrable trends that have continued since WA8LP filed its 2006 Waiver Request. Even before February 2007's new initiatives, WA8LP provided the very kind of outreach and marketing incentives the Commission has cited favorably as measures demonstrating that further progress will be made. Further, the additional incentives that WA8LP began offering last month reflect its ongoing commitment. WA8LP will again affirm its steadfast commitment to continuing its good faith efforts toward compliance.⁴⁶ In this manner, WA8LP has demonstrated, and continues to demonstrate, a clear path to full compliance.⁴⁷

⁴⁵ See *Sprint Order* at ¶ 25.

⁴⁶ *Tier III Carriers Order*, 20 FCC Rcd at 7772 (Tier III carriers expected "to take the concrete steps necessary to implement, in good faith, any revised deployment schedule").

⁴⁷ See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems - GTE Pacifica, Inc. d/b/a Verizon Pacifica Request for Waiver, Order*, 21 FCC Rcd 3770, 3775-76 (2006) (granting full extent of waiver for reasons under the *E911 Fourth MO&O* in addition to the *ENHANCE 911 Act*).

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E. Pursuant to the ENHANCE 911 Act's Criteria WA8LP's Extension Should be Granted in Full

The ENHANCE 911 Act mandates that the Commission grant a request for waiver of the 95 percent milestone if “strict enforcement of the requirements ... would result in consumers having decreased access to emergency services.”⁴⁸ In the *Order* the Commission found that “[i]t appears likely that strict enforcement of Washington RSA 8’s current October 31, 2006 deadline under these circumstances would impair the ability of certain 911 calls to reach emergency assistance, and “would result in consumers having decreased access to emergency services” within the meaning of the ENHANCE 911 Act.⁴⁹ Having made that finding, however, the Commission opted to not grant the entire requested extension, asserting “that Washington RSA 8 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.”⁵⁰

WA8LP respectfully submits that this analysis is both at odds with the clear intent of the ENHANCE 911 Act and is based on factual error. The Commission appears to have truncated the requested extension, in part, because in 2005 WA8LP had miscalculated the initial penetration rate. This is not a relevant statutory consideration, and it would appear contrary to

⁴⁸ ENHANCE 911 Act, at § 107(a), 118 Stat. 3986, 3991.

⁴⁹ *Order* at ¶ 14.

⁵⁰ *Id.* WA8LP notes that on March 9, 2007, the Commission granted South Canaan Cellular Communications Company, L.P. relief through September 30, 2007 solely pursuant to the ENHANCE 911 Act. See *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petitions for Waiver of Enhanced 911 Phase II Requirements*, CC Docket No. 94-102, DA 07-1217, ¶¶ 12, 21 (rel. March. 9, 2007). WA8LP’s handset penetration figures are comparable to South Canaan’s, and WA8LP submits that its handset promotional efforts and factual showing underscoring the obstacles to compliance and need for relief are even more comprehensive than South Canaan’s. The Commission’s decision to grant South Canaan such relief cannot be reconciled with its decision with respect to WA8LP. See *Melody Music, Inc. v. FCC*, 345 F.2d 730, 732 (D.C. Cir. 1965) (Commission must explain reasons for treating similarly situated applicants differently); *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) (“An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties”).

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Congress' intent for the Commission to punish subscribers by denying them access to emergency services because the carrier made an inadvertent miscalculation (which the *Order* notes WA8LP disclosed to the Commission).⁵¹ In addition, while WA8LP demonstrated above that it in no way "fell short in promoting adoption of location-capable handsets" this is not a relevant statutory consideration either,⁵² and it is impossible to reconcile the Commission's criticism of WA8LP's ALI efforts in light of the Commission lauding WA8LP's efforts in the *Sprint Order*.

⁵¹ *Order* at n.26. As previously disclosed, counsel for WA8LP notified WTB Staff of this on March 31, 2006 immediately after discovering WA8LP's miscalculation and "offered to immediately file a letter with the Commission explaining the source of the discrepancy but was instead instructed by the Commission staff to fully disclose the circumstances surrounding the calculation error in the [next scheduled quarterly] report." See May 1, 2006 Quarterly Status Report at n.4.

⁵² While this may be a relevant consideration for the Commission's general waiver standard, the statutory standard is clear and, indeed, Congress would have said so had it intended the Commission to incorporate this factor into the agency's application of the ENHANCE 911 Act. See *Hernstadt v. FCC*, 677 F.2d 893, 902 n.22 (D.C. Cir. 1980) (Congress presumed to be cognizant of and legislate against background of existing agency interpretation of law); *Sweet Home v. Babbitt*, 17 F.3d 1463, 1471 (D.C. Cir. 1994) (same), *rev'd on other grounds*, 515 U.S. 687 (1995).

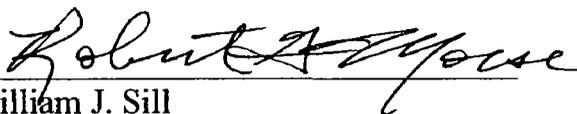
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III. CONCLUSION

For the foregoing reasons, the Commission should reconsider its *Order* and grant WA8LP the full extent of the relief requested in the 2006 Waiver Request through October 31, 2007.

Respectfully submitted,

**WASHINGTON RSA NO. 8 LIMITED
PARTNERSHIP**

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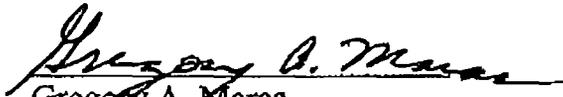
March 12, 2007

DECLARATION OF GREGORY A. MARAS

I, Gregory A. Maras, declare under penalty of perjury that the following is true and correct:

1. I am the Secretary of Inland Cellular Telephone Company, General Partner of Washington RSA No. 8 Limited Partnership ("WA8LP").
2. I have reviewed the foregoing Petition for Reconsideration and believe it to be true and correct to the best of my knowledge, information and belief.

This Declaration is executed on this 9th day of March, 2007.


Gregory A. Maras
Secretary of General Partner,
Inland Cellular Telephone Company