REDACTED VERSION – FOR PUBLIC INSPECTION

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones	)	WT Docket No. 01-309
	)	
Petitions for Waiver of Section 20.19 of the Commission's Rules	)	

To: The Commission

CELLULAR PHONE OF KENTUCKY AND LITCHFIELD COUNTY CELLULAR, INC. DBA RAMCELL OF KENTUCKY PETITION FOR RECONSIDERATION

Pursuant to Section 405(a) of the Communications Act of 1934, as amended (the "Act"), and Section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, Cellular Phone of Kentucky, Inc. and Litchfield County Cellular, Inc. dba Ramcell of Kentucky ("Petitioners"), hereby seek reconsideration of the Commission's denial of Petitioners' requests for waiver of Section 20.19(c)(2)(i)(A) of the Commission's rules and the Commission's referral of the matter to the Enforcement Bureau.[1] By this filing, Petitioners submit additional financial-related information demonstrating that deploying an alternative digital wireless technology was not an economically feasible option. Commission consideration of this additional information is consistent with the public interest and warrants grant of Petitioners' waiver requests and reconsideration of the referral of non-compliance to the Enforcement Bureau.[2]

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[1] *See In the Matter of Section 68.4(a) of the Commission's Rules Governing Hearing Aid-Compatible Telephones, Petitions for Waiver of Section 20.19 of the Commission's Rules*, Memorandum Opinion and Order, WT Docket No. 01-309, FCC 07-51, ¶¶ 61-71, 76, 82 (rel. Apr. 11, 2007) ("*Order*").

[2] *See* 47 U.S.C. § 405(a); 47 C.F.R. § 1.106(c)(2). It is well-established that consideration of additional facts is in the public interest when necessary to ensure that important Commission policy objectives are faithfully fulfilled. *See, e.g., In the Matter of Local Exchange Carriers' Individual Case Basis DS3 Service Offerings*, 5 FCC Rcd 4842, ¶ 33 (1990); *Aircom Consultants, Inc.*, 18 FCC Rcd 1806, ¶ 9 n.30 (WTB 2003) (consideration of new facts in the public interest "[i]n light of petitioner's claim that it proposes to offer telecommunications services to rural and underserved populations"); *EchoStar Satellite Corp.*, 17 FCC Rcd 23489, ¶ 5 (IB 2002); *see also Pinpoint*
(continued on next page)

I. BACKGROUND

Petitioners are "Tier III" licensees for two rural cellular TDMA systems in the Kentucky 6-Madison RSA and Kentucky 11-Clay RSA markets. When the Petitioners designed and constructed their digital cellular systems, TDMA was a highly regarded and prominent technology. That changed, however, as CDMA and GSM became more widely accepted and utilized. In the 2003-2004 time frame, Petitioners determined that it would be necessary for both business reasons and regulatory compliance purposes to deploy a CDMA overbuild and transition their customers to that new technology.

Due to unforeseen financial setbacks that occurred in the 2004-2005 period, however, this plan became nonviable. Without a CDMA overlay, Petitioners were forced to conclude in 3Q2005 that they lacked the financial ability to make the requisite investments necessary to become HAC compliant and to continue in business, and thus, were compelled to sell their systems. Petitioners notified the Commission of their intention to sell their systems in September of 2005.[3] Selling any cellular system is a complex, time-consuming endeavor, but Petitioners worked in good faith, employing the services of a third party broker to find a buyer for the system, despite their limited transactional resources. Given the outmoded nature of the TDMA technology and the precarious financial condition of their systems, finding a buyer proved more difficult than anticipated.

Communications, Inc., 14 FCC Rcd 6421, ¶ 7 (WTB 1999); *Virginia Tech Fdn., Inc.*, 13 FCC Rcd 4535, ¶ 5 (WTB 1998). By the terms of the Commission's own Orders in this proceeding Petitioners' financial condition raises significant public interest issues with respect to their waiver request. Moreover, Petitioners' requests were supported by a officer's declaration, stating that all of the information, including that concerning their financial condition, was true and correct. No parties are prejudiced or adversely affected by consideration of this information. In these circumstances, consideration of these facts is also important to ensuring that the Commission's processes remain fair and accessible to small rural carriers. *See Letter to Mr. Elliott J. Greenwald, Esq.*, 13 FCC Rcd 7132 (WTB 1998) (acknowledging "the public interest in ensuring the fairness of the Commission's processes").

[3] *See* Petitioners' Requests for Waiver in WT Docket No. 03-109, filed September 16, 2005.

By August of 2006, Petitioners reached an agreement in principle with Verizon Wireless to sell their systems, and the process of due diligence had begun. Subsequently, beginning shortly before November 2006, Petitioners limited their handset offerings to two TDMA handsets and, thus, the *de minimis* exemption became applicable. Petitioners filed applications for assignment of their respective licenses to Verizon Wireless on March 30, 2007, which were recently granted.[4] Petitioners understand that Verizon Wireless intends to complete a CDMA overbuild and begin selling compliant handsets within 9 months after closing of the transaction.

II. DISCUSSION

The rules provide in relevant part that "[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."[5] In meeting this showing, the Commission indicated that rural TDMA carriers should demonstrate "'a clear path to full compliance' by, for example, providing concrete evidence of its documented commitment to a date certain for that transition to be accomplished."[6] Petitioners meet this standard in view of the previous information supported by declaration and the information provided herein.

A. Rural TDMA Networks and the Commission's *Reconsideration Order*

In its 2005 *Reconsideration Order*, the Commission modified its rules governing carriers' handset offerings "in light of [its] recognition that small wireless carriers are often unable to influence product development, and because of the record evidence that supports a conclusion

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[4] *See* ULS Nos. 0002962219 and 0002962269.

[5] 47 C.F.R. § 1.925(b)(3)(ii).

[6] *See In the Matter of Section 63.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 11194, ¶ 50 (2005) ("*Reconsideration Order*").

that wireless carriers in general have migrated away from the TDMA air interface."[7] The Commission also expressly "acknowledge[d] that a technology overbuild represents a considerable undertaking and requires a significant investment." and was not certain, but "*hopeful* that this limited relief will allow TDMA carriers, which often have small numbers of subscribers and thus lower revenues, to focus their limited resources primarily on upgrading their networks."[8] The Commission was cognizant that strict enforcement "*could have the unintended consequence of forcing these carriers to shut down their networks*, which may deprive customers of service."[9] In its *Reconsideration Order*, the Commission also concluded "that the necessary technology to complete these network overbuilds is readily available" but recognized that there may be "circumstances where TDMA carriers do not intend to completely replace existing networks" and that it would "entertain individual requests for relief."[10] Petitioners requested such relief, which the Commission denied in its *Order*.

B. The *Order* Mischaracterizes Petitioners' Circumstances, Which Underscore that Strict Compliance Would Be Unduly Burdensome and that Petitioners Have No Reasonable Alternative

Citing to waiver criteria established outside the instant proceeding,[11] the Commission concluded that Petitioners' "claims of financial distress are not supported by the factual detail the Commission demands from licensees attempting to excuse compliance with the rules on financial grounds" and that "[a]bsent submission of the requisite financial documentation, we cannot determine whether [Petitioners] lacked the financial resources to change their network technology or bring themselves into [HAC] compliance in other ways, and … cannot conclude

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[7] *Id.* at ¶ 49.
[8] *Id.*
[9] *Id.* (emphasis added).
[10] *Id.* at ¶ 50.

that the systems' failure to sell at an earlier date is other than a function of the asking price."[12] As a threshold matter, the statements contained in the Petition were not mere "claims" but were supported by the declaration of an officer of the Petitioners. Nonetheless, Petitioners here have attached audited financial statements for the period 2002-2005, which were the basis of the declarant's statements concerning Petitioners' eroding financial condition.[13]

Following is an overview, based on this data, of the company's financial condition and the circumstances that necessitated the Petitioners' waiver requests:

- Petitioners' total revenues [redacted] Over that same period, the value of their assets [redacted], while total subscribership has [redacted].
- In February 2004, Petitioners obtained an estimate for deploying a CDMA overlay in their markets.[14] [redacted]
- [redacted][16]
- [redacted]

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[11] *See Order* at ¶ 65 n.208 (citing to the E-911 docket and a 1980 decision regarding certain broadcast rules).
[12] *Order* at ¶ 65.
[13] *See* Attachment 1.
[14] *See* Attachment 2, document titled "Ramcell Cellular Kentucky CDMA Overlay," dated February 05, 2004.
[15] *Id.*
[16] [redacted]

[redacted]

- [redacted] Thus, it became necessary to sell the systems.

The *Order* acknowledges that these circumstances can justify waiver relief for Tier III TDMA carriers such as Petitioners, and the Commission must account for this information here.[17]

The Commission characterizes Petitioners as seeking "an accommodation to their business decisions to sell their systems rather than undertake an overbuild" and presumes that they "could have implemented those business decisions, and sold their TDMA systems, well in advance of the September 16, 2005 compliance deadline."[18] The Commission cites no record basis for these conclusions, nor could it. First, it was not until September 2005 that it became clear that the Petitioners' financial condition precluded Petitioners from being able to build CDMA overlays for their systems. This was a painful decision for the Petitioners, as they had built their systems and provided reliable cellular service to their subscribers for over 15 years. Once the difficult decision to sell the systems was made, however, it proved more challenging to implement. Neither the marketplace nor the Commission have "commoditized" either Part 22 cellular licenses and networks, or the process of acquiring them.

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[17] *See Order* at ¶ 66. As this information relates directly to the public interest merits of the waiver request and corroborates Petitioners' previous sworn statements concerning their financial condition, the Commission must account for this information on reconsideration. *See* 47 C.F.R. § 1.106(c)(2); *supra* note 2. The record indicates that staff contacted other parties with pending waiver requests prior to release of the *Order* to request additional information. *See* Mid-Tex Cellular, Ltd., Letter in WT Docket No. 01-309, at 1, filed Feb. 22, 2007 (letter filed "[p]ursuant to a request by [Commission] staff"). Indeed, the Commission treated the pending waiver requests as "permit but disclose" presumably so that staff would be able to engage in such discussions. *See* Public Notice, WT Docket No. 01-309, DA 07-102 (rel. Jan. 18, 2007). Petitioners received similar no inquiries or contact from staff requesting additional information or documentation or otherwise indicating that the factual showing was deficient.

[18] *Order* at ¶¶ 66, 70.

Petitioners maintain small operations – indeed, they are the type of small, locally-based providers Congress and the Commission have sought to encourage.[19] Unlike nationwide and many mid-sized carriers, Petitioners do not maintain in-house transactional personnel, and it was necessary to engage various third parties to help facilitate the transaction while ensuring that existing personnel remained focused on providing reliable cellular service. Petitioners thus engaged a broker to assist in the sale of the systems, but the rural nature and economic downturn of the markets, the weakened cash flow of the systems, and the lack of CDMA overlays, significantly limited the number of interested buyers.[20] Once an interested buyer was identified, transactional negotiations and the buyer's due diligence efforts further lengthened the process. Petitioners entered into an agreement with Verizon Wireless to sell their respective systems, and prepared their portions of the assignment applications, which were granted April 30, 2007, as rapidly as was possible. The systems will soon be owned and operated by Verizon Wireless.

The Commission's reasoning in the *Order* stands in stark contrast to its long held recognition that small rural carriers are confronted with unique challenges that require special consideration.[21] The Commission's decision here would essentially mandate that a Tier III licensee incur punitive transaction costs as a condition of sale when confronted with a regulatory deadline with which it cannot reasonably comply. Compliance here is not a simple matter of

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[19] *See* 47 U.S.C. § 309(j)(3)-(4); *Facilitating the Provision of Spectrum-Based Services to Rural Areas and Promoting Opportunities for Rural Telephone Companies To Provide Spectrum-Based Services*, 19 FCC Rcd 19078, ¶ 31 (2004) ("*Rural Wireless Order*") (discussing Commission policy of promoting broad dissemination of licenses and opportunities for smaller entities in rural areas).

[20] The attached audited financial statement for 2004-2005 confirms that management was "actively marketing the company and its assets." *See* Attachment 1, Combined Financial Statements for December 31, 2005 and 2004, at 13. Petitioners also note that other nationwide or regional carriers already had a presence in the company's markets, thus making the sale of the assets even more challenging.

[21] *See Reconsideration Order* at ¶ 49; *see also 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, 17 FCC Rcd 14,841 (2002); *Revision of the Commission's Rules To Ensure Compatibility with*
(continued on next page)

buying handsets that are already out in the marketplace, but making a huge capital investment in a CDMA overlay while, in Petitioners' case, simultaneously absorbing significant revenue shortfalls. Particularly where, as here, the buyer has the resources of a Tier I carrier and will thus be able to bring the markets into compliance more expeditiously, denial of Petitioners' waiver sends the wrong signal to small entities operating or seeking to operate in rural areas contrary to Commission policy.[22]

C. Public Interest Considerations Weigh In Favor of Granting Petitioners' Waiver Requests

The Commission's denial of the waiver requests, and particularly its referral of the matter to the Enforcement Bureau, will not further the public interest goal of making HAC handsets available in these markets, as Petitioners are now subject to the *de minimis* exception under Section 20.19(e) of the rules, and customers will be transitioned to Verizon Wireless's CDMA network in a short period of time. In the RFA accompanying the adoption of the *de minimis* exception, the Commission touted the rule as "recogniz[ing] that certain manufacturers and service providers may have only a small presence in the market."[23] While Petitioners were not formally eligible for the *de minimis* exception until November of 2006, they compete against a number of nationwide carriers already and clearly have "only a small presence in the market."[24]

Enhanced 911 Emergency Calling Systems, E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers, Order to Stay, 18 FCC Rcd. 20987 (2003).

[22] *See Rural Wireless Order* at ¶ 8 (acting to "eliminat[e] disincentives to serve or invest in rural areas, and helping to reduce the costs of market entry, network deployment and continuing operations"). Given the upheavals many small rural carriers have experienced as the industry has consolidated and as roaming revenues decline, Petitioners submit that it is not in the public interest for the Commission to add "insult to injury" as they and their principals try to adjust to the rapidly changing marketplace.

[23] *See In the Matter of Section 68.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Report and Order, 18 FCC Rcd. 16753, App. B ¶ 12 (2003) ("*Report and Order*").

[24] In addition the audited financial statements make clear that with each passing year Ramcell's cellular revenues, and thus its market share, continued to erode.

Moreover, not affording Petitioners their requested relief creates inequitable situations in which smaller carriers are potentially subject to more burdensome requirements than larger ones.[25]

In addition, unlike Petitioners many rural TDMA-based carriers were not subject to the rule until September of 2006. In the *Order*, the Commission states that "[t]o the extent [Petitioners] suggest that a waiver is warranted in part because they *could* have availed themselves of the relief provided to overbuilding TDMA carriers, … we disagree."[26] Petitioners suggest no such thing and did not try to "game" the rules in any manner. Petitioners fully acknowledged in the record that they "could not avail [themselves] of the transition period for TDMA systems under Section 20.19(c)(2)(i)(B)."[27] Nevertheless, given the Commission's emphasis on "ensuring that hearing aid-compatible handsets are made available to consumers in the shortest period possible,"[28] in considering public interest detriments and benefits of Petitioners' waiver request it is *very* relevant that the Commission expressly deemed it consistent

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[25] For example, an MVNO with a nationwide presence offering only two handsets is eligible for the *de minimis* exception, even if it has many more subscribers than Petitioners. Similarly, a nationwide facilities-based carrier is initially eligible for the exception for handsets operating on a new air interface protocol, even though it presumably (based on the Commission's rationale) has more influence over manufacturers and may very well sell more of those new handsets than Petitioners have total customers. In its desire to prevent such inequities, the Commission rejected an interpretation of the *de minimis* exception that would have effectively imposed more burdensome requirements on smaller entities. *See Reconsideration Order* at ¶ 53 n.173.

[26] *Order* at ¶ 66 n.209.

[27] *See* August 30th Letters in WT Docket No. 01-309, at 2. The Commission contrasts Petitioners' requests for relief with those of Leaco, SLO and Entertainment Unlimited ("EU"), who, according to the Commission, "affirmatively state they will undertake overbuilds …." *Order* at ¶ 66 n.209. In fact, the circumstances as reflected in the public record are not as clear-cut as the Commission apparently presumes. Leaco notified the Commission on May 16, 2006, that it had reduced its TDMA handset offering to just two digital wireless handsets. *See* Leaco Rural Telephone Cooperative, Inc., Amendment to Conditional Petition for Limited Waiver, WT Docket No. 01-309, filed May 16, 2006. Thus, the record does not reflect whether Leaco ultimately completed its digital overbuild or not (although Petitioners have no reason to believe Leaco did not). SLO and EU requested a further waiver with respect to TDMA handsets through *September 18, 2007*, and while SLO at least has apparently completed a digital overbuild, the record still indicates that EU's remains TDMA-only. *See* Harinder R. Kumra d/b/a Entertainment Unlimited, Sixth Semi-Annual Report, WT Docket No. 01-309, filed Dec. 1, 2006, at 1; SLO/EU Petition for Temporary Waiver or Temporary Stay, WT Docket No. 01-309, at 1.

[28] *Reconsideration Order* at ¶ 50.

with the public interest to permit other rural TDMA carriers to *not* offer any HAC-compliant handsets through September 16, 2006, regardless of how many TDMA models they offered.[29]

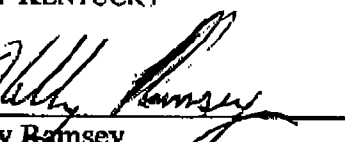
Furthermore, Petitioners never sought authority to operate under a waiver for an indefinite period of time. To the contrary, as a result of Petitioners' efforts to find a buyer that has the resources to provide HAC handsets to the markets and undertake the required capital intensive build-out, HAC-compliant handsets will be available in the near future. In short, while the process admittedly took longer than hoped, Petitioners have demonstrated herein a "documented commitment to a date certain for that transition [to CDMA technology] to be accomplished" consistent with the *2005 Reconsideration Order*.

III. CONCLUSION

For the foregoing reasons, the Commission should reconsider its *Order* by granting Petitioners' waiver requests and rescinding the referral of the matter to the Enforcement Bureau.

Respectfully submitted,

CELLULAR PHONE OF KENTUCKY, INC, AND
LITCHFIELD COUNTY CELLULAR, INC. DBA
RAMCELL OF KENTUCKY

By: 

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May 11, 2007

[29] The Commission found that the provision for TDMA networks "amounts to an exception and maintains the status quo for affected entities ...." *Id.* at ¶ 73 (in Final Regulatory Flexibility Certification). Petitioners' customers would be in exactly the same position as a TDMA carrier who in good faith availed itself of the relief afforded in the *Reconsideration Order* but ceased its overbuild once its total handset offerings dropped to two models.

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ATTACHMENT 1

FINANCIAL STATEMENTS

(REDACTED FROM PUBLIC VERSION)

ATTACHMENT 2

CDMA OVERLAY COST ESTIMATE

(REDACTED FROM PUBLIC VERSION)

DECLARATION OF KELLY RAMSEY

I, Kelly Ramsey, declare under penalty of perjury that the following is true and correct:

1. I am the Vice President of Cellular Phone of Kentucky, Inc. and Litchfield County Cellular, Inc. dba Ramcell of Kentucky.

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 this 11 day of May, 2007.

Kelly Ramsey

Kelly Ramsey