

REDACTED VERSION – FOR PUBLIC INSPECTION

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Federal Communications Commission  
Office of the Secretary

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 )  
)  
Petitions for Waiver of Cellular Phone of )  
Kentucky, Inc., Litchfield County Cellular, )  
Inc. dba Ramcell of Kentucky, and Litchfield )  
County Cellular, Inc. d/b/a Ramcell of Oregon )

To: The Commission

PETITION FOR RECONSIDERATION

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### SUMMARY

Petitioners are Tier III carriers who requested relief from the Commission's Enhanced 911 ("E911") handset deployment benchmarks in varying degrees. The Commission granted relief from Section 20.18(g)(1)(v) of the rules through November 2, 2007 pursuant to the ENHANCE 911 Act, but nonetheless referred Petitioners to the Enforcement Bureau ("EB") for purported violations of the rules. Petitioners seek reconsideration of the Commission's denial of their requests for waiver of Section 20.18(g)(1)(v) of the Commission's rules, the Commission's referral of the matter to the Enforcement Bureau, and the Commission's finding of non-compliance with the interim handset deployment benchmarks of Section 20.18(g)(1)(i)-(v) of the Commission's rules.

The Commission's finding of Petitioners' noncompliance with Section 20.18(g)(1)(v) is flatly inconsistent with the ENHANCE 911 Act. The Commission's finding that ENHANCE 911 Act relief is warranted precluded the Enforcement Bureau referral. The Commission's decision is contrary to the text of Section 107(a) of the ENHANCE 911 Act and to Congress's intent. The Commission's decision is also inconsistent with its prior application of the ENHANCE 911 Act, which is distinct from the Commission's other rules and precedents regarding waivers of the E911 rules. Congress could not have intended to allow Congress to grant relief from the rule while also punishing them for being unable to overcome the difficulties the ENHANCE 911 Act was intended to address. Thus, the referral of Petitioners to the Enforcement Bureau with respect to their compliance with Section 20.18(g)(1)(v) should be rescinded.

The finding of "bad faith" against Litchfield of Oregon is without foundation in law and fact. For the reasons stated above, the ENHANCE 911 Act governs the Commission's consideration of Litchfield of Oregon's waiver request and precludes the Commission's finding of bad faith. While ignorance of the law is not a basis for a waiver or a forfeiture mitigation factor, the Commission has never equated it with bad faith. The Commission's decision in this regard is inconsistent with its own E911 precedent, and the record does not support the Commission's finding here. The Commission should rescind its finding of bad faith and the accompanying Enforcement Bureau referral accordingly.

As demonstrated by the financial-related information showing that deploying an alternative digital wireless technology was not an economically feasible option for the Kentucky Licensees, the Commission must reconsider its denial of the Kentucky Licensees' request for waiver of Sections 20.18(g)(1)(i)-(v) of the Commission's rules. While the Kentucky Licensees sought relief under the ENHANCE 911 Act, not the Commission's general waiver standard, additional financial information is nonetheless provided demonstrating the Kentucky Licensees' eroding financial condition. Severe financial hardship is an established basis for waiver of the E911 rules, and the record does not support the Commission's conclusions with respect to the nature of the Kentucky Licensees' efforts to sell their TDMA systems. While the process of selling the systems took longer than hoped, the Kentucky Licensees undertook good faith efforts to sell their systems and never sought a waiver of the rules for indefinite period of time. Customers will in any case have full access to compliant ALI-capable handsets and Phase II services in the near future.

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To: The Commission

**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., Litchfield County Cellular, Inc. dba Ramcell of Kentucky, and Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon (collectively “Petitioners”), hereby seek reconsideration of the Commission’s denial of Petitioners’ requests for waiver of Section 20.18(g)(1)(v) of the Commission’s rules, the Commission’s referral of the matter to the Enforcement Bureau, and the Commission’s finding of non-compliance with the interim handset deployment benchmarks of Section 20.18(g)(1)(i)-(v) of the Commission’s rules.<sup>1</sup>

As Petitioners demonstrate below: (1) the Commission’s finding of Petitioners’ noncompliance with Section 20.18(g)(1)(v) is flatly inconsistent with the ENHANCE 911 Act; (2) the finding of “bad faith” against Litchfield of Oregon is without foundation in law and fact;

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<sup>1</sup> See *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Petitions for Waiver of Cellular Phone of Kentucky, Inc., Litchfield County Cellular, Inc. dba Ramcell of Kentucky, and Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon*, Order, CC Docket No. 94-102, FCC 07-77 (rel. May 2, 2007) (“Order”). Petitioners are all commonly-controlled entities. For purposes of this petition, the Oregon (continued on next page)

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and (3) as demonstrated by the financial-related information showing that deploying an alternative digital wireless technology was not an economically feasible option for the Kentucky Licensees, the Commission must reconsider its denial of the Kentucky Licensees' request for waiver of Sections 20.18(g)(1)(i)-(v) of the Commission's rules.<sup>2</sup>

### I. BACKGROUND

The Kentucky Licensees are "Tier III" licensees of two rural cellular TDMA systems in the Kentucky 6-Madison RSA and the Kentucky 11-Clay RSA. Litchfield of Oregon is also a "Tier III" licensee, operating a rural cellular CDMA system in the Oregon 5-Coos Bay RSA. Petitioners requested relief from Section 20.18(g)(1) of the Commission's rules in varying degrees and for various specifically enumerated reasons. First, Litchfield of Oregon, which operates a Part 22 cellular CDMA and analog network, timely complied with all of the handset deployment benchmarks except for the last benchmark due to a misunderstanding of the Commission's E911 Phase II rules. As attested to in an officer's declaration included in its

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licensee is referred to as "Litchfield of Oregon," and the other petitioners are referred to collectively as the "Kentucky Licensees").

<sup>2</sup> Commission consideration of the additional information provided herein for the Kentucky Licensees is consistent with the public interest and warrants grant of their waiver requests and reconsideration of the referral of non-compliance to the Enforcement Bureau. *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 re 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 Communications, Inc.*, 14 FCC Rcd 6421, ¶ 7 (WTB 1999); *Virginia Tech Fdn., Inc.*, 13 FCC Rcd 4535, ¶ 5 (WTB 1998). This information is not relevant to the statutory criteria of the ENHANCE 911 Act, pursuant to which the Kentucky Licensees requested relief, and the Commission had never previously indicated that such information is relevant to its ENHANCE 911 Act analysis. Thus, the *Order's* break from its ENHANCE 911 Act precedent here in imposing these criteria warrants consideration of the Kentucky Licensees' financial condition in the public interest pursuant to Section 1.106(c)(2) of the rules. Further, 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").

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January 22, 2007 waiver request, personnel misunderstood the application of Section 20.18(g)(1)(v) of the Commission's rules and mistakenly believed it was in compliance with that final benchmark.<sup>3</sup> The company, through counsel, self-reported this misunderstanding to Commission staff on December 20, 2006 and sought an extension of the deadline to accommodate the sale of the market to Verizon Wireless.

The Kentucky Licensees face a strikingly different set of circumstances with respect to their Part 22 cellular TDMA and analog systems. When they 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, the Kentucky Licensees 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 2004 and 2005, the Kentucky Licensees could no longer afford to deploy a CDMA overbuild and therefore, would be unable to comply with the Commission's Phase II E911 handset benchmarks. Without a CDMA overlay, the Kentucky Licensees were forced to conclude in the third quarter of 2005 that they lacked the financial ability to continue in business and were compelled to sell their systems. The Kentucky Licensees notified the Commission of their intention to sell their systems in September of 2005.<sup>4</sup> 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

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<sup>3</sup> Litchfield of Oregon Request for Waiver in CC Docket No. 94-102, Declaration of Kelly Ramsey ("Declaration"), filed January 22, 2007.

<sup>4</sup> See Kentucky Licensees Requests for Waiver in CC Docket No. 94-102, filed September 16, 2005 ("Kentucky Petitions").

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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.

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. The due diligence process took longer than expected thereby delaying the signing of agreements between the Petitioners and Verizon Wireless. Shortly thereafter, the Petitioners filed applications for assignment of their respective licenses to Verizon Wireless on March 30, 2007, and those applications were granted on April 30, 2007.<sup>5</sup> The transaction is scheduled to close in July 2007. As part of the Assignment Applications, Verizon Wireless stated its intent to complete a CDMA overbuild in the Kentucky markets and begin selling compliant handsets there within 9 months after closing of the transaction.<sup>6</sup>

## II. DISCUSSION

### A. The Commission's Enforcement Bureau Referral Relating To The 95 Percent Penetration Rule Is Inconsistent With The ENHANCE 911 Act And Should Be Rescinded On Reconsideration.

The ENHANCE 911 Act provides in relevant part that, with respect to “any petition filed by a qualified Tier III carrier requesting a waiver of compliance of Section 20.18(g)(1)(v) of the Commission's rules ... [t]he Commission *shall grant the waiver* of compliance ... requested by the petition if it determines that strict enforcement of the requirements of that section would

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<sup>5</sup> See ULS Nos. 0002962219 and 0002962269 (“Assignment Applications”).

<sup>6</sup> Assignment Applications, Exhibit 1, p. 1 (“Within nine months after the closing of the transaction between Verizon Wireless and [the Petitioners], Verizon Wireless will convert the [Kentucky markets] to a CDMA 1XRTT data-capable network. At that time, existing customers will be provided with CDMA digital handsets and transitioned to the Verizon Wireless newly constructed CDMA network.”).

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result in consumers having decreased access to emergency services.”<sup>7</sup> The Commission explicitly “conclude[d] that some relief from the deadline is warranted pursuant to the ENHANCE 911 Act” and granted each of the Petitioners an extension through November 2, 2007.<sup>8</sup>

The Commission also found, however, that the Petitioners “fail[ed] to make good faith efforts to comply with” the rule and referred the matter “to the Enforcement Bureau for appropriate actions.”<sup>9</sup> As discussed below, the Commission’s finding of lack of good faith efforts is not a relevant factor under the ENHANCE 911 Act. The Commission’s finding that the ENHANCE 911 Act warrants relief from the rule precludes it from sanctioning the Petitioners and referral to the Enforcement Bureau is inappropriate. Once the Commission determined that the statutory prerequisites of the ENHANCE 911 Act have been met, the statutory mandate that the Commission “shall grant” the waiver is the end of the matter.<sup>10</sup>

When the ENHANCE 911 Act was enacted, the Commission had already announced its criteria for considering requests for waiver of its E-911 Phase II requirements for all carriers, including Tier III carriers.<sup>11</sup> Congress was fully aware that a significant number of Tier III

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<sup>7</sup> See National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986, 3991, § 107(a) (2004) (“ENHANCE 911 Act”) (emphasis added).

<sup>8</sup> Order, ¶ 16.

<sup>9</sup> *Id.*, ¶¶ 18-19.

<sup>10</sup> While the Commission did not grant the full extent of relief Petitioners requested, it nonetheless found that the statutory criteria were sufficiently met to warrant at least a partial extension. *Id.*, ¶ 17.

<sup>11</sup> 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 (2000) (“*E911 Fourth MO&O*”); *Tier III Carriers Order*, 20 FCC Rcd at 7714; *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 (continued on next page)

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carriers' waiver requests had been pending for some time,<sup>12</sup> and if Congress had been concerned merely with the pending status of these petitions it would have ended Section 107(a) of the ENHANCE 911 Act after the first sentence imposing the 100 day time limit for acting on waiver petitions.<sup>13</sup> Congress did not end there, however, but opted instead to add the second sentence of Section 107(a) which imposes an explicit, substantive standard governing the Commission's consideration of Tier III carriers' Phase II requests.<sup>14</sup> Congress clearly intended that this standard, not the one the Commission had previously established, would apply to Tier III carriers.<sup>15</sup>

As the Commission recognizes, the ENHANCE 911 Act criteria are "distinct from the Commission's rules and established precedent regarding waivers of the E911 requirements."<sup>16</sup> The Commission's own decisions applying the ENHANCE 911 Act make clear that noncompliance may be excused under the ENHANCE 911 Act when the waiver criteria established under the Commission's rules and E911 precedents are not met.<sup>17</sup> In the *Order*,

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may face extraordinary circumstances in meeting one or more of the deadlines for Phase II deployment and [] relief may therefore be warranted").

<sup>12</sup> See ENHANCE 911 Act § 106 (requiring that the Commission report to Congress on the status of pending Tier III waiver requests).

<sup>13</sup> See *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute).

<sup>14</sup> ENHANCE 911 Act § 107(a) ("The Commission *shall grant* the waiver of compliance with the requirements of section 20.18(g)(1)(v) of the Commission's rules ... requested by the petition if it determines that strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services.") (emphasis added).

<sup>15</sup> In this regard as well, an earlier version of the ENHANCE 911 Act excluded the language of Section 107(a) and explicitly left the Commission's waiver processes and standards untouched. See H.R. 2898, 108<sup>th</sup> Cong., § 3 (as passed by the U.S. House of Representatives Nov. 4, 2003); H.R. Rep. No. 108-311, at 12 (2003) (describing reporting requirements of H.R. 2898).

<sup>16</sup> *Order*, ¶ 9.

<sup>17</sup> See, e.g., *Revision of the Commission's Rules to Ensure Compatibility with ENHANCE 911 Emergency Calling Systems*, CC Docket No. 94-102, *Order*, FCC 07-9, ¶ 15 (rel. Feb. 8, 2007); *Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Copper Valley Wireless, Inc. Petition for* (continued on next page)

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however, the Commission applied the “good faith efforts” criterion established *prior to* the ENHANCE 911 Act to the Petitioners’ requests for waiver despite the fact that good faith is not a factor enumerated in the ENHANCE 911 Act.<sup>18</sup> The Commission abruptly departed from its own decisions by adopting a different interpretation in the *Order* without explanation, which it may not do.<sup>19</sup> In concurrently finding the ENHANCE 911 Act criteria were met while also referring the Petitioners to the Enforcement Bureau for possible sanctions, the Commission eviscerates the objective of Section 107(a) of the ENHANCE 911 Act - providing relief to rural Tier III providers.

It could not conceivably have been Congress’s intent to have the Commission grant Tier III carriers extensions of time while also punishing them for being unable to meet the very challenges the ENHANCE 911 Act was intended to address. Insofar as the Commission may have discretion in other circumstances to grant relief on a prospective basis while also imposing a forfeiture or other enforcement action,<sup>20</sup> the Commission’s apparent presumption that it has authority to do so here is inconsistent with the ENHANCE 911 Act. For these reasons, the Commission’s referral of the Petitioners to the Enforcement Bureau with respect to their compliance with Section 20.18(g)(1)(v) of the Commission’s rules should be rescinded.

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*Waiver or Temporary Stay*, Order, 21 FCC Rcd 3778, ¶ 17 (2006). In *Copper Valley Wireless*, the Commission considered the general waiver criteria in determining the extent of relief granted under the ENHANCE 911 Act, but in no way suggested that those criteria were relevant to the relevant statutory basis for relief. See *Copper Valley Wireless*, ¶ 3 n.8.

<sup>18</sup> See *Order*, ¶ 6 (citing the language from 2003 *Tier III Stay Order*).

<sup>19</sup> See *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 57 (1983) (“An agency’s view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis.”); *National Conservative Political Action Comm. v. FEC*, 626 F.2d 953, 959 (D.C. Cir. 1980) (“Agencies are under an obligation to follow their own regulations, procedures, and precedents, or provide a rational explanation for their departures”).

<sup>20</sup> See *Ameritech Corp.*, Notice of Apparent Liability for Forfeiture and Order to Show Cause, 10 FCC Rcd. 20559 (1995) (issuing NAL for past violation and delegating authority to grant waiver prospectively).

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**B. The Commission’s Findings Of Lack Of Good Faith Efforts To Comply With Section 20.18(g)(1)(v) Of The Commission’s Rules Are Erroneous.**

**1. The Commission’s Finding of Bad Faith by Litchfield of Oregon is Erroneous.**

The Commission found that “Litchfield of Oregon’s failure to understand the rule is inexcusable and we find evidences bad faith on its part to comply with the Commission’s E911 rules.”<sup>21</sup> The Commission thus referred Litchfield of Oregon to the Enforcement Bureau “for its failure to make good faith efforts to comply with” Section 20.18(g)(1)(v) of the Commission’s rules.<sup>22</sup> As noted above, the ENHANCE 911 Act governs the Commission’s consideration of Litchfield of Oregon’s waiver request. For this reason alone, referral to the Enforcement Bureau with respect to the rule at issue is improper. In any event, a finding of bad faith is highly inappropriate and contrary to Commission precedent.

Litchfield of Oregon fully acknowledges that, in general, “ignorance of or unfamiliarity with the Commission’s rules is neither a basis for waiver nor a forfeiture mitigation factor.”<sup>23</sup> Such ignorance or unfamiliarity, however, has never been equated with “bad faith,” which has been defined generally (and embraced by the Commission) as “not simply bad judgment or negligence, but ... conscious doing of a wrong because of dishonest purpose or moral obliquity.”<sup>24</sup> In an Enforcement Bureau proceeding just last year involving circumstances

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<sup>21</sup> *Order*, ¶ 18.

<sup>22</sup> *Id.*

<sup>23</sup> See *Lamar County Cellular, Inc.*, Notice of Apparent Liability for Forfeiture, 21 FCC Rcd 4375, ¶ 17 (EB 2006) (citing *Southern Cal. Broad.*, 6 FCC Rcd 4387, ¶ 3 (1991), *Evergreen Broad.*, 26 FCC 2d 453 ¶ 4 (1970); *Barnacle Broad. Co.*, 19 FCC Rcd 13830, 13832-33 ¶ 10 (EB 2004)).

<sup>24</sup> See BLACK’S LAW DICTIONARY 139 (6th ed. 1990); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, 20 FCC Rcd 17278, ¶ 113 (2005) (citing BLACK’S LAW DICTIONARY).

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substantively identical to Litchfield of Oregon's, the Commission found "ignorance of the law" but in no way suggested that "bad faith" was involved.<sup>25</sup> Here, the record indicates a virtually identical "failure to understand the rule," as evidenced by the Declaration, but clearly does not constitute bad faith. The Commission's departure from precedent is both unexplained and unjustifiable.<sup>26</sup> The Commission should rescind its finding of bad faith and the accompanying Enforcement Bureau referral accordingly.

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

The Commission referred the Kentucky Licensees to the Enforcement Bureau "[f]or their failure to make good faith efforts to comply with the requirements of Section 20.18(g)(1)(v)."<sup>27</sup> For the same reasons, the Commission admonished the Kentucky Licensees for noncompliance with the interim benchmarks of Section 20.18(g)(1)-(iv) of the Commission's rules.<sup>28</sup> The Commission reasoned that the Kentucky Licensees "have not justified their failure to bring their systems into compliance by the deadline, either through an earlier sale or by undertaking the overbuild themselves ...."<sup>29</sup> Specifically, the Commission found that "claims of financial

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<sup>25</sup> See *Lamar County Cellular*, ¶ 17. In this decision, the licensee stated that "it did not realize that the FCC's rules require a call-back number." *Id.*, ¶ 6. Petitioners submit that the Phase I ANI rule (47 C.F.R. §§ 20.3, 20.18(d)(1)) is every bit as "clear on its face" as Section 20.18(g)(1)(v), see *Order*, ¶ 18, and while the Commission found that the licensee's omissions in *Lamar County Cellular* reflected "ignorance of the law," there was no finding of bad faith or any upward adjustment of the base forfeiture. See *Lamar County Cellular*, ¶¶ 15-18 (no finding of egregious misconduct or other factor warranting upward adjustment).

<sup>26</sup> Indeed, Litchfield of Oregon acted in good faith to report and remedy its mistaken belief. As evidenced by the Declaration, Litchfield of Oregon upon identification of its mistaken understanding of the Commission's final E911 benchmark, took action to fully and timely report its non-compliance to the Commission. Shortly thereafter, Litchfield of Oregon filed a request for waiver to remedy its non-compliance.

<sup>27</sup> *Order*, ¶ 19.

<sup>28</sup> See *id.*, ¶¶ 21-23.

<sup>29</sup> See *id.*, ¶ 19.

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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 [the Kentucky Licensees] lacked the financial resources to change their network technology or bring themselves into compliance in other ways, and ... cannot conclude that the systems’ failure to sell at an earlier date is other than a function of the asking price.”<sup>30</sup>

As a threshold matter, the Kentucky Licensees sought relief under the ENHANCE 911 Act, not the Commission’s general E911 waiver standard and, moreover, the statements contained in their Petitions were not mere “claims” but were supported by an officer’s declaration.<sup>31</sup> 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.<sup>32</sup>

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

- The Kentucky Licensees’ total revenues [REDACTED]  
[REDACTED]  
Over that same period, the value of their assets [REDACTED], while total subscribership has [REDACTED].
- In February 2004, the Kentucky Licensees obtained an estimate for deploying a CDMA overlay in their markets.<sup>33</sup> [REDACTED]  
[REDACTED]

<sup>30</sup> Order, ¶ 21.

<sup>31</sup> Kentucky Petitions, Declaration of Kelly Ramsey.

<sup>32</sup> See Attachment 1.

<sup>33</sup> See Attachment 2, document titled “Ramcell Cellular Kentucky CDMA Overlay,” dated February 5, 2004.

<sup>34</sup> *Id.*

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[REDACTED]

- [REDACTED]<sup>35</sup>

- [REDACTED]

- [REDACTED]

Thus, it became necessary to sell the systems.

Under the Commission's previous standard for waiver of its E911 rules, the severe financial hardship the Kentucky Licensees face is an established basis for a waiver of the Commission's E911 Phase II requirements.<sup>36</sup> While the Commission chides the Kentucky Licensees for not providing this information previously, their waiver request was premised on the ENHANCE 911 Act, for which this information is not relevant. Prior to springing this new analysis on Ramcell, the Commission had never previously indicated that financial information was relevant to its ENHANCE 911 Act determinations. Accordingly, insofar as the Commission

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<sup>35</sup> [REDACTED]

<sup>36</sup> In the 2003 *Tier III Stay Order* (which pre-dates the ENHANCE 911 Act), the Commission acknowledged "severe financial hardship" as a basis for a waiver and discussed the information the Commission indicated would be viewed as probative in that context. *Tier III Stay Order*, ¶¶ 26, 29.

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may account for these factors in the first place, it is necessary in the public interest to account for this information here.<sup>37</sup>

The Commission characterizes the Kentucky Licensees' petition as premised exclusively on a business decision entirely within their control and presumes that they "could have implemented those business decisions, and sold their TDMA systems, well in advance of the deadlines" and that their difficulties in selling the systems were "entirely foreseeable."<sup>38</sup> 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 Kentucky Licensees' financial condition precluded Kentucky Licensees from being able to build CDMA overlays for their systems. This was a painful decision for the Kentucky Licensees, 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.

The Kentucky Licensees maintain small operations – indeed, they are the type of small, locally-based providers Congress and the Commission have sought to encourage.<sup>39</sup> Unlike nationwide and many mid-sized carriers, the Kentucky Licensees do not maintain in-house

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<sup>37</sup> See *Order*, ¶ 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. It would also be inequitable for the Commission to subject Petitioners to enforcement action based on a fundamentally altered ENHANCE 911 Act waiver criteria without providing Petitioners the opportunity to meet those criteria in the first instance.

<sup>38</sup> *Order*, ¶¶ 21-23.

<sup>39</sup> 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).

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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. The Kentucky Licensees 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.<sup>40</sup> Once an interested buyer was identified, transactional negotiations and the buyer's due diligence efforts further lengthened the process. The Kentucky Licensees 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.<sup>41</sup>

The Commission's reasoning in the *Order* stands in stark contrast to recognition throughout this proceeding that small rural carriers are confronted with unique challenges that require special consideration.<sup>42</sup> 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 regulatory deadlines with which it cannot reasonably comply. Compliance here is not a simple matter of buying handsets that are already out in the marketplace, but making a huge capital investment in a CDMA overlay while, in the Kentucky Licensees' case, simultaneously

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<sup>40</sup> 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.

<sup>41</sup> The closing for the transaction has been scheduled for July 2007.

<sup>42</sup> See *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 Enhanced 911 Emergency Calling Systems, E911 Compliance Deadlines for Non-Nationwide Tier III CMRS Carriers*, Order to Stay, 18 FCC Rcd 20987 (2003); see also *In the Matter of Section 68.4 of the Commission's Rules Governing Hearing Aid-Compatible Telephones*, Order on Reconsideration and Further Notice of Proposed Rulemaking, 20 FCC Rcd. 11194, ¶ 49 (2005).

## REDACTED VERSION – FOR PUBLIC INSPECTION

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 and more efficiently due to economies of scale. Denial of the full relief requested by the Kentucky Licensees' and referral to the Enforcement Bureau sends the wrong signal to small entities operating or seeking to operate in rural areas which is contrary to the Commission's policy of encouraging the deployment of wireless services in rural areas.<sup>43</sup>

The Kentucky Licensees never sought authority to operate under a waiver for an indefinite period of time. To the contrary, as a result of their efforts to find a buyer that has the resources to undertake the required capital intensive CDMA build-out, location-compliant handsets will be available in the near future. In short, while the process admittedly took longer than hoped, the Kentucky Licensees have demonstrated herein the equivalent of a "path to full compliance" such that customers will have full access to compliant ALI-capable handsets and Phase II services in the near future.

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<sup>43</sup> See *Rural Wireless Order*, ¶ 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.

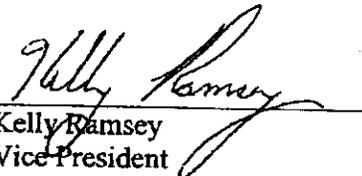
**III. CONCLUSION**

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.,  
LITCHFIELD COUNTY CELLULAR, INC. DBA  
RAMCELL OF KENTUCKY AND LITCHFIELD  
COUNTY CELLULAR, INC. D/B/A RAMCELL OF  
OREGON

By:



Kelly Ramsey  
Vice President  
Cellular Phone of Kentucky, Inc.,  
Litchfield County Cellular, Inc. dba  
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Litchfield County Cellular, Inc. d/b/a  
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6915 Harrodsburg Road  
Nicholasville, KY 40356

June 1, 2007

**REDACTED VERSION – FOR PUBLIC INSPECTION**

**ATTACHMENT 1**

**FINANCIAL STATEMENTS**

**(REDACTED FROM PUBLIC VERSION)**

**REDACTED VERSION – FOR PUBLIC INSPECTION**

**ATTACHMENT 2**

**CDMA OVERLAY COST ESTIMATE**

**(REDACTED FROM PUBLIC VERSION)**

**REDACTED VERSION – FOR PUBLIC INSPECTION**

**CERTIFICATE OF SERVICE**

I, LaVon E. Nickens, do hereby certify that on the 1st day of June, 2007, a copy of the foregoing "Petition for Reconsideration" was served in the manner set forth below:

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, D.C. 20554

*via Hand Delivery.*

Mr. Jeff Cohen  
Deputy Chief, Policy Division  
Public Safety and Homeland Security Bureau  
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Ms. Carol Simpson  
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/s/ \_\_\_\_\_  
LaVon E. Nickens