**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

MAY 7 - 2007

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| In the Matter of | ) | |
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| Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems | ) | CC Docket No. 94-102 |
| | ) | |
| 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**

**Adopted: May 2, 2007** **Released: May 2, 2007**

By the Commission:

## I. INTRODUCTION

1. In this Order, we address petitions for waiver of the Commission's Enhanced 911 (E911) Phase II requirements filed by Cellular Phone of Kentucky, Inc. (CPK), Litchfield County Cellular, Inc. dba Ramcell of Kentucky (Litchfield of Kentucky), and Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon (Litchfield of Oregon) (collectively, Petitioners),[1] three commonly owned[2] Tier III service providers.[3] All three Petitioners request waiver of the requirement in Section 20.18(g)(1)(v) of the Commission's rules that carriers employing a handset-based E911 Phase II location technology were to have achieved 95% penetration among their subscribers of location-capable handsets by December 31,

[1] *See* Cellular Phone of Kentucky, Inc. Petition for Waiver of the Location-Capable Handset Benchmark Deadlines, CC Docket No. 94-102 (filed Oct. 27, 2005) (CPK Petition); Cellular Phone of Kentucky, Inc. Further Supplement to Petition for Waiver of the Location-Capable Handset Benchmark Deadlines, CC Docket No. 94-102 (filed Jan. 30, 2007) (CPK Jan. 30, 2007 Supplement); Litchfield County Cellular, Inc. dba Ramcell of Kentucky Petition for Waiver of the Location-Capable Handset Benchmark Deadlines, CC Docket No. 94-102 (filed Oct. 27, 2005) (Litchfield of Kentucky Petition); Litchfield County Cellular, Inc. dba Ramcell of Kentucky Further Supplement to Petition for Waiver of the Location-Capable Handset Benchmark Deadlines, CC Docket No. 94-102 (filed Jan. 30, 2007) (Litchfield of Kentucky Jan. 30, 2007 Supplement); Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon Petition for Limited Waiver of Section 20.18(g) of the Commission's Rules, CC Docket No. 94-102 (filed Jan. 22, 2007) (Litchfield of Oregon Petition).

[2] *See* Litchfield of Oregon Petition at 1 n.1.

[3] Tier III carriers are non-nationwide Commercial Mobile Radio Service (CMRS) providers with no more than 500,000 subscribers as of the end of 2001. *See* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; Phase II Compliance Deadlines for Non-Nationwide Carriers, CC Docket No. 94-102, *Order to Stay*, 17 FCC Rcd 14841, 14848 ¶ 22 (2002) (*Non-Nationwide Carriers Order*).

2005.[4] CPK and Litchfield of Kentucky also seek extensions of time to comply with the handset sale and activation requirements the Commission has established for Tier III carriers.[5]

2. Timely compliance with the Commission's wireless E911 rules ensures that the important public safety needs of wireless callers requiring emergency assistance are met as quickly as possible. In analyzing requests for extensions of the Phase II deadlines, the Commission has afforded relief only when the requesting carrier has met the Commission's standard for waiver of the Commission's rules.[6] Where carriers have met the standard, the relief granted has required compliance with the Commission's rules and policies within the shortest practicable time.[7] We are also mindful of Congress' directive in the ENHANCE 911 Act to grant waivers for Tier III carriers of the 95% penetration benchmark if "strict enforcement . . . would result in consumers having decreased access to emergency services."[8]

3. Pursuant to the ENHANCE 911 Act, and based on the record before us, we find that some relief from the 95% handset penetration requirement is warranted. We therefore grant the Petitioners an extension of the handset penetration requirement until November 2, 2007. We refer the matter of the Petitioners' failure to make good faith efforts to comply with the requirements of Section 20.18(g)(1)(v) to the Commission's Enforcement Bureau for appropriate action. We also conclude that CPK and Litchfield of Kentucky have failed to show that they made diligent efforts to comply with the Phase II rules for the sale and activation of location-capable handsets. Accordingly, we deny their requests for further waiver of Section 20.18(g)(1)(i)-(iv) and admonish them for their failure to comply with these rules.

## II. BACKGROUND

### A. Phase II Requirements

4. The Commission's E911 Phase II rules require wireless licensees to provide Public Safety Answering Points (PSAPs) with Automatic Location Identification (ALI) information for 911 calls.[9] Licensees can provide ALI information by deploying location information technology in their networks (a network-based solution),[10] or Global Positioning System (GPS) or other location technology in subscribers' handsets (a handset-based solution).[11] The Commission's rules also establish phased-in

[4] *See* 47 C.F.R. § 20.18(g)(1)(v).

[5] Tier III carriers subject to Phase II E911 requirements were required to begin selling and activating location-capable handsets by September 1, 2003, and to ensure that at least 25% of all new handsets activated were location-capable by November 30, 2003; that at least 50% of all new handsets activated were location-capable by May 31, 2004; and that 100% of all new digital handsets activated were location-capable by November 30, 2004. *See Non-Nationwide Carriers Order*, 17 FCC Rcd at 14851 ¶ 33; *see also* 47 C.F.R. § 20.18(g)(1)(i)-(iv).

[6] *See* Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems; E911 Phase II Compliance Deadlines for Tier III Carriers, CC Docket No. 94-102, *Order*, 20 FCC Rcd 7709, 7709-10 ¶ 1 (2005) (*Tier III Carriers Order*).

[7] *See id.*

[8] National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004).

[9] *See* 47 C.F.R. § 20.18(e).

[10] Network-based location solutions employ equipment and/or software added to wireless carrier networks to calculate and report the location of handsets dialing 911. These solutions do not require changes or special hardware or software in wireless handsets. *See* 47 C.F.R. § 20.3.

[11] Handset-based location solutions employ special location-determining hardware and/or software in wireless handsets, often in addition to network upgrades, to identify and report the location of handsets calling 911. *See* 47 C.F.R. § 20.3.

schedules for carriers to deploy any necessary network components and begin providing Phase II service.[12] However, before a wireless licensee's obligation to provide E911 service is triggered, a PSAP must make a valid request for E911 service, *i.e.*, the PSAP must be capable of receiving and utilizing the data elements associated with the service and must have a mechanism in place for recovering its costs.[13]

5. In addition to deploying the network facilities necessary to deliver location information, wireless licensees that elect to employ a handset-based solution must meet the handset deployment benchmarks set forth in Section 20.18(g)(1) of the Commission's rules, independent of any PSAP request for Phase II service.[14] After ensuring that 100% of all new digital handsets activated are location-capable, licensees were required to achieve 95% penetration among their subscribers of location-capable handsets no later than December 31, 2005.[15]

### B. Waiver Standards

6. The Commission has recognized that smaller carriers may face "extraordinary circumstances" in meeting one or more of the deadlines for Phase II deployment.[16] The Commission previously has stated its expectations for requests for waiver of the E911 Phase II requirements. Waiver requests must be "specific, focused and limited in scope, and with a clear path to full compliance. Further, carriers should 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."[17] To the extent that a carrier bases its request for relief on delays that were beyond its control, it must submit specific evidence substantiating the claim, such as documentation of the carrier's good faith efforts to meet with outside sources whose equipment or services were necessary to meet the Commission's benchmarks.[18] When carriers rely on a claim of financial hardship as grounds for a waiver, they must provide sufficient and specific factual information.[19] A carrier's justification for a waiver on extraordinary financial hardship grounds may be strengthened by documentation demonstrating that it has used its best efforts to obtain financing for the required upgrades from available federal, state, or local funding sources.[20] The Commission also noted, in considering earlier requests for relief by Tier III carriers, that it

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[12] *See* 47 C.F.R. §§ 20.18(f), (g)(2).

[13] *See* 47 C.F.R. § 20.18(j)(1).

[14] *See* 47 C.F.R. § 20.18(g)(1).

[15] *See* 47 C.F.R. § 20.18(g)(1)(v).

[16] *Tier III Carriers Order*, 20 FCC Rcd at 7714 ¶ 9; *see also Non-Nationwide Carriers Order*, 17 FCC Rcd at 14846 ¶ 20 (stating that "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"); 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, CC Docket No. 94-102, *Order to Stay*, 18 FCC Rcd 20987, 20994 ¶ 17 (2003) (*Order to Stay*) (stating that "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").

[17] Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Fourth Memorandum Opinion and Order*, 15 FCC Rcd 17442, 17458 ¶ 44 (2000).

[18] *See Order to Stay*, 18 FCC Rcd at 20996-97 ¶ 25.

[19] *See id.* at 20997 ¶ 29. We note that the Commission generally is disinclined to find that financial hardship alone is a sufficient reason for an extension of the E911 implementation deadlines. *Id.*

[20] *See id.*

expects all carriers seeking relief to work with the state and local E911 coordinators and with all affected PSAPs in their service area, so that community expectations are consistent with a carrier's projected compliance deadlines. To the extent that a carrier can provide supporting evidence from the PSAPs or state or local E911 coordinators with whom the carrier is assiduously working to provide E911 services, this would provide evidence of its good faith in requesting relief.[21]

7. In applying the above criteria, the Commission has in the past recognized that special circumstances particular to smaller carriers may warrant limited relief from E911 requirements. For example, the Commission has noted that some Tier III carriers face unique hurdles such as significant financial constraints, small and/or widely dispersed customer bases, and large service areas that are isolated, rural, or characterized by difficult terrain (such as dense forest or mountains), along with a corresponding reduced customer willingness to forgo existing handsets that may provide expanded range, but are not location-capable.[22] In evaluating requests for waiver from Tier III carriers, the Commission, therefore, has considered challenges unique to smaller carriers facing these circumstances.

8. Finally, we note that distinct from the Commission's rules and established precedent regarding waivers of the E911 requirements, in December 2004 Congress enacted the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (ENHANCE 911 Act).[23] The ENHANCE 911 Act, *inter alia,* directed the Commission to act on any petition filed by a qualified Tier III carrier requesting a waiver of Section 20.18(g)(1)(v) within 100 days of receipt, and to grant such request for waiver if "strict enforcement of the requirements of that section would result in consumers having decreased access to emergency services."[24]

## C. Petitions for Waiver

### 1. CPK and Litchfield of Kentucky

9. CPK operates a cellular TDMA system in the Kentucky 6 – Madison Rural Service Area (RSA) market,[25] and Litchfield of Kentucky operates a cellular TDMA system in the Kentucky 11 – Clay RSA market.[26] Their service areas consist of "sparsely populated, rural counties."[27] The carriers previously sought and were granted extensions of time, equal to that granted other Tier III carriers, to complete a CDMA upgrade and comply with the interim deadlines for the sale and activation of location-capable handsets.[28]

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[21] *Id.* at 20997 ¶ 28.

[22] *See Tier III Carriers Order*, 20 FCC Rcd at 7718, 7719, 7726, 7732, 7736-37 ¶¶ 17, 19, 37, 57, 70.

[23] National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004).

[24] *Id.* § 107(a), 118 Stat. 3986, 3991. The ENHANCE 911 Act defines a "qualified Tier III carrier" as "a provider of commercial mobile service (as defined in section 332(d) of the Communications Act of 1934 (47 U.S.C. 332(d)) that had 500,000 or fewer subscribers as of December 31, 2001." *Id.* § 107(b), 118 Stat. 3986, 3991.

[25] *See* CPK Petition at 1.

[26] *See* Litchfield of Kentucky Petition at 1.

[27] *See* CPK Petition at 2; Litchfield of Kentucky Petition at 2.

[28] *See Order to Stay,* 18 FCC Rcd at 21001, App. A.

10. In April 2004, both carriers reported that they had encountered "unforeseen obstacles" in building their CDMA overlays and requested additional relief.[29] Each carrier represented to the Commission that it had "secured the funding to begin deploying its CDMA overlay by the fourth quarter of 2004 . . . with final work to be completed by the second quarter of 2006.[30] In the *Tier III Carriers Order*, the Commission accordingly granted both carriers relief from the Phase II handset sale and activation deadlines, allowing them until October 4, 2004 to begin selling and activating location-capable handsets; until October 31, 2005 to meet the 25% benchmark; until November 30, 2005 to meet the 50% benchmark; and until December 31, 2005 to meet the 100% benchmark.[31] The Commission also granted an extension until January 31, 2007 to meet the 95% penetration benchmark.[32] In granting the petitions for waiver, the Commission emphasized that the carriers were to take "a more aggressive approach to handset deployment" in order to meet the extended handset sale and activation deadlines.[33]

11. CPK and Litchfield of Kentucky failed to meet any of these handset sale and activation benchmarks, and both carriers reported that they were "unable to accomplish the transition to CDMA as originally planned."[34] Each carrier asserted that it "experienced additional financial setbacks which made its planned CDMA conversion impossible," that the proposed CDMA overlay was "not economically viable from a business standpoint," and that it had "initiated steps toward placing the markets for sale."[35] In October 2005, CPK and Litchfield of Kentucky sought further extensions of their handset sale and activation deadlines until February 28, 2006,[36] by which time they hoped to have a buyer, but each has since filed several supplements to its original request, seeking additional time to comply. On February 17, 2006, the carriers requested an additional six months – until August 31, 2006 – to complete the sale of their systems.[37] On August 30, 2006, the carriers filed further supplements, stating that each had secured an "agreement in principle" to sell its system to "a large, well-established wireless carrier."[38] Petitioners indicated that the purchasing carrier had promised to bring their systems into compliance with the Commission's E911 requirements, and that the carrier was "conducting its due diligence review in anticipation of purchasing" the systems.[39] Petitioners added that they anticipated signing a final agreement and submitting the requisite assignment applications to the Commission by October 31, 2006;[40] they requested a further six-month extension of the compliance deadline, to February 28, 2007.[41]

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[29] Cellular Phone of Kentucky, Inc. Supplement and Further Petition for Limited Waiver and Extension of Time, CC Docket No. 94-102 at 1 (filed Apr. 14, 2004) (CPK Apr. 14, 2004 Supplement); Litchfield County Cellular, Inc. dba Ramcell of Kentucky Supplement and Further Petition for Limited Waiver and Extension of Time, CC Docket No. 94-102, at 1 (filed Apr. 14, 2004) (Litchfield of Kentucky April 14, 2004 Supplement).

[30] *See* CPK Apr. 14, 2004 Supplement at 5; Litchfield of Kentucky Apr. 14, 2004 Supplement at 5.

[31] *See Tier III Carriers Order*, 20 FCC Rcd at 7725-26 ¶¶ 35-36, 7731-32 ¶¶ 55-56.

[32] *See id.* at 7726 ¶ 38, 7732 ¶ 58.

[33] *See id.* at 7725 ¶ 35.

[34] *See* Cellular Phone of Kentucky, Inc. Interim Report, CC Docket No. 94-102 at 1 (filed Sept. 1, 2005); Litchfield of Kentucky Interim Report, CC Docket No. 94-102, at 1 (filed Sept. 1, 2005).

[35] CPK Petition at 4; Litchfield of Kentucky Petition at 4. Petitioners noted that they had "advised the Commission of the lack of availability of ALI-capable TDMA handsets," and had "intended to construct a new CDMA network that would enable [them] to comply with the Commission's [E911 Phase II] rules." CPK Petition at 2-3; Litchfield of Kentucky Petition at 2-3.

[36] CPK Petition at 2; Litchfield of Kentucky Petition at 2.

[37] CPK Feb. 17, 2006 Supplement; Litchfield of Kentucky Feb. 17, 2006 Supplement.

[38] CPK Aug. 30, 2006 Further Supplement; Litchfield of Kentucky Aug. 30, 2006 Further Supplement.

[39] CPK Aug. 30, 2006 Further Supplement at 2-3; Litchfield of Kentucky Aug. 30, 2006 Further Supplement at 2-3.

[40] CPK Aug. 30, 2006 Further Supplement at 3; Litchfield of Kentucky Aug. 30, 2006 Further Supplement at 3.

In letters submitted to the Commission on October 17, 2006, Petitioners again changed the requested extension date for the handset sale and activation benchmarks to January 31, 2007.[42]

12. Finally, in letters submitted on January 30, 2007, one day before their deadline for achieving 95% penetration among their subscribers of location-capable handsets, CPK and Litchfield of Kentucky reported they had "finally reached an agreement in principle" for the purchase of their systems and that "the purchasing carrier [would] bring [their] markets into compliance with the Commission's E911 requirements."[43] Each carrier now requests "an extension of the [handset sale and activation] benchmarks and the 95 percent [location-capable handset] penetration deadline until 12 months from the consummation of the sale of its TDMA system in order to finalize and complete the sale of its TDMA system and to enable the buyer to incorporate [each carrier's] customers into its network."[44] On March 30, 2007, CPK and Litchfield of Kentucky filed applications with the Commission seeking to assign their cellular and other licenses to Cellco Partnership d/b/a Verizon Wireless (Verizon Wireless).[45]

### 2. Litchfield of Oregon

13. Litchfield of Oregon operates a cellular CDMA and analog system in the Oregon 5-Coos RSA market, located in "rural central Oregon."[46] Litchfield of Oregon is a Tier III carrier and has deployed a handset-based Phase II location system. Litchfield of Oregon previously sought and was granted additional time to meet the Commission's location-capable handset sales and activation benchmarks, on the same schedule granted to other Tier III carriers, in the Commission's 2003 *Order to Stay*.[47] The *Order to Stay* did not, however, alter the December 31, 2005 deadline for achieving 95% penetration of location-capable handsets.

14. In its Petition, Litchfield of Oregon reports that it met all of the benchmarks for Tier III carriers "except the final benchmark of 95 percent penetration of location-capable handsets."[48] The carrier also explains that it "determined that it had previously misunderstood the Commission's E911 rules."[49] Litchfield of Oregon states that it "incorrectly believed that the final benchmark that required 95 percent penetration for location-capable handsets was limited to new activations only."[50] As a result, Litchfield of Oregon "did not timely seek a waiver of [this] benchmark prior to December 31, 2005."[51] Litchfield of Oregon reports that approximately 44% of its in-operation handsets are location-capable and requests a waiver of the 95% benchmark through June 30, 2007, "by which time [Litchfield of Oregon] anticipates it will have received Commission consent to the sale of its wireless system and consummated

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[41] CPK Aug. 30, 2006 Further Supplement at 3; Litchfield of Kentucky Aug. 30, 2006 Further Supplement at 3.

[42] CPK Oct. 17, 2006 Further Supplement at 2; Litchfield of Kentucky Oct. 17, 2006 Further Supplement at 2.

[43] CPK Jan. 30, 2007 Further Supplement at 2; Litchfield of Kentucky Jan. 30, 2007 Further Supplement at 2.

[44] [cite]

[45] *See* Application for Authority to Transfer Control of Cellular Phone of Kentucky, Assignor, and Cellco Partnership, Assignee, File No. 0002962219 (filed Mar. 30, 2007); Application for Authority to Transfer Control of Litchfield County Cellular, Inc., Assignor, and Cellco Partnership, Assignee, File No. 0002962269 (filed Mar. 30, 2007).

[46] Litchfield of Oregon Petition at 1.

[47] *See Order to Stay*, 18 FCC Rcd at 21001, App. A.

[48] Litchfield of Oregon Petition at 1.

[49] *Id.* at 3.

[50] *Id.*

[51] *Id.*

that transaction."[52] On March 30, 2007, Litchfield of Oregon filed an application with the Commission seeking to assign its cellular and other licenses to Verizon Wireless.[53]

## III. DISCUSSION

15. We believe that it was critical for all handset-based carriers to have met the final implementation deadline of December 31, 2005 for 95% location-capable handset penetration, if at all possible, in order to allow all stakeholders (including carriers, technology vendors, public safety entities, and consumers) to have greater certainty about when Phase II would be implemented and would have ensured that Phase II would be fully implemented as quickly as possible.[54] Absent Phase II location data, emergency call takers and responders must expend critical time and resources questioning wireless 911 callers to determine their location, and/or searching for those callers when the callers cannot provide this information. At the same time, however, the Commission has recognized that requests for waiver of E911 requirements may be justified, but only if appropriately limited, properly supported, and consistent with established waiver standards.[55] Accordingly, when addressing requests for waiver of the 95% handset penetration deadline, we remain mindful that delay in achieving the required handset penetration level could impair the delivery of safety-of-life services to the public. We must also remain mindful, however, of Congress' directive in the ENHANCE 911 Act to grant waivers of the 95% requirement to Tier III carriers if strict enforcement would result in consumers having decreased access to emergency services.[56]

### A. Requests for Waiver of the 95% Handset Penetration Requirement

16. Consistent with Congress' directive in the ENHANCE 911 Act to grant Tier III waivers if strict enforcement would result in consumers having decreased access to emergency services,[57] we believe that some extension of the December 31, 2005 deadline for Litchfield of Oregon and the current January 31, 2007 deadline for CPK and Litchfield of Kentucky are warranted under the ENHANCE 911 Act. CPK and Litchfield of Kentucky indicate that, if compelled to shut down their TDMA and analog service, their customers "would not be able to place *any* cellular calls for a period of time, much less calls to 911 for basic and Phase I emergency services."[58] Litchfield of Oregon asserts that "many of [its] customers rely on high powered analog handsets to receive cellular service of rural and remote areas of central Oregon" and that "[w]ithout continued access to [Litchfield of Oregon's] analog cellular system, these customers will have no access to any wireless service, including emergency services."[59] Therefore, we find that certain of each Petitioner's customers would likely find it more difficult, and at times impossible, to contact a PSAP in parts of their respective service areas if those customers were forced to convert from TDMA or analog phones to location-capable handsets. It thus appears likely that strict enforcement of the handset penetration rule, under these circumstances, "would result in consumers having decreased access to emergency services," within the meaning of the ENHANCE 911 Act, at least in some cases. We therefore conclude that some relief from the deadline is warranted pursuant to the

[52] *Id.* at 3-4.

[53] *See* Application for Authority to Transfer Control of Litchfield County Cellular, Inc., Assignor, and Cellco Partnership, Assignee, File No. 0002962269 (filed Mar. 30, 2007).

[54] *See Non-Nationwide Carriers Order*, 17 FCC Rcd at 14853 ¶ 38.

[55] *See Tier III Carriers Order*, 20 FCC Rcd at 7709-10 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-43 ¶ 6.

[56] *See supra* ¶ 7.

[57] See *supra* ¶ 8.

[58] CPK Jan. 30, 2007 Further Supplement at 4; Litchfield of Kentucky Jan. 30, 2007 Further Supplement at 4.

[59] Litchfield of Oregon Petition at 6.

ENHANCE 911 Act.[60] Accordingly, we grant all three Petitioners an extension until November 2, 2007.[61]

17. We decline to grant CPK and Litchfield of Kentucky the full relief they request, which is twelve months from the consummation of the sale of their systems. Once their systems are sold, CPK and Litchfield of Kentucky will no longer be subject to the requirements of Section 20.18(g)(1)(v), so an additional twelve months' relief beyond the consummation date is unnecessary. We believe that a more reasonable approach is to grant the carriers a more modest extension that will provide them time to complete the sale of their systems. Because all three Petitioners are similarly situated, we grant all three Petitioners an extension until November 2, 2007. We emphasize – particularly in light of the repeated requests for further relief filed by CPK and Litchfield of Kentucky in this proceeding – that the Petitioners should not assume that the Commission would act favorably on any future request for relief from the 95% requirement based on the same grounds.

18. In light of the ENHANCE 911 Act's language, we are willing to grant the Petitioners limited relief from the handset penetration deadline, but we believe that a referral to the Enforcement Bureau is necessary to address their failure to make good faith efforts to comply with the rule. We are deeply concerned about Litchfield of Oregon's failure to file a timely request for waiver of the 95% handset penetration requirement before the December 31, 2005 deadline. Litchfield of Oregon concedes, as it must, that its earlier interpretation of the 95 percent requirement was incorrect. In fact, 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. Section 20.18(g)(1)(v) is clear on its face – as compared to Sections 20.18(g)(1)(i)-(iv), Section 20.18 (g)(1)(v) has no language indicating it applies to new handset activations only. Furthermore, Section 20.18(g)(1)(v) has been in place for over five years, affording Litchfield of Oregon significant time to understand this clear rule. Further, the Commission has, since late 2005, released numerous orders considering waiver requests of the 95% requirement, any reading of which should have corrected any misunderstanding on the part of Litchfield of Oregon. We especially expect carriers to understand their compliance responsibilities when public safety is at stake. As a result of its inexcusable failure to understand the 95% requirement, Litchfield of Oregon failed to give the public notice of its noncompliance, which is especially troubling given the important public safety implications inherent in the Commission's E911 rules. For its failure to make good faith efforts to comply with the requirements of Section 20.18(g)(1)(v), we refer Litchfield of Oregon to the Enforcement Bureau for appropriate actions.

19. We are equally concerned about the failures of CPK and Litchfield of Kentucky to achieve compliance with the handset penetration rule. As we explain more fully below, CPK and Litchfield of Kentucky 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, and have repeatedly offered the Commission timetables for bringing their systems into compliance that have not been met. Compliance with Commission rules is especially important where, as here, public safety is at stake. For their failure to make good faith efforts to comply with the requirements of Section 20.18(g)(1)(v), we refer CPK and Litchfield of Kentucky to the Enforcement Bureau for appropriate actions.

20. *Reporting Requirement.* As a condition of the relief granted in this Order, we require Petitioners to file regular reports apprising the Commission of the status of its transaction with Verizon Wireless. These reports must be filed on the on the first and fifteenth of each month, beginning on

[60] Because we find that relief from the 95% handset penetration requirement is warranted pursuant to the ENHANCE 911 Act, we need not determine whether Petitioners' Requests satisfy the Commission's E911 waiver criteria.

[61] We note that the Commission has not received any objections from the public safety community specific to the instant Requests.

May 15 and continuing until the sale of Petitioners' systems is completed, or six months from the date of release of this Order, whichever is earlier.

### B. CPK and Litchfield of Kentucky Requests for Waiver of the Handset Deployment and Activation Deadlines

21. We deny CPK and Litchfield of Kentucky's requests for waiver of the handset sale and activation deadlines because they have not shown diligent efforts to come into compliance as soon as possible. Reduced to its essentials, CPK and Litchfield of Kentucky's argument is that they lack the financial resources to come into compliance, and therefore will have to sell their respective systems to an entity or entities that can afford our regulatory mandate. The 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.[62] CPK and Litchfield of Kentucky's decisions not to overlay their TDMA networks are business decisions, as are their determinatic ns to sell the systems. Absent submission of the requisite financial documentation, we cannot determine whether CPK and Litchfield of Kentucky lacked the financial resources to change their network technology or bring themselves into compliance in other ways, and, absent information to the contrary, we cannot conclude that the systems' failure to sell at an earlier date is anything other than a function of the asking price.

22. CPK and Litchfield of Kentucky could have implemented those business decisions, and sold their TDMA systems, well in advance of the deadlines for compliance with the handset sale and activation rules. Although CPK and Litchfield of Kentucky represent that they acted diligently in listing the systems with a broker and otherwise took reasonable measures to complete the planned sales as soon as possible, they offer only conclusory assertions in this regard, and offer no explanation for their delay in listing the systems with a broker. CPK and Litchfield of Kentucky each observe that, "because TDMA is an outmoded air interface for commercial mobile radio service, it poses an economic disincentive to potential buyers as any buyer will have to overlay the TDMA system to an alternative air interface."[63] This circumstance, however, was entirely foreseeable to the carriers.

23. CPK and Litchfield of Kentucky have not shown that they satisfy any of the criteria for waiver set forth in Section 1.925(b)(3) of the Commission's rules and the cases interpreting that rule. It is the Commission's general policy not to grant extensions of compliance deadlines based on matters within the regulated entities' control, such as business decisions of the sort made by CPK and Litchfield of Kentucky.[64] While it is entirely a matter of each carrier's business judgment as to whether to itself

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[62] *See, e.g.*, Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, *Order to Stay*, CC Docket No. 94-102, 18 FCC Rcd 20987, 20997 ¶ 29 (2003) (providing that small carriers seeking waivers of E911 requirements partly on the basis of financial hardship should "provide the Commission with sufficient and specific factual information to assess the *bona fides* of the hardship showing" and that "to the extent this information contains data about the carrier's financial condition that is not prepared in accordance with generally accepted accounting principles (GAAP), it is unlikely that the Commission will be able to assign much weight to this data" and that "a carrier's justification for a waiver on extraordinary financial hardship grounds will be strengthened by documentation demonstrating that it has used its best efforts to obtain financing for the required upgrades from Federal, state, or local sources of funding that are available to it"); Teleprompter of Quincy, *Memorandum Opinion and Order*, 83 FCC 2d 431, 438 ¶ 14 (1980) (parties seeking waivers of the broadcast network non-duplication rules are cautioned that "[m]ere arguments and predictions ... are insufficient substitutes for factual information . . . including . . . detailed financial information").

[63] CPK Supplement at 2; Litchfield Supplement at 2.

[64] *See, e.g.*, MCI Communications Corporation, *Memorandum Opinion and Order*, 2 FCC Rcd 233, 234 ¶ 7 (1987) (stating that "independent business judgments based upon economic considerations traditionally have not been considered circumstances beyond a licensee's control and thus have not justified extensions of time"); *P&R Temmer v. FCC*, 743 F.2d 918, 930 (D.C. Cir. 1984) (agreeing with the Commission that a licensee's failure to meet a loading deadline "resulted from its own business decisions and is thus attributable to circumstances under [the

(continued....)

overbuild a CDMA system or to sell its TDMA system to another carrier that would undertake such an overbuild, the choice of the latter option does not excuse the failure to more diligently pursue such a transaction. We conclude that these carriers have not adequately justified their failure to bring their systems into compliance by the deadline, either through an earlier sale or by undertaking the overbuild themselves. We therefore deny their waiver requests and admonish CPK and Litchfield of Kentucky for their noncompliance with the handset sale and activation rules.

## IV. CONCLUSION

24. For the foregoing reasons, we grant all three Petitioners an extension of the 95% location-capable handset penetration requirement until November 2, 2007. In light of the Petitioners' failure to make good faith efforts to comply with the requirements of Section 20.18(g) of the Commission's rules, we refer the Petitioners to the Commission's Enforcement Bureau for appropriate actions. Finally, we deny CPK and Litchfield of Kentucky's requests for further waiver of the handset deployment and activation deadlines and admonish these carriers for their noncompliance with Section 20.18(g)(1)(i)-(iv).

## V. ORDERING CLAUSES

25. IT IS ORDERED, pursuant to the ENHANCE 911 Act, Pub. L. No. 108-494, 118 Stat. 3986 (2004), and Sections 1.3 and 1.925 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.925, that the foregoing Order IS ADOPTED.

26. IT IS FURTHER ORDERED that the Petition for Waiver of the Location-Capable Handset Benchmark Deadlines filed by Cellular Phone of Kentucky, Inc. IS GRANTED IN PART, subject to the conditions and reporting requirements specified herein, AND IS OTHERWISE DENIED. The deadline for compliance with Section 20.18(g)(1)(v) will be November 2, 2007.

27. IT IS FURTHER ORDERED that the Petition for Waiver of the Location-Capable Handset Benchmark Deadlines filed by Litchfield County Cellular, Inc. dba Ramcell of Kentucky IS GRANTED IN PART, subject to the reporting requirements specified herein, AND IS OTHERWISE DENIED. The deadline for compliance with Section 20.18(g)(1)(v) will be November 2, 2007.

28. IT IS FURTHER ORDERED that the Petition for Limited Waiver of Section 20.18(g) of the Commission's rules by Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon filed January 22, 2007 IS GRANTED subject to the reporting requirements specified herein. The deadline for compliance with Section 20.18(g)(1)(v) will be November 2, 2007.

29. IT IS FURTHER ORDERED that for their lack of good faith in complying with Section 20.18(g) of the Commission's rules, Cellular Phone of Kentucky, Inc., Litchfield County Cellular, Inc. dba Ramcell of Kentucky, and Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon with SHALL BE REFERRED to the Commission's Enforcement Bureau for appropriate action.

30. IT IS FURTHER ORDERED that Cellular Phone of Kentucky, Inc. and Litchfield County Cellular, Inc. dba Ramcell of Kentucky ARE ADMONISHED for their failure to comply with Section 20.18(g)(1)(i)-(iv) of the Commission's rules.

31. IT IS FURTHER ORDERED that copies of this Order shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Cellular Phone of Kentucky, Inc. and Litchfield County Cellular, Inc. dba Ramcell of Kentucky, and their counsel, William J. Sill and Nguyen T. Vu,

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licensee's] control," and finding as a consequence that the Commission was justified in denying the licensee's request to waive or extend the loading deadline).

Esq., Wilkinson Barker Knauer LLP, 2300 N Street, NW, Suite 700, Washington, DC 20037; and to Litchfield County Cellular, Inc. d/b/a Ramcell of Oregon, and its counsel, Janet Fitzpatrick Moran and Carly T. Didden, Patton Boggs LLP, 2550 M Street, NW, Washington, DC 20037.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch

Marlene H. Dortch
Secretary