

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

In the Matter of
Request for Waiver of Location-Capable Handset
Penetration Deadline by Nextel Partners, Inc.
WT Docket No. 05-302

ORDER

Adopted: December 21, 2006

Released: January 5, 2007

By the Commission:

I. INTRODUCTION

1. In this Order, we address a request for relief from the Commission's wireless Enhanced 911 (E911) Phase II requirements filed by Nextel Partners, Inc. (Nextel Partners), a Tier I wireless service provider. Specifically, Nextel Partners requests a two-year extension of time to comply with 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 must achieve 95% penetration, among their subscribers, of location-capable handsets by December 31, 2005.

1 See Petition for Limited Waiver of Nextel Partners, Inc., WT Docket No. 05-302, filed Oct. 21, 2005 (Nextel Partners Petition). In August 2005, the Commission granted applications filed by Nextel Communications, Inc. (Nextel) and Sprint Corporation (Sprint) for consent to transfer control of all licenses and authorizations held directly and indirectly by Nextel to Sprint. See Applications of Nextel Communications, Inc. and Sprint Corporation for Consent to Transfer Control of Licenses and Authorizations, WT Docket No. 05-63, Memorandum Opinion and Order, 20 FCC Rcd 13967 (2005). Further, in June 2006, the Commission granted applications filed by Sprint Nextel and Nextel Partners for consent to transfer control of all licenses and authorizations held indirectly by Nextel Partners to Sprint Nextel. See Applications of Nextel Partners, Inc., Transferor, and Nextel WIP Corp. and Sprint Nextel Corporation, Transferees, for Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002444650, 0002444656, 0002456809, Memorandum Opinion and Order, 21 FCC Rcd 7358 (2006). The parties consummated this transaction on June 27, 2006. See File No. 0002444650. Sprint Nextel also has filed a request for waiver of the 95% handset penetration deadline. See Sprint Nextel Corporation Request for Limited Waiver, WT Docket No. 05-286, filed Sept. 29, 2005 (Sprint Nextel Request). Because Sprint Nextel and Nextel Partners were separate entities as of the relevant compliance deadline, we address the Sprint Nextel and Nextel Partners waiver requests in separate orders.

2 Tier I carriers are Commercial Mobile Radio Service (CMRS) providers with nationwide footprints. 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, 14843 ¶ 7 (2002) (Non-Nationwide Carriers Order). In the Non-Nationwide Carriers Order, the Commission found that there were six carriers with national footprints, including Nextel. Id. For purposes of this Tier I status, the Commission treated Nextel and Nextel Partners as a joint entity because of the unique characteristics of the network technology they both used and the fact that the two carriers had requested treatment as a joint entity when they previously had sought relief from the E911 deadlines. See id. at 14843 n.14.

3 See 47 C.F.R. § 20.18(g)(1)(v); Nextel Partners Petition at 2.

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 pursuant to our waiver authority, the Commission has afforded relief only when the requesting carrier has met the Commission's standard for waiver of the Commission's rules.⁴ Where carriers have met the standard, the relief granted has required compliance with the Commission's rules and policies within the shortest practicable time.⁵

3. Based on the record before us, we deny Nextel Partners' waiver request. As we explain more fully below, Nextel Partners' request fails to satisfy the Commission's waiver standards and thus we decline to grant the requested two-year extension of the Commission's December 31, 2005 95% handset penetration requirement. We find that Nextel Partners failed to take sufficient efforts in advance of the deadline to assure timely compliance, and has not committed to taking additional steps to ensure that it achieves compliance as quickly as possible, as evidenced by its poor penetration rates even in the months following the December 31, 2005 deadline. Consequently, we refer the matter of Nextel Partners' failure to comply with the handset penetration requirement to the Commission's Enforcement Bureau for appropriate enforcement action.

II. BACKGROUND

A. Phase II Requirements

1. General 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.⁶ Licensees can provide ALI information by deploying location information technology in their networks (a network-based solution),⁷ or Global Positioning System (GPS) or other location technology

⁴ See Wireless E911 Phase II Implementation Plan of Nextel Communications, Inc., CC Docket No. 94-102, *Order*, 16 FCC Rcd 18277, 18281-86 ¶¶ 13-30 (2001) (*Nextel Phase II Waiver Order*); Request for Waiver by Sprint Spectrum L.P. d/b/a Sprint PCS, CC Docket No. 94-102, *Order*, 16 FCC Rcd 18330, 18335-38 ¶¶ 15-26 (2001); Request for Waiver by Verizon Wireless, CC Docket No. 94-102, *Order*, 16 FCC Rcd 18364, 18369-74 ¶¶ 16-26 (2001); Request for Waiver by AT&T Wireless Services, Inc., CC Docket No. 94-102, *Order*, 16 FCC Rcd 18253, 18257-59 ¶¶ 13-19 (2001); Request for Waiver by Cingular Wireless LLC, CC Docket No. 94-102, *Order*, 16 FCC Rcd 18305, 18308-11 ¶¶ 14-20 (2001); 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, 7709-7710 ¶ 1 (2005) (*Tier III Carriers Order*). Tier III carriers may be entitled to relief pursuant to the Commission's waiver standard or, alternatively, the ENHANCE 911 Act, which directs the Commission 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." National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, 118 Stat. 3986 (2004) (ENHANCE 911 Act). 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.* at § 107(b), 118 Stat. 3986, 3991.

⁵ See *Tier III Carriers Order*, 20 FCC Rcd at 7709-7710 ¶ 1.

⁶ See 47 C.F.R. § 20.18(e).

⁷ 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, *Network-based Location Technology*.

in subscribers' handsets (a handset-based solution).⁸ The Commission's rules also establish phased-in schedules for carriers to deploy any necessary network components and begin providing Phase II service.⁹ 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.¹⁰

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.¹¹ After ensuring that 100% of all new digital handsets activated are location-capable, licensees must achieve 95% penetration, among their subscribers, of location-capable handsets no later than December 31, 2005.¹²

2. E911 Waiver Standards and the Nextel Phase II Waiver Order

6. On September 8, 2000, the Commission released the *Fourth MO&O*, in which it recognized that "special circumstances" may warrant a waiver of the E911 Phase II requirements.¹³ The Commission's general waiver standards require a waiver proponent to show that the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and grant would be in the public interest, or, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.¹⁴ With respect to waiver of the E911 Phase II requirements, the Commission required that waiver requests must be "specific, focused and limited in scope, and with a clear path to full compliance,"¹⁵ and that requesting 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."¹⁶ The requirement that carriers present a "clear path to full compliance" dictates that we grant relief only when sufficiently justified and limit any extension of the handset penetration deadline

⁸ 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, *Location-Capable Handsets*.

⁹ See 47 C.F.R. § 20.18(f), (g)(2).

¹⁰ See 47 C.F.R. § 20.18(j)(1).

¹¹ See 47 C.F.R. § 20.18(g)(1).

¹² See 47 C.F.R. § 20.18(g)(1)(v).

¹³ See 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, 17457 ¶ 43 (2000) (*Fourth MO&O*).

¹⁴ See 47 C.F.R. § 1.925(b)(3). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); 47 C.F.R. § 1.3.

¹⁵ *Fourth MO&O*, 15 FCC Rcd at 17458 ¶ 44.

¹⁶ *Id.*

to the shortest practicable time.¹⁷ We otherwise continue to expect carriers to achieve full compliance with the E911 Phase II requirements as soon as possible.¹⁸

7. In October 2001, Nextel and Nextel Partners sought waiver of the E911 handset sale and activation deadlines because delayed availability of suitable handsets was hindering their compliance with the Commission's Rules.¹⁹ In response, the Commission adopted a Phase II compliance plan jointly proposed by Nextel and Nextel Partners finding that extension of those deadlines was justified, in part, because Motorola, Inc. (Motorola) was the sole source for the specific network technology used by Nextel and Nextel Partners and Motorola had not yet completed development of a location-capable handset for that technology.²⁰ Pursuant to the adopted plan, the Commission extended the deadlines for Nextel and Nextel Partners with respect to the sale and activation of location-capable handsets.²¹ For example, the deadline for ensuring that 100% of all new digital handsets activated are location-capable was extended for both carriers from December 31, 2002 to December 1, 2004.²²

8. However, the Commission did not extend the December 31, 2005 deadline for achieving 95% penetration of location-capable handsets.²³ In accepting their plan, the Commission recognized that meeting the December 31, 2005 deadline for 95% penetration would "require rapid replacement of old, non-A-GPS handsets with A-GPS handsets."²⁴ Although the Commission took note of Nextel's and Nextel Partners' assertions that the 95% penetration deadline would be met because (1) commercial features and 3G services to be introduced with A-GPS handsets would provide an incentive for customers to upgrade their handsets, and (2) customer churn and growth should ensure compliance by December 31, 2005,²⁵ the Commission expected Nextel and Nextel Partners to comply with the December 31, 2005 compliance date even if Nextel's and Nextel Partners' estimates of churn, customer acceptance of new features, and system growth proved inaccurate.²⁶

9. In its 2003 *Order to Stay*,²⁷ the Commission put carriers on notice that any claim based on factors beyond a carrier's control would be credited only if the carrier submitted specific evidence substantiating the claim, e.g., documentation that, despite a carrier's good faith efforts to conclude agreements with outside sources whose equipment or services were necessary to meet the Commission's benchmarks, it was unable to do so.²⁸ Carriers claiming that financial hardship prevented compliance with the December 31, 2005 95% penetration deadline were advised that a waiver was unwarranted unless

¹⁷ See *Tier III Carriers Order*, 20 FCC Rcd at 7709-7710 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-14843 ¶ 6.

¹⁸ See *Fourth MO&O*, 15 FCC Rcd at 17458 ¶ 45.

¹⁹ See *Nextel Phase II Waiver Order*.

²⁰ See *id.* at 18279 ¶¶ 8, 9, 18283-84 ¶ 19.

²¹ See *id.* at 18289 ¶ 37.

²² See *id.*

²³ See *id.* at 18284 ¶ 20, 18289 ¶ 37.

²⁴ *Id.* at 18284 ¶ 22.

²⁵ *Id.*

²⁶ *Id.* at 18285 ¶ 23.

²⁷ See *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 (2003) (*Order to Stay*).

²⁸ *Id.* at 20996-20997 ¶ 25.

the carrier provided sufficient and specific factual information,²⁹ and that a carrier seeking a waiver based on extraordinary financial hardship could strengthen its justification by submitting documentation demonstrating that it has used its best efforts to obtain financing for the required upgrades from available Federal, state, or local funding sources.³⁰ Finally, the Commission stated that it:

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.³¹

B. Nextel Partners Petition and Comments

1. Summary of Petition

10. Nextel Partners uses Motorola's Integrated Digital Enhanced Network (iDEN) technology.³² Nextel Partners adopted a handset-based solution to satisfy its E911 Phase II obligations. It offers service under the Nextel brand name in certain mid-sized and rural markets where, by agreement with Nextel, it has exclusive rights to operate.³³ Nextel Partners requests a two-year extension of the December 31, 2005 deadline for achieving 95% penetration of location-capable handsets, *i.e.*, until December 31, 2007.³⁴

11. The Commission previously has viewed Nextel Partners as a joint entity with Nextel for purposes of E911 compliance, and considered Nextel Partners and Nextel as a single Tier I carrier on that basis.³⁵ However, Nextel Partners now argues that "circumstances have changed that make separate consideration of this current Nextel Partners waiver request appropriate."³⁶ In particular, Nextel Partners argues that the Sprint Nextel merger improved Nextel's ability to meet its benchmark in ways that do not apply to Nextel Partners. Nextel Partners notes, for example, that while Sprint Nextel can leverage the former customer base of Sprint when calculating its overall penetration level, Nextel Partners cannot rely on those Sprint subscribers, with their high penetration level, to assist it in meeting the December 31, 2005 deadline.³⁷

12. Nextel Partners states that, considered on its own, it would not be classified as a Tier I nationwide carrier, and that it "is by far the smallest carrier classified as 'Tier I' for compliance

²⁹ *See id.* at 20997 ¶ 29. The Commission noted that it generally is disinclined to find that financial hardship alone is a sufficient reason for an extension of the E911 implementation deadlines. *Id.*

³⁰ *See id.*

³¹ *See id.* at 20997 ¶ 28.

³² Nextel Partners Petition at 3.

³³ *Id.*

³⁴ *Id.* at 2.

³⁵ *See supra* note 2. *See also* Nextel Partners Petition at 6. We note that Nextel and Nextel Partners jointly proposed the Phase II compliance plan adopted in the *Nextel Phase II Waiver Order*, and both carriers were granted extensions of the handset sale and activation deadlines. *See supra* ¶ 7.

³⁶ Nextel Partners Petition at 6.

³⁷ *See id.* at 7.

purposes,” with approximately 1.7 million subscribers at the end of 2004.³⁸ It points out that, as defined in the Ensuring Needed Help Arrives Near Callers Employing 911 Act of 2004 (ENHANCE 911 Act), a “qualified” Tier III carrier is one with 500,000 or fewer subscribers as of December 31, 2001 and asserts that as of that date, Nextel Partners “had a base of 515,900 subscribers, only slightly above the ENHANCE 911 Act’s definition of a Tier III carrier.”³⁹ It argues that “[t]he more flexible implementation parameters afforded Tier III carriers are unquestionably more appropriate than treating Nextel Partners as a Tier I national carrier in evaluating the circumstances of this waiver request.”⁴⁰

13. Nextel Partners alleges that relief is warranted because, despite taking “literally the same actions as [Nextel] to meet its E911 compliance benchmarks,” it has been unable to achieve 95% penetration due to lower than expected churn and handset replacement rates and the impact of the software defect affecting iDEN handsets in 2004.⁴¹ Nextel Partners argues that it “has a lower than industry average customer churn rate,” which, when considered with its shorter timetable from initial A-GPS activations to 95% penetration, led to a lower rate of handset replacement than it claims the Commission predicted and upon which it based the December 31, 2005 deadline.⁴² Nextel Partners also reports that on July 19, 2004, its sole handset vendor, Motorola, notified Nextel Partners that a latent problem in the software of a number of handset models rendered all A-GPS services unusable.⁴³ The handset defect can be remedied by “reflashing,” *i.e.*, installing corrective software in the handset. Nextel Partners also attributes the lower rate of handset replacement to customer satisfaction with their existing phones, the fact that “[a] large portion of Nextel Partners’ customer base are enterprise or government agency accounts that typically have long-term equipment replacement cycles,”⁴⁴ and the lack of PSAP readiness in its service area, “thus limiting the appeal of A-GPS capable phones in those markets.”⁴⁵ Because of these factors, Nextel Partners estimates that, even absent the software failure in its handsets, it could have achieved only 85% penetration by December 31, 2005, and with the software problem it expected to have achieved only 74.2% as of that date.⁴⁶ More recently, Nextel Partners reports that, as of April 30, 2006, it obtained an 80.2% penetration level, which would have been approximately 88% had the handset defect not occurred.⁴⁷

14. Nextel Partners describes the efforts it undertook to reflash or upgrade the handsets affected by the software defect, including taking “immediate steps to reflash the approximately 170,000 A-GPS handsets it then maintained in its inventory,” providing “appealing incentives” to its customers to reflash their handsets, and mailing over 389,000 self-reflash kits to enable subscribers to reflash their handsets at their home or office.⁴⁸ Nextel Partners indicates that it has thereby reflashed approximately

³⁸ *Id.* at 5.

³⁹ *See id.* at 5 & n.10 (citing National Telecommunications and Information Administration Organization Act – Amendment, Pub. L. No. 108-494, § 107(b), 118 Stat. 3986, 3991 (2004)). *See also supra* n.4.

⁴⁰ Nextel Partners Petition at 24.

⁴¹ *See id.* at 7, 13-19.

⁴² *See id.* at 16-19.

⁴³ *See id.* at 19.

⁴⁴ *Id.* at 17-18.

⁴⁵ *Id.* at 10.

⁴⁶ *Id.* at 15, 17.

⁴⁷ *See* Nextel Partners, Inc. Phase I and Phase II E911 Quarterly Report, CC Docket No. 94-102, filed May 1, 2006, at 12.

⁴⁸ *See* Nextel Partners Petition at 21.

295,215 handsets, but that over 200,000 defective handsets remain.⁴⁹ In addition to these efforts, it also indicates that it “continues to create incentives to encourage customer handset upgrades or reflashing.”⁵⁰ Finally, it states that “[i]n addition to the continuation of existing efforts, Nextel Partners has several other initiatives in place to ensure a 95 percent penetration rate by December 31, 2007.”⁵¹ Nextel Partners argues that these efforts, in combination with an anticipated increase in subscriber growth, “should guarantee a path to full compliance . . . by December 31, 2007.”⁵²

2. Summary of Comments

15. The Wireless Telecommunications Bureau sought comment on the Nextel Partners Request on October 21, 2005.⁵³ Motorola and Centennial filed comments supporting the request. Motorola argued that it was “not appropriate or fair to adhere to a penetration deadline that was based on an incorrect estimate [by the Commission] of the rate of churn,” particularly if the cause is that “customers *like their phones so much* that they do not want to exchange them.”⁵⁴ Motorola asserted that Nextel Partners, supported by Motorola, had “done everything reasonably possible to meet [the December 31, 2005] deadline and its inability to do so stems from a good faith churn rate estimate that turns out (in hindsight) to have been overly optimistic when applied to its special user base.”⁵⁵ It added that “all of these phones (whether they have been reflashed or not) should be included as compliant phones in calculating achievement of the 95 percent goal” because (1) the phones “have GPS E-911 location capability in them and simply need to be reflashed in order to again communicate 911 location information,” and (2) “every user has readily available to him the ability to reflash his phone and turn the GPS E-911 location capability of his phone on.”⁵⁶ Centennial agreed with Nextel Partners’ argument that the lower-than-anticipated churn rate combined with the impact of the software failure established good cause for a waiver.⁵⁷

16. APCO and NENA also filed comments. APCO noted that “Nextel Partners is not even close to meeting the 95% requirement.”⁵⁸ Further, referring to comments it filed on the Sprint Nextel Request, wherein it stated that the “results for the iDEN network are extremely troubling, and require close scrutiny by the Commission,” APCO recommended that we apply the same “exacting level of scrutiny” to Nextel Partners’ request as to Sprint Nextel’s.⁵⁹ Responding to Nextel Partners’ reliance on a

⁴⁹ See *id.* at 20-22.

⁵⁰ See Nextel Partners Reply at 5 (noting direct mail advertisements, discounted or free handset offers, targeted outreach to group and government users, and calls to customers with non-A-GPS or non-reflashed handsets with “even more attractive upgrades”).

⁵¹ Nextel Partners Petition at 22-23.

⁵² *Id.* at 23.

⁵³ See Wireless Telecommunications Bureau Requests Comment on Nextel Partners Petition for Limited Waiver of the December 31, 2005 Deadline to Achieve Ninety-Five Percent Penetration of Location-Capable Handsets Among its Subscribers, WT Docket No. 05-302, *Public Notice*, 20 FCC Rcd 16588 (Wireless Tel. Bur. 2005). Comments were due Nov. 4, 2005, and reply comments were due Nov. 14, 2005.

⁵⁴ Motorola Comments on Nextel Partners Petition at 3 (emphasis in original).

⁵⁵ *Id.*

⁵⁶ *Id.* at 4.

⁵⁷ See Centennial Comments on Nextel Partners Petition at 3-4. In addition, Nextel Partners submitted a letter supporting its petition from the Santa Rosa County Sheriff’s Office. See Nextel Partners Petition, Ex. 1.

⁵⁸ See APCO Comments on Nextel Partners Petition at 2.

⁵⁹ See *id.*

lack of PSAP readiness to support its request, NENA pointed out that the rules require carriers to be ready independently of the readiness of local PSAPs.⁶⁰ NENA also incorporated the comments it made in connection with the Sprint Nextel request, in which it noted Nextel's "dilemma" in having to rely on a sole handset supplier "whose handsets, even when delivered late, betrayed in mid-2004 a software glitch."⁶¹ NENA also argued in its comments on the Sprint Nextel waiver request, however, that the Commission placed a "special burden" on Nextel to meet its handset penetration commitments "even if market conditions prove less than favorable."⁶² Without concluding whether Sprint Nextel's efforts met this burden, NENA submitted that the Commission should measure Sprint Nextel's (and by extension, Nextel Partners') efforts against the efforts of other carriers seeking relief from the handset deadline.⁶³ NENA stated that it was "not much inclined to credit" the efforts to "re-flash" handsets affected by the software glitch because "Motorola (and Nextel, by its necessary reliance on Motorola) brought on itself the related problems of a late start in handset manufacture and the software glitch."⁶⁴

17. In its comments specific to Nextel Partners, NENA added that the number of phones affected by the software problem, which it calculated to constitute approximately 40% of Nextel Partners' non-location-capable phones, argued against treating these phones as compliant regardless of whether their software had been upgraded.⁶⁵ NENA advocated that any relief should be no more than one year, "with the possibility of extension if quarterly reports show acceptable levels of conversion effort."⁶⁶

III. DISCUSSION

18. 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 ensure that Phase II would be fully implemented as quickly as possible.⁶⁷ Absent Phase II location data, emergency call takers and responders must expend critical time and resources questioning wireless 911 callers to determine their location, searching for those callers when the callers cannot provide this information, or both.⁶⁸ 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. At the same time, however, the Commission has recognized that

⁶⁰ See NENA Comments on Nextel Partners Petition at 1-2.

⁶¹ NENA Comments on Sprint Nextel Request at 3.

⁶² See *id.* at 8 (citing *Nextel Phase II Waiver Order*, 16 FCC Rcd at 18285 ¶ 23).

⁶³ See *id.*

⁶⁴ See *id.* at 9.

⁶⁵ See NENA Comments on Nextel Partners Petition at 3.

⁶⁶ *Id.* at 3-4.

⁶⁷ See *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14853 ¶ 38.

⁶⁸ Phase I E911 service provides a PSAP with data elements containing the telephone number of the originator of the 911 call and the location of the cell site or base station receiving the 911 call. See 47 C.F.R. § 20.18(d). Thus, the actual location of the caller can be miles distant from the location information provided to the PSAP, with consequent delay in providing the caller with emergency services, assuming that the caller actually can be located. Phase II service, by comparison, has a required location accuracy of 100 meters for 67% of calls and 300 meters for 95% of calls (for a network-based location solution) or 50 meters for 67% of calls and 150 meters for 95% of calls (for a handset-based location solution). See 47 C.F.R. § 20.18(h)(1)-(2).

requests for waiver of E911 requirements may be justified, but only if appropriately limited, properly supported, and consistent with established waiver standards.⁶⁹

19. We find that Nextel Partners has failed to meet the Commission's standards for waiver of the 95% handset penetration requirement. The steps taken by Nextel Partners to meet the December 31, 2005 deadline were limited and ultimately ineffective in achieving 95% penetration, as evidenced by the poor penetration levels obtained by Nextel Partners both prior to the deadline and in the months following the deadline. Specifically, Nextel Partners achieved a penetration rate of only 74.2% by the December 31, 2005 deadline, and as of April 30, 2006, had only reached 80.2%. Moreover, Nextel Partners' filing lacks a clear path to full compliance with the 95% penetration requirement. Nextel Partners' proposals for achieving compliance are notably non-specific, equivocal in some instances and rest, in large part, on measures that already have proven unsuccessful. Accordingly, based on the record before us, we are not persuaded that Nextel Partners would meet the required penetration level within the requested waiver period even were we to grant the two-year extension it seeks.

20. We reject Nextel Partners' argument that the Commission's orders granting relief of the 95% penetration requirement to Tier III carriers provides a basis for granting Nextel Partners similar relief due to its claimed circumstances. Nextel Partners asserts that its size as of December 31, 2001 was "only slightly above the ENHANCE 911 Act's definition of a Tier III carrier" and argues that "[t]he more flexible implementation parameters afforded Tier III carriers are unquestionably more appropriate than treating Nextel Partners as a Tier I national carrier in evaluating the circumstances of this waiver request."⁷⁰ Nextel Partners concedes, however, that even viewed as a separate carrier, it does not qualify as a Tier III carrier.⁷¹ Congress specifically limited the relief available under the ENHANCE 911 Act to "qualified" Tier III carriers.⁷² To view Nextel Partners as a qualified Tier III carrier when it does not meet this definition would run contrary to Congress' express intent. Further, based on prior Commission decisions, Nextel Partners knew or should have known that the Commission would hold it to the standards of a Tier I carrier. Significantly, the *Nextel Phase II Waiver Order* granted the same relief and imposed the same conditions on both Nextel and Nextel Partners.

21. We also do not credit Nextel Partners' reliance on customer churn as justifying its non-compliance with the December 31, 2005 deadline. When the Commission adopted a handset penetration requirement in 1999, it emphasized that, while seeking "largely to rely on market forces, coupled with the requirement that new activations be ALI-capable, to replace or upgrade handsets," carriers were required to take "additional steps to ensure that the public safety goals of this proceeding are achieved within a reasonable period regardless of normal handset churn."⁷³ The Commission specifically suggested that such efforts could include "lower rates for customers using ALI-capable handsets, rebates or generous allowances to encourage trade-ins of non-capable handsets, or actual handset exchanges or retrofitting."⁷⁴ Thus, if carriers experience low churn rates, they should then take more aggressive affirmative steps to encourage adoption of location-capable handsets, rather than simply pointing to lower than expected

⁶⁹ See *Tier III Carriers Order*, 20 FCC Rcd at 7709-7710 ¶ 1; *Non-Nationwide Carriers Order*, 17 FCC Rcd at 14842-14843 ¶ 6.

⁷⁰ Nextel Partners Petition at 5, 24.

⁷¹ See *id.* at 5.

⁷² See *supra* n.4.

⁷³ Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Third Report and Order*, 14 FCC Rcd 17388, 17412 ¶ 52 (1999).

⁷⁴ *Id.* at 17413 ¶ 53.

churn levels as a basis for supporting waiver relief.⁷⁵ Furthermore, in accepting, as part of Nextel's and Nextel Partners' compliance plan, their commitment to comply with the December 31, 2005 deadline, the Commission made clear that it expected Nextel and Nextel Partners to "do more than simply rely on normal handset churn and market trends" to meet their compliance obligations.⁷⁶

22. We equally discount Nextel Partners' argument that lack of Phase II capability in some areas justifies its non-compliance. The lack of PSAP readiness in some areas to receive and utilize wireless caller information does not provide a basis for affording relief from the December 31, 2005 deadline. Handset deployment benchmarks operate independent of PSAP readiness. In this regard, we agree with NENA that location-capable handsets benefit public safety even if the customer's local PSAP is not ready for Phase II, due to the mobile nature of wireless phones.⁷⁷ When customers travel, a location-capable phone provides Phase II service in the many communities where PSAPs are, in fact, Phase II ready. Accordingly, we find unpersuasive the argument that the state of PSAP readiness for Phase II service is a valid consideration when evaluating requests for extension of the handset penetration deadline.

23. We do find, however, that the handset defect was an event beyond Nextel Partners' practical control and one that affected – but nonetheless did not excuse – its failure to achieve 95% penetration by the December 31, 2005 deadline. In this connection, we are persuaded that Nextel Partners experienced an unforeseen and unprecedented latent defect unique to iDEN handsets that instantly and completely resulted in the handsets' loss of location capability. Although we believe that Nextel Partners is responsible for its choice of technologies, and thus, at least to some extent, for its resulting vulnerability to the software defect,⁷⁸ we find that the defect was so unique and unforeseeable that Nextel Partners could not reasonably have anticipated the defect when it chose its network technology or at any time thereafter prior to the time the defect suddenly manifested itself. We also credit Nextel Partners' statements that Motorola is the sole source of handsets for iDEN networks and that Nextel Partners thus had no alternative but to deploy the Motorola product.⁷⁹

24. A carrier's obligation in an event such as that encountered by Nextel Partners is to promptly and aggressively respond once the problem is identified. Nextel Partners did so.⁸⁰ In addition to reflashing handsets to remedy the defect, it promptly modified its network, within six days, so that the defective handsets could at least provide Phase I E911 information. Moreover, it quickly informed affected PSAPs when the defect manifested itself and explained to PSAP personnel, to some extent, how

⁷⁵ Nextel Partners' generalized assertions that it has a unique customer base, and that certain customers resist upgrading to location-capable handsets, prove only that it should have undertaken more aggressive efforts tailored to its customer base and the measures necessary to overcome any resistance to upgrading to location-capable phones.

⁷⁶ *Nextel Phase II Waiver Order*, 16 FCC Rcd at 18285 ¶ 23. See Joint Petition of CTIA and the Rural Cellular Association for Suspension or Waiver of the Location-Capable Handset Penetration Deadline, WT Docket No. 05-288, *Order*, FCC 06-59, ¶ 23 (rel. Jan. 5, 2007) (*CTIA/RCA Order*) ("if carriers experienced low churn rates, . . . they should have then taken 'more aggressive affirmative steps' to encourage adoption of location-capable handsets, rather than simply pointing to lower than expected churn levels as a basis for supporting waiver relief.").

⁷⁷ See NENA Comments in WT Docket No. 05-288 (filed Oct. 21, 2005) at 4. See also *CTIA/RCA Order* at ¶ 22.

⁷⁸ See NENA Comments on Sprint Nextel Request at 9.

⁷⁹ See Nextel Partners Petition at 5.

⁸⁰ See *id.* at 22-23.

it would address the problem.⁸¹ These early efforts by Nextel Partners signify that it did perform commendably, immediately after the defect was recognized.

25. Despite our acknowledgment of the software defect, it is not controlling in our analysis of Nextel Partners' waiver request. An overriding factor is Nextel Partners' admission that it would have fallen short of the December 31, 2005 benchmark even had it not encountered the software problem. Specifically, even absent the defect, Nextel Partners would have achieved only 85% penetration by the deadline,⁸² and even as of April 30, 2006, achieved only 88% penetration.⁸³ Therefore, the software defect notwithstanding, Nextel Partners' waiver request had to cite facts sufficient for us to determine: (a) that Nextel Partners had made sufficient and effective efforts to encourage subscribers to upgrade non-compliant handsets and (b) that Nextel Partners has shown us the requisite path to full compliance with the 95% penetration requirement. In both respects, Nextel Partners has failed to do so. As discussed below, Nextel Partners' efforts were both insufficient and ineffective. The Nextel Partners Petition is devoid of any concrete showings indicative of a path to full compliance. There is no merit in the excuses Nextel Partners has offered for its non-compliance. We thus are denying its request.

26. Efforts taken by Nextel Partners leading up to the deadline to increase handset penetration levels did not result in sufficient gains in penetration levels. Nextel Partners states that: (1) "every month virtually all Nextel Partners customers receive direct mail advertisements highlighting new handset models and their commercial A-GPS capabilities;" (2) customers are offered substantial discounts on upgraded handsets, and in some cases, free handsets; (3) "[d]irect outreach efforts target . . . group and government users by offering them additional economic incentives to upgrade or replace their phones;" and (4) "Nextel Partners systematically identifies and calls customers with non-A-GPS phones or non-reflashed handsets . . . and offers these customers even more attractive upgrades, including discounts of up to \$250 on new A-GPS handsets."⁸⁴

27. Given its low penetration levels, Nextel Partners knew or should have known well before December 31, 2005 that its modest efforts to meet the deadline were proving inadequate and that more aggressive steps were needed to achieve timely compliance. However, Nextel Partners has submitted nothing to indicate that it did anything other than continue to rely on those demonstrably insufficient measures as the deadline approached. For example, to the extent Nextel Partners offered free or reduced-price location-capable phones as an inducement to its subscribers to upgrade non-location capable handsets, Nextel Partners could have eliminated any requirement that such customers also accept as a condition of receipt of compliant phones a renewed or extended service contract, which likely would have improved the effectiveness of its efforts. This unresponsiveness is of particular concern because in 2001, years before the 2005 deadline, the Commission explicitly warned Nextel Partners to undertake "special measures" to assure compliance.⁸⁵ Nextel Partners was thus on notice that it would need to intensify its efforts to meet the handset penetration requirement.

28. The efforts that Nextel Partners states will lead to compliance lack specifics and firm commitments. Despite having achieved poor location-capable handset penetration levels, Nextel Partners fails to delineate specific efforts and firm commitments leading to compliance. Significantly, Nextel

⁸¹ See *id.* at 19-20.

⁸² See Nextel Partners Petition at 17.

⁸³ See Nextel Partners, Inc. Phase I and Phase II E911 Quarterly Report, CC Docket No. 94-102, filed May 1, 2006, at 12.

⁸⁴ See Nextel Partners Reply at 5.

⁸⁵ See *Nextel Phase II Waiver Order*, 16 FCC Rcd at 18285 ¶ 23.

Partners commits to little in the way of additional, more meaningful efforts. It states that its future efforts will include “continued direct marketing to virtually every Nextel Partners customer” as well as “mass advertisements highlighting new handset models and their A-GPS capabilities.”⁸⁶ It also asserts that “customers are offered substantial discounts on upgraded handsets and in some cases will be offered free handsets.”⁸⁷ However, these promises offer no more than its efforts to date, which have thus far proven inadequate.⁸⁸ Nextel Partners’ plans are not specific and lack firm schedules. For example, Nextel Partners notes it “will target Nextel Partners’ group and government users by offering them additional economic incentives,” and that it is “working with Motorola to develop promotional plans that could, for example, include cash payments for upgrading handsets.”⁸⁹ In light of the fact that Nextel Partners’ penetration rate, as of December 31, 2005, was only 74.2% and, as late as April 30, 2006, was still only at 80.2%,⁹⁰ its proposals leave us particularly unconvinced that it has a clear path to full compliance, much less that it has undertaken “concrete steps necessary to come as close as possible to full compliance.”⁹¹

29. Motorola, in comments, claims Nextel Partners has done “everything reasonably possible to meet this deadline”⁹² We disagree. Other carriers already have undertaken or committed to specific efforts beyond those described by Nextel Partners. For example, Puerto Rico Telephone Company d/b/a Verizon Wireless Puerto Rico (PRTC), a Tier III carrier, indicated that, as the deadline approached, it added to its existing efforts a campaign to call all customers with non-GPS-capable handsets and offer them (1) a choice between two free GPS-compliant handsets with the renewal of the customer’s contract; (2) a one-year contract term rather than two years; and (3) 100 free minutes per month for three months.⁹³ Similarly, Great Lakes of Iowa, another Tier III carrier, stated in a pleading filed with the Commission that, as part of its efforts to achieve 95% penetration, it “called each TDMA and analog customer and, as an incentive to migrate to the CDMA network, offered them a free location capable phone and a month of free service if they upgraded their phones,” and also “offered to waive its two-year contract term, allowing these customers to upgrade to a free phone before their contracts would normally award another free phone.”⁹⁴ Other Tier III carriers also have permitted handset upgrades without requiring any contract extension and offered discounts on accessories.⁹⁵ Although not exhaustive, these examples illustrate more aggressive efforts that Nextel Partners could have taken to ensure timely compliance with the 95% requirement. Furthermore, these efforts were undertaken by Tier III carriers

⁸⁶ Nextel Partners Petition at 23.

⁸⁷ *Id.*

⁸⁸ See Nextel Partners Petition at 13 (basing its two-year extension request on “current trends in its customer churn rate and *the continuation of aggressive handset upgrade incentive programs*”) (emphasis added).

⁸⁹ *Id.* at 23.

⁹⁰ See Nextel Partners, Inc. Phase I and Phase II E911 Quarterly Report, CC Docket No. 94-102, filed May 1, 2006, at 12.

⁹¹ See *Fourth MO&O*, 15 FCC Rcd at 17458 ¶44.

⁹² Motorola Comments on Nextel Partners Petition at 3.

⁹³ See Letter from Suzanne Yelen, Wiley Rein & Fielding LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 94-102, filed Dec. 23, 2005, at 1.

⁹⁴ See Great Lakes of Iowa, Inc. d/b/a CellularOne Petition for Temporary and Limited Waiver of Section 20.18(g)(1)(v) of the Commission’s Rules, CC Docket No. 94-102, filed Nov. 10, 2005, at 2-3.

⁹⁵ See, e.g., Cable & Communications Corporation, August 1, 2006 Report, CC Docket No. 94-102, filed July 28, 2006, at 2 (offered free phone, free activation and 10% discount on accessory purchases with two year contract); Washington RSA No. 8 Limited Partnership Quarterly E911 Status Report, CC Docket No. 94-102, filed August 1, 2006, at 2-3 (discount on new phone without contract extension and 500 bonus minutes).

with presumably fewer resources than Nextel Partners, a Tier I carrier.⁹⁶ We conclude, based on the totality of the circumstances, that, in light of the achieved levels of penetration, Nextel Partners' efforts have been so insufficient that we must deny relief. Nextel Partners' 74.2% penetration level by the December 31, 2005 penetration deadline, and only 80.2% as of April 30, 2006, warrant referral of the matter to the Commission's Enforcement Bureau for appropriate action.

30. *Reporting Requirements.* In order to closely monitor and assess the status of Nextel Partners' efforts toward compliance with the E911 requirements, including the 95% handset penetration requirement, we require Nextel Partners to:

- Submit to the Commission quarterly status reports, beginning February 1, 2007 and until Nextel Partners achieves 95% handset penetration. These reports must include detailed information that describes and discusses with specificity: (1) Nextel Partners' efforts to encourage customers to upgrade to location-capable handsets; and (2) the percentage of Nextel Partners customers with location-capable handsets.
- Within five days of achieving a 95% handset penetration rate, submit to the Commission a letter certifying Nextel Partners' full compliance with Section 20.18(g)(1)(v).
- Submit to the Commission quarterly reports (every February 1, May 1, August 1 and November 1), beginning February 1, 2007, which shall include the following information: (1) the number and status of Phase II requests from PSAPs (including those requests it may consider invalid); and (2) the estimated dates on which Phase II service will be available to PSAPs served by Nextel Partners' network. These quarterly reports must be filed until one year after Nextel Partners certifies compliance with the 95% handset penetration requirement.⁹⁷

We note that these requirements may be modified by a future action taken by the Enforcement Bureau.

IV. CONCLUSION

31. It is amply clear that the measures Nextel Partners took in the past or promises for the future fall short of satisfying the Commission's criteria for waiver of the December 31, 2005 deadline. We therefore deny the request of Nextel Partners for a two-year waiver of its obligation to ensure that 95% of its customers have location-capable handsets. We also find that Nextel Partners' conceded failure to meet the December 31, 2005 deadline should be addressed through the enforcement process. The Commission previously has placed carriers on notice that referrals may be made to the Enforcement Bureau for failure to comply with an applicable Phase II deadline, even when requests for relief are submitted in advance of deadlines set forth in the Commission's Rules or orders.⁹⁸

⁹⁶ We also note that carriers have a history of upgrading their networks to more advanced air interfaces, such as from analog and TDMA systems to CDMA and GSM, and have been quite successful in convincing customers to change handsets to accommodate the new air interface, effectively requiring current customers to change out their handsets in order to continue receiving service.

⁹⁷ Because Sprint Nextel and Nextel Partners are now the same company, they may elect to file a consolidated report, *i.e.*, with the overall location-capable handset penetration figure for the combined company.

⁹⁸ See Revision of Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102, *Order*, 18 FCC Rcd 21838, 21844 ¶ 12 (2003) ("A carrier may seek a waiver in advance of a deadline in the Phase II rules or its compliance plan. However, the carrier always becomes liable for possible

(continued....)

V. PAPERWORK REDUCTION ACT

32. This document contains a new information collection requirement subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. It has been submitted to the Office of Management and Budget (OMB) for review under Section 3507(d) of the PRA. OMB, the general public, and other federal agencies were invited to comment on the new information collection requirements contained in this proceeding. In addition, we note that pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4), we previously sought specific comment on how the Commission might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

VI. ORDERING CLAUSES

33. Accordingly, IT IS ORDERED, pursuant to Sections 1.3 and 1.925 of the Commission’s rules, that the foregoing *Order* IS ADOPTED.

34. IT IS FURTHER ORDERED that the Petition for Limited Waiver by Nextel Partners, Inc., filed Oct. 21, 2005, IS DENIED.

35. IT IS FURTHER ORDERED that Nextel Partners is subject to the reporting requirements specified herein.

36. IT IS FURTHER ORDERED that the matter of the non-compliance of Nextel Partners with Section 20.18(g)(1)(v) of the Commission’s Rules SHALL BE REFERRED to the Commission’s Enforcement Bureau for appropriate actions.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

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enforcement action if it fails to comply with an applicable Phase II deadline. Referral to the Enforcement Bureau when such an apparent violation is reported, or otherwise appears likely, is a normal and familiar exercise of the Commission’s authority and discretion”).

APPENDIX**Comments and Reply Comments**Comments

Association of Public-Safety Communications Officials-International, Inc. (APCO)

Centennial Communications Corp. (Centennial)

Motorola, Inc. (Motorola)

National Emergency Number Association (NENA)

Reply Comments

National Emergency Number Association (NENA)

Nextel Partners, Inc. (Nextel Partners)