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

In the Matter of	**)**	
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Review of the Emergency Alert System	**)**	EB Docket No. 04-296
	)	
NTELOS Petition for Limited Waiver	**)**	
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ORDER

Adopted: February 27, 2009   **Released: February 27, 2009**

By the Acting Chief, Public Safety and Homeland Security Bureau:

I.   INTRODUCTION

1.   On July 12, 2007, the Commission adopted the *Second Report and Order* revising the Part 11 Emergency Alert System (EAS) rules and extending to wireline video providers the requirement to provide EAS messages to subscribers.[1] The Commission required such providers to become EAS compliant within 30 days of the *Second Report and Order*'s publication in the Federal Register, or 60 days from Congress' receipt from the Commission of a report on its EAS modifications pursuant to the Congressional Review Act, whichever came later.[2] This requirement went into effect on December 3, 2007.[3]

2.   On March 17, 2008, NTELOS MEDIA Inc. ("NTELOS") filed a request for limited waiver of the *Second Report and Order*'s wireline video provider compliance requirement until December 31, 2008, in order to implement software upgrades to implement EAS functionality.[4] On December 19, 2008, NTELOS filed an amendment to its March 17, 2008 petition, requesting a further extension of the EAS requirements until February 28, 2009.[5] We conclude that a waiver should be granted, to the extent explained below, because NTELOS has demonstrated unique and unusual factual circumstances warranting relief, and granting relief would be in the public interest. However, because NTELOS provided no explanation as to why it waited until after the rules went into effect to file for

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[1] Review of the Emergency Alert System; Independent Spanish Broadcaster Association, the Office of Communication of the United Church of Christ, Inc., and the Minority Media and Telecommunications Council, Petition for Immediate Relief, EB Docket No. 04-296, *Second Report and Order and Further Notice of Proposed Rulemaking*, 22 FCC Rcd 13275 (2007) (*Second Report and Order*; *FNRPM*).

[2] *Second Report and Order*, 22 FCC Rcd at 13298, 13310 ¶¶ 48, 83, as modified by *Erratum* (2007).

[3] *See* 72 Fed. Reg. 62,123 (2007).

[4] NTELOS Petition for Limited Waiver, EB Docket No. 04-296 (filed Mar. 17, 2008) (NTELOS Petition).

[5] NTELOS Amended Petition for Limited Waiver, EB Docket No. 04-296 (filed Dec. 19, 2008) (NTELOS Amended Petition).

waiver, we will not grant the waiver *nunc pro tunc*.

II. BACKGROUND

3. The Commission may waive its rules for good cause shown.[6] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest, and grant of a waiver would not undermine the policy served by the rule.[7] An applicant seeking a waiver faces a high hurdle and must plead with particularity the facts and circumstances that warrant a waiver.[8]

A. NTELOS Initial Request for Waiver

4. In its initial request for waiver, NTELOS asserted that it "utilizes the same Microsoft IPTV Edition software described by AT&T in its Petition for Limited Waiver filed in this docket on November 14, 2007."[9] Furthermore, NTELOS stated that it, "is only able to obtain the Microsoft software through Alcatel-Lucent rather than directly from Microsoft," and that, "[in the fall of 2007], NTELOS was informed that the Microsoft software was unable to support EAS, but was assured that EAS functionality would be available in the software in early 2008. Consequently, NTELOS expected to be able to complete deployment of EAS by April 1, 2008."[10] "Very recently," NTELOS continued, "NTELOS learned that the previous dates we had been given for EAS availability would not be met. According to new information that NTELOS has received from the vendor, the software upgrade to the Microsoft system that will allow NTELOS to deploy EAS will not be available to NTELOS until after AT&T's deployment."[11]

5. NTELOS stated that it "is committed to EAS and we are now working with our vendor to establish an achievable timeline to deploy the software upgrade and implement EAS functionality."[12] However, "it may be as late as fourth quarter of 2008 before the needed software upgrade is available to NTELOS and deployed."[13] NTELOS initially requested "a time-limited waiver of the EAS obligations until December 31, 2008."[14]

B. NTELOS Amended Petition for Waiver

6. On December 19, 2008, NTELOS filed an amendment to its March 17, 2008 petition requesting a further extension of the EAS requirements until February 28, 2009.[15] In NTELOS' amended petition on December 18, 2008, it states that it has "initiated a multi-stage software upgrade of its IPTV

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[6] 47 C.F.R. § 1.3. *See Northeast Cellular Telephone Co., L.P. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[7] *See WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (*WAIT Radio*).

[8] *See id*. (*citing Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664 (D.C. Cir. 1968)); Birach Broadcasting Corporation, *Memorandum Opinion and Order*, 18 FCC Rcd 1414, 1415 ¶ 6 (2003).

[9] NTELOS Petition at 1.

[10] *Id*.

[11] *Id*. at 1-2.

[12] NTELOS Petition at 2.

[13] *Id*.

[14] *Id*.

[15] NTELOS Amended Petition for Limited Waiver, EB Docket No. 04-296 (filed Dec. 19, 2008). (NTELOS Amended Petition)

system with Alcatel-Lucent and the upgrade is approximately 50% complete."[16] NTELOS contends that "operational issues have delayed the final software upgrade with EAS compatibility until 1Q09."[17]

       7.   NTELOS reiterates that it has "worked with its local franchising authorities and has in place measures to mitigate, to the extent possible, the lack of EAS capability on the Microsoft IPTV Edition software."[18] Finally, NTELOS argues that, "[a]lthough NTELOS is requesting an extension until February 28, 2009, we believe that the software upgrade will be complete and EAS deployed before that date."[19]

III.   DISCUSSION

       8.   In the *Second Report and Order*, the Commission found that a viewer's reasonable expectation regarding the availability of alerts over television programming is identical, whether the programming is over-the-air broadcasting, cable, DBS, or a new wireline video service.[20] The Commission thus extended EAS requirements to wireline video service providers.

       9.   On March 25, 2008, the Commission granted a limited and conditioned waiver to AT&T Inc. ("AT&T") which, as NTELOS notes, was deploying the same Microsoft IPTV Edition software chosen by NTELOS.[21] The AT&T Petition was granted because AT&T "demonstrated unique factual circumstances, *i.e.*, that technical limitations of its system architecture, affecting both hardware and software equipment, prevent it from complying with the deadline in the *Second Report and Order* and that, absent an upgrade of its hardware and software facilities, it has no reasonable alternative by which to provide EAS on all of the channels it carries prior to its proposed implementation date."[22] Additionally, we found it compelling that AT&T "demonstrated a unique limitation in its system design preventing it from meeting our deadline, but has developed a solution to neutralize that limitation and come into compliance with the EAS rules in a reasonable time frame."[23] Thus, the Commission granted a limited waiver conditioned on AT&T informing its subscribers of the extent to which it provided EAS messages, its efforts to provide such messages on all channels, and the specific dates on which AT&T expected to become compliant within 30 days after the release of the Order.[24] We also required that AT&T inform prospective subscribers to "the precise limitations of its provision of EAS, including providing clear information of which channels support EAS, the channels not supporting EAS, and the dates by which the channels presently not supporting EAS will be EAS compliant."[25]

       10.   NTELOS argues that, like AT&T, technical limitations prevented it from meeting the Commission's prescribed December 3, 2007 compliance deadline. Specifically, in its original Petition, NTELOS asserted that it had to wait to receive "the software upgrade to the Microsoft system that will

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[16] NTELOS Amended Petition at 2.

[17] *Id*. at 2.

[18] *Id*.

[19] *Id*. at 3.

[20] *Second Report and Order*, 22 FCC Rcd at 13297 ¶ 46.

[21] AT&T Petition for Limited Waiver, EB Docket No. 04-296, *Order*, 23 FCC 5086 (2008). (AT&T Order)

[22] *Id*. at 4 ¶ 10.

[23] *Id*. at 5 ¶ 12.

[24] *Id*. at 5 ¶ 13.

[25] *Id*.

allow NTELOS to deploy EAS."[26] NTELOS goes on to assert that it "contacted its local franchising authorities and put in place measures to mitigate, to the extent possible, the lack of EAS capability on the Microsoft IPTV Edition software."[27] In its Amended Petition, NTELOS asserts that "operational issues" further delayed its ability to deploy EAS "until 1Q09."[28] In that same Amended Petition, NTELOS asserts that it "continues to educate each customer wishing to sign up for our IPTV service about the EAS situation and we explain that EAS is only available currently on the broadcast channels in our lineup."[29]

11.   Based on our review of the NTELOS petitions, we find that, consistent with Section 1.3 of the Commission's rules and *WAIT Radio*, NTELOS has demonstrated unique factual circumstances,[30] *i.e.*, that technical limitations of its IPTV system architecture prevented NTELOS from complying with the Commission's EAS compliance deadline, and, it had no reasonable alternative by which to provide EAS on all of the channels it carries prior to its proposed implementation date.

12.   However, NTELOS fails to explain, either in its Petition or in its Amended Petition, why it waited over three months after the December 3, 2007 EAS compliance date to seek waiver of the compliance requirement. In fact and as noted above, NTELOS acknowledges that it was informed in the fall of 2007 about its software problem and that, as a result, it expected "to be able to complete deployment of EAS by April 1, 2008."[31] NTELOS thereby concedes that it had calculated that it would not become compliant until almost four months after the mandatory compliance date, but, again, fails to explain why it did not seek an extension of that requirement until three months after the compliance date had passed.

13.   Accordingly, although we are persuaded for all the reasons adduced herein to grant NTELOS' petition and waive its obligation to implement EAS capabilities for its IPTV service until February 28, 2009, we decline to grant it relief *nunc pro tunc* to the Commission's December 3, 2007 compliance date. Instead, we grant relief for the period beginning on the date of NTELOS's original petition (March 17, 2008). Further, we will refer this matter to the Enforcement Bureau for further action.

IV.   ORDERING CLAUSES

14.   Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, THIS ORDER in EB Docket No. 04-296 IS ADOPTED.

15.   IT IS FURTHER ORDERED that the Petition and Amended Petition filed by NTELOS MEDIA Inc., ARE GRANTED subject to the conditions specified herein. The deadline for NTELOS' compliance with Part 11 of the Commission's Rules, 47 C.F.R. Part 11, is February 28, 2009.

16.   This action is taken under delegated authority pursuant to Sections 0.191 and 0.392 of the Commission's rules, 47 C.F.R. §§ 0.191, 0.392.

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[26] NTELOS Petition at 2.

[27] NTELOS Petition at 2.

[28] NTELOS Amended Petition at 2.

[29] *Id*., NTELOS Amended Petition at 2.

[30] *See*, NTELOS Petition, NTELOS Amended Petition.

[31] *Id*. at 1.

FEDERAL COMMUNICATIONS COMMISSION

David Furth
Acting Chief
Public Safety and Homeland Security Bureau