

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

In the Matter of the Petition of	)	
	)	
TROY STATE UNIVERSITY	)	
	)	FCC File Nos. 746093, 746094
Regarding Private Operational Fixed	)	
Microwave Radio Stations	)	
WNTN678, Victoria, Alabama and	)	
WNTN679, Dothan, Alabama	)	

**ORDER**

**Adopted:** January 13, 2000

**Released:** January 14, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

**I. INTRODUCTION**

1. We have before us a petition by Troy State University (Troy State) titled "Request for Co-Primary Frequency Assignment" in which Troy State requests primary status for two paths in the 2 GHz band that Troy State erroneously deleted from the authorizations for private operational fixed microwave radio Stations WNTN678, Victoria, Alabama, and WNTN679, Dothan, Alabama.<sup>1</sup> For the reasons set forth below, we deny Troy State's request but will authorize the 2 GHz paths on a secondary basis.

**II. BACKGROUND**

2. The Commission has reallocated portions of the 2 GHz band from fixed microwave services (FMS) to emerging technology (ET) services, including the personal communications services (PCS).<sup>2</sup> To this end, the Commission has adopted certain transition rules.<sup>3</sup> First, rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a period of time, by the end of which the incumbents are to relocate to another portion of the spectrum.<sup>4</sup> ET licensees have the option, however, of

<sup>1</sup> Troy State Request for Co-Primary Frequency Reassignment (dated Feb. 14, 1996) (Troy State Petition).

<sup>2</sup> Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

<sup>3</sup> See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public and most conducive to the introduction of new services. See *ET First Report and Order*, 7 FCC Rcd at 6886-87 ¶ 5.

<sup>4</sup> 47 C.F.R. §§ 101.69(b), 101.79(a). See also *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.<sup>5</sup> Second, as a general matter, we authorize new FMS stations and most modifications of FMS stations in the 2 GHz band on a secondary basis to ET systems.<sup>6</sup> One practical effect of these rules is that incumbent FMS licensees that are authorized on a primary basis will have the costs of relocating to other bands paid for by the new ET licensees if the ET licensees force them to relocate. On the other hand, ET licensees are under no obligation to pay to relocate 2 GHz links that are authorized on a secondary basis.<sup>7</sup>

3. Troy State is a state university offering courses at various campuses in eastern and southern Alabama.<sup>8</sup> To serve its students at its various campuses, Troy State operates a video educational communications system which consists of an eight-link microwave network.<sup>9</sup> At one point, seven of the links operated in the 2 GHz band.<sup>10</sup> Currently, only the link between Station WNTN678, Victoria, Alabama and Station WNTN679, Dothan, Alabama operates in the 2 GHz band.<sup>11</sup>

4. Stations WNTN678 and WNTN679 were originally authorized to operate in the 2 GHz band with primary status. On May 22, 1996, Troy State filed applications to modify its licenses for seven FMS stations in its network, including Stations WNTN678 and WNTN679, to change the frequencies on which they operated from frequencies in the 2 GHz band to frequencies in the 6 GHz band.<sup>12</sup> The applications were granted and new licenses were issued on July 29, 1996;<sup>13</sup> a public notice listing the grants was released on August 9, 1996.<sup>14</sup> The new licenses contained only the new 6 GHz frequencies and not the

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<sup>5</sup> See 47 C.F.R. §§ 101.69(a), 101.71-101.77.

<sup>6</sup> 47 C.F.R. § 101.81. See Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of Proposed Rule Making*, 11 FCC Rcd 8825, 8868 ¶ 88 (1996) (*Cost Sharing First Report and Order*).

<sup>7</sup> See *Cost Sharing First Report and Order*, 11 FCC Rcd at 8869 ¶ 89.

<sup>8</sup> Troy State Petition at 1.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> See Troy State's Supplement to Request for Co-Primary Frequency Reassignment (filed Feb. 19, 1998) at 1-2 (Troy State Supplement).

<sup>12</sup> Troy State Petition at 2. See Troy State's Applications for Station Authorization in the Private Operational Fixed Microwave Service for Stations WNTL490, WNTL491, WNTL492, WNTW845, WNTW847, WNTN678, WNTN679 (FCC File Nos. 727109-727115) (Troy State Applications). In addition, Troy State filed an application for Station WNTK613 to request that 6 GHz frequencies be added to the license, but without deleting the current 2 GHz frequency. Troy State's Application for Station Authorization in the Private Operational Fixed Microwave Service for Station WNTK613 (FCC File No. 727116).

<sup>13</sup> Troy State Petition at 2.

<sup>14</sup> Wireless Telecommunications Bureau Weekly Receipts and Disposals, *Public Notice*, Report No. 1860 (Aug. 9, 1996).

previously authorized 2 GHz frequencies.<sup>15</sup>

5. On February 14, 1997, Troy State filed a petition titled "Request for Co-Primary Frequency Reassignment."<sup>16</sup> In the petition, Troy State states that it did not intend to change the frequencies on which it operated from frequencies in the 2 GHz band to those in the 6 GHz band; rather, it intended simply to add the 6 GHz frequencies to the station licenses, and to retain the 2 GHz frequencies until it entered into and implemented relocation agreements with the relevant PCS licensees.<sup>17</sup> Troy State states that it did not discover the error until approximately ninety days after the licenses were issued.<sup>18</sup> To rectify the error, Troy State requests that it be authorized to operate on the previously deleted 2 GHz frequencies on a primary basis.<sup>19</sup> Troy State adds that it does not have the resources to relocate the facilities itself, and states that if it loses primary status, it may have to eliminate the distance education programming now provided on these paths.<sup>20</sup> Such a result, Troy State claims, would adversely affect statewide educational programs now offered to the citizens of Alabama.<sup>21</sup>

6. On October 27, 1998, Sprint Spectrum LP (Sprint) filed an objection to Troy State's request.<sup>22</sup> Sprint is a PCS licensee in the Birmingham, Alabama Major Trading Area (MTA), the area in which Troy State's stations are located.<sup>23</sup> Sprint argues that Troy State is requesting a grant of new licenses in the 2 GHz band and that Troy State has failed to demonstrate why such licenses should not be

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<sup>15</sup> Troy State Petition at 2. We again note that Station WNTK613 did retain its authority to operate in the 2 GHz band.

<sup>16</sup> Troy State Petition. The caption of the Petition refers to seven stations, Stations WNTL490, WNTL492, WNTK613, WNTW845, WNTW847, WNTN678 and WNTN679. As stated above, however, Troy State had retained the 2 GHz path previously authorized for Station WNTK613. Also attached to the Petition were incomplete applications for seven stations. Instead of an application for Station WNTK613, however, Troy State attached an application for Station WNTL530 which is not otherwise referred to in the Petition. However, as Troy State now seeks to maintain the Petition only with respect to Stations WNTN678 and WNTN679, *see infra* ¶ 8, we need not resolve this discrepancy.

<sup>17</sup> Troy State Petition at 3. Indeed, Troy State argues that it did not even intend to use the 6 GHz frequencies until it entered into relocation agreements; only then would it construct and operate the 6 GHz facilities. *Id.* at 2. Troy State says that it applied for 6 GHz frequencies in anticipation that it might enter into relocation agreements. *Id.* Troy State states that it was concerned that 6 GHz frequencies were scarce in Alabama and thought that the negotiation and relocation process would proceed more smoothly if it was already authorized on the 6 GHz frequencies. *Id.*

<sup>18</sup> *Id.* at 2.

<sup>19</sup> *Id.* at 1.

<sup>20</sup> *Id.* at 4.

<sup>21</sup> *Id.*

<sup>22</sup> Objection of Sprint PCS to Request for Co-Primary Frequency Reassignment (filed Oct. 27, 1998) (Sprint Objection).

<sup>23</sup> Sprint Objection at 1.

granted on a secondary basis.<sup>24</sup> Sprint states that in planning and structuring the build-out of its PCS system, it has relied upon the fact that Troy State was no longer authorized on a primary basis in the 2 GHz band.<sup>25</sup> Sprint contends that granting Troy State's request not only would add to the relocation costs Sprint must pay but would also impede Sprint's PCS buildout, ultimately harming consumers.<sup>26</sup> Sprint argues that Troy State, and not Sprint, should suffer the consequences of Troy State's error in asking the Commission to delete its 2 GHz path.<sup>27</sup>

7. Troy State filed a reply to Sprint's objection on November 2, 1998.<sup>28</sup> Troy State argues that since the 2 GHz paths were licensed with primary status when Sprint obtained its PCS license, the relocation costs to be paid by Sprint were "fixed" at that time; therefore, Troy State argues, granting Troy State's request would not cause any increased relocation costs.<sup>29</sup> Troy State also disputes that Sprint detrimentally relied on the fact that its paths were not authorized on a primary basis.<sup>30</sup> Finally, Troy State argues that Sprint should not be allowed to avoid its obligation to pay relocation costs merely because of a subsequent licensing error.<sup>31</sup>

8. Troy State subsequently informed the Commission that it had reached relocation agreements with various PCS licensees, and accordingly withdrew the relevant applications and amended its petition to remove the relevant stations from its request.<sup>32</sup> The only stations remaining the subject of Troy State's petition are Stations WNTN678, Victoria, Alabama and WNTN679, Dothan, Alabama.<sup>33</sup>

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<sup>24</sup> *Id.* at 1, 4.

<sup>25</sup> *Id.* at 1-2, 4.

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* at 2, 4.

<sup>28</sup> Troy State's Reply to Objection of Sprint PCS to Request for Co-Primary Frequency Reassignment (filed Nov. 2, 1998) (Troy State Reply).

<sup>29</sup> *Id.* at 3-4.

<sup>30</sup> *Id.* at 4.

<sup>31</sup> *Id.* at 2, 4-5.

<sup>32</sup> Letter from James Clower, Director, Department of Radio and Television, Troy State University to Barry Bixler, Federal Communications Commission, Private Operational Fixed Radio Services (dated Aug. 4, 1999). *See also* Troy State's Amendment to Request for Co-Primary Frequency Reassignment (filed Jan. 12, 1998); Letter from Dr. William E. Flinn, System Director of Information and Technology, Troy State University to Microwave Branch, Licensing Division, Wireless Telecommunications Bureau, Federal Communications Commission (filed Jan. 12, 1998) (rescinding applications regarding Stations WNTL490 and WNTL492); Troy State's Further Amendment to Request for Co-Primary Frequency Reassignment (filed Apr. 21, 1998); Letter from Dr. William E. Flinn, System Director of Information and Technology, Troy State University to Microwave Branch, Licensing Division, Wireless Telecommunications Bureau, Federal Communications Commission (dated Apr. 16, 1998) (rescinding applications regarding Stations WNTW847 and WNTW845).

<sup>33</sup> *See* Letter from James Clower, Director, Department of Radio and Television, Troy State University to Barry (continued....)

### III. DISCUSSION

9. The first issue before us is the proper characterization and timeliness of Troy State's request. First, Troy State argues that its request is one to correct an error in a Commission action.<sup>34</sup> Troy State recognizes that such petitions must be filed within thirty days.<sup>35</sup> The licenses which Troy State seeks to correct were issued on July 29, 1996. Troy State's request was not filed until February 14, 1997, over six months later. Thus, as an initial matter, it appears that Troy State's petition for reconsideration is untimely. Troy State argues, however, that the relevant date for beginning the thirty-day time period is not July 29, 1996, the date the licenses were issued, but July 28, 1997, the date when Troy State's period for constructing its 6 GHz facilities expired.<sup>36</sup> Troy State argues that it was authorized to continue to operate with primary status in the 2 GHz band during the construction period.<sup>37</sup> Thus, Troy State contends, the problem it attempted to address in its petition -- its loss of primary status in the 2 GHz band -- did not become a reality until the construction period ended on July 28, 1997.<sup>38</sup> Since its petition was filed well before that date, Troy State contends that the petition is timely.<sup>39</sup>

10. We reject Troy State's argument. Troy State seeks to rectify what it terms an inadvertent error, the deletion of the 2 GHz paths from its licenses. That action occurred when we granted Troy State's applications to replace its 2 GHz paths with new 6 GHz paths and issued Troy State new licenses to that effect. The time in which petitions for reconsideration must be filed is set forth explicitly in the Commission's Rules and, contrary to Troy State's contentions, is a function of when the Commission takes an action, not when the party seeking reconsideration encounters the consequences of that action.<sup>40</sup> In this regard, we note that Section 1.4 of the Rules provides that if the full text of an action document is not released, but a descriptive document entitled "Public Notice" describing the action is released, the date for starting the period during which to file petitions for reconsideration is the date of the public notice.<sup>41</sup> A document entitled "Public Notice" was released on August 9, 1996, describing the grant of Troy State's license.<sup>42</sup> Therefore, any petition for reconsideration had to be filed by Troy State by

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Bixler, Federal Communications Commission, Private Operational Fixed Radio Services (dated Aug. 4, 1999).

<sup>34</sup> See Troy State Supplement at 2.

<sup>35</sup> *Id.* See 47 C.F.R. 1.106(f).

<sup>36</sup> Troy State Supplement at 2.

<sup>37</sup> *Id.* at 3-4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> See 47 C.F.R. §§ 1.4, 1.104(b), 1.106(f).

<sup>41</sup> 47 C.F.R. § 1.4(b)(4); see also 47 C.F.R. § 1.106(f).

<sup>42</sup> Wireless Telecommunications Bureau Weekly Receipts and Disposals, *Public Notice*, Report No. 1860 (Aug. 9, 1996).

Monday, September 9, 1996.<sup>43</sup> Troy State's request was not filed until February 14, 1997.<sup>44</sup> Accordingly, to the extent Troy State's request is a petition for reconsideration, it must be dismissed as untimely.<sup>45</sup>

11. Troy State argues that even if its request is not timely, the equities favor granting the request.<sup>46</sup> In this connection, we find that even if we were to treat Troy State's submission as a request for waiver of the rules according secondary status to new licenses in the 2 GHz band, such request should be denied under the circumstances presented. We may grant a waiver of a rule when (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case and grant of the waiver would be in the public interest or (ii) in view of the unique or unusual factual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>47</sup> For the reasons set forth below, we conclude that Troy State has not shown that grant of a waiver is warranted in this case.

12. Troy State states that it did not intend to delete the 2 GHz paths from its licenses. However, Troy State does not refute the fact that such result was specifically requested in the applications that were subsequently granted.<sup>48</sup> Troy State provides no reason why it made this mistake, other than to say that it necessarily relied on the expertise of others in the applications process.<sup>49</sup> Troy State states that Comsearch prepared Troy State's applications and Troy State claims that it indicated to Comsearch that it was not prepared to give up its 2 GHz frequencies.<sup>50</sup> However, Troy State must bear the responsibility for the actions of those it chose to act on its behalf.<sup>51</sup> Moreover, as Troy State admits, it signed the

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<sup>43</sup> The thirty-day period ended on September 8, 1996, a Sunday. Therefore, pursuant to the Commission's Rules, 47 C.F.R. § 1.4(j), any petition for reconsideration had to be filed by the next business day, Monday, September 9, 1996.

<sup>44</sup> While Troy State indicates that it became aware of the error ninety days after the licenses were issued, Troy State Petition at 3, it does not explain why it then took another three months to file its request.

<sup>45</sup> 47 C.F.R. § 1.106(f); *see* Nextel Communications, Inc., *Order*, 13 FCC Rcd 281, 283-84 ¶¶ 5-7 (WTB 1998) (dismissing as untimely petition that was in substance a petition for reconsideration, although not styled as such, where petition was not filed within 30 days of date of public notice of action complained of); *Metromedia, Inc., Memorandum Opinion and Order*, 56 FCC 2d 909, 909-10 ¶ 2 (1975) (dismissing as untimely petition for reconsideration filed one day late); *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993) (Commission's refusal to entertain petition for reconsideration filed one day late was justified).

<sup>46</sup> Troy State Supplement at 2.

<sup>47</sup> 47 C.F.R. § 1.925(b)(3).

<sup>48</sup> Troy State's applications requested that its authorized frequencies be "change[d]" from 2 GHz frequencies to 6 GHz frequencies, not that 6 GHz frequencies be "add[ed]" to Troy State's licenses. *See* Troy State's Applications; Troy State Petition at 2.

<sup>49</sup> Troy State Petition at 2.

<sup>50</sup> *Id.*

<sup>51</sup> *See* Centel Cellular Co. of North Carolina Limited Partnership, *Memorandum Opinion and Order*, 11 FCC Rcd 10800, 10815 ¶ 21 (1996); MTD, Inc., *Memorandum Opinion and Order*, 6 FCC Rcd 34, 34 ¶ 5 (1990).

applications.<sup>52</sup> Troy State thus had the opportunity, as well as the obligation, to review the applications to ensure that they were accurate prior to their submission to the FCC.<sup>53</sup> Troy State also claims that it did not notice the error when it received its licenses, because the relevant personnel were busy negotiating a relocation agreement.<sup>54</sup> Again, we note that it was Troy State's responsibility to check the accuracy of its licenses.<sup>55</sup> Under these circumstances, we find that it is not inequitable to hold Troy State to the license modifications that it requested in its modification applications.

13. Taking into account all of the facts and circumstances, we conclude that Troy State has not shown that a grant of the waiver would be in the public interest, or that applying the Commission's rule that new FMS licenses in the 2 GHz band are authorized on a secondary basis to ET licensees would be inequitable or contrary to the public interest. Accordingly, having found that Troy State's petition is untimely as a petition for reconsideration and having concluded that Troy State has failed to show that it should be granted a waiver of the Commission's Rules, we deny Troy State's Request for Co-Primary Frequency Reassignment. Because Troy State apparently is still operating on its old 2 GHz frequencies<sup>56</sup> and wishes to remain on those frequencies, we will grant Troy State's applications to modify its licenses for Stations WNTN678 and WNTN679 to allow it to operate in the 2 GHz band on a secondary basis to ET licensees.

#### IV. ORDERING CLAUSES

14. ACCORDINGLY, IT IS ORDERED that pursuant to Sections 4(i) and 405 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 405, and Sections 1.106 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.106, 1.925, the Request for Co-Primary Frequency Assignment of Troy State University, dated February 14, 1997, IS DENIED and the licenses for Stations WNTN678 and WNTN679 will be modified to restore the authorization to operate on 2 GHz frequencies but only on a secondary basis to ET systems.

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<sup>52</sup> Troy State Petition at 2.

<sup>53</sup> See 47 C.F.R. § 1.65(a); 47 C.F.R. § 101.19(a)(4) (1996); see also Mary Ann Salvatoriello, *Memorandum Opinion and Order*, 6 FCC Rcd 4705, 4706 ¶ 6 (1991) (signature on an application "provides assurance that the applicant personally reviewed the application and can be held responsible for the truthfulness and accuracy of the statements therein").

<sup>54</sup> Troy State Petition at 3.

<sup>55</sup> As stated above, Troy State had 30 days from public notice of the action deletion of the frequencies at issue to seek reconsideration of that action. 47 C.F.R. § 1.106.

<sup>56</sup> See Troy State Reply at 2.

15. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

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Chief, Public Safety and Private Wireless Division  
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