

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

In the Matter of)	
)	
CHEEKTOWAGA-SLOAN)	FCC File Nos. 0001220304,
UNION FREE SCHOOL DISTRICT)	0001220313
)	
Petition for Reconsideration and)	
Request for Waiver of Section 101.147)	
of the Commission's Rules)	

ORDER ON RECONSIDERATION

Adopted: January 26, 2005

Released: January 31, 2005

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

1. *Introduction.* We have before us a petition for reconsideration (Petition) submitted by Cheektowaga-Sloan Union Free School District (Cheektowaga-Sloan) on May 15, 2003.¹ The Petition asks that we reconsider the April 29, 2003 action by the Licensing and Technical Analysis Branch (Branch) of the former Public Safety and Private Wireless Division² dismissing Cheektowaga-Sloan's applications³ and requests for waiver of Sections 101.97 and 101.147 of the Commission's Rules,⁴ to obtain authorization on a primary basis in the 17.7-19.7 GHz (18 GHz) band Fixed Microwave Service (FMS) for new stations to replace expired FMS Stations WPNH671 and WPNH670, Sloan, New York. For reasons discussed below, we grant the Petition in part and deny it in part. Specifically, we will authorize Cheektowaga-Sloan to operate on a secondary basis to Fixed Satellite Service (FSS) and Mobile Satellite Service (MSS) systems.

2. *Background.* The Commission has reallocated portions of the 18 GHz band from terrestrial fixed services (FS), including the FMS, to satellite services.⁵ To this end, the

¹ See Letter dated May 9, 2003, from Margaret Jones-Carey, Chief Academic Officer, to Secretary, Federal Communications Commission, Washington, D.C. (Petition).

² The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical Infrastructure Division. See Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).

³ FCC File Nos. 0001220304, 0001220313.

⁴ 47 C.F.R. §§ 101.97, 101.147.

⁵ See Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3 -17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, *Report and Order*, IB Docket No. 98-172, 15 FCC Rcd 13430 (2000) (*18 GHz Report and Order*). The satellite services operating in the 18 GHz band consist of both the FSS and the MSS.

Commission adopted certain transition rules.⁶ In doing so, the Commission balanced the needs of incumbent FS licensees to continue operating their systems with the need to conserve vacant 18 GHz band spectrum for use by satellite licensees, to provide satellite licensees with the flexibility to establish new services, and to preclude satellite licensees from bearing any unwarranted additional costs in relocating FS licensees.⁷ Thus, rather than immediately clearing the entire 18 GHz band of the incumbent FS users, the Commission permitted the incumbents to continue to occupy portions of the band on a co-primary basis with the FSS and MSS licensees for a significant length of time, by the end of which the incumbents are to relocate to other spectrum.⁸ FSS and MSS licensees have the option, however, of requiring the FS and FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁹ In addition, the Commission authorized extensions and major modifications of existing FS systems only on a secondary basis to FSS and MSS systems.¹⁰ Most minor modifications of FS stations are also authorized on a secondary basis unless the licensee can demonstrate that it needs primary status and that the modifications will not add to the relocation costs to be paid by the FSS or MSS licensees.¹¹ The result is that, although incumbent FS licensees are able to continue operating their systems with primary status – as those systems currently exist – any expansions and most modifications to the systems result in secondary status. Also, no new FS licenses will be granted in the 18.3-19.3 GHz portion of the 18 GHz band.¹²

3. Cheektowaga-Sloan, an educational institution located near Buffalo, New York,¹³ was an incumbent licensee operating Stations WPNH669 and WPNH670 on a primary basis when the Commission adopted and released the *18 GHz Report and Order*. Station WPNH669

⁶ See 47 C.F.R. §§ 101.83-101.97. The rules are intended to protect the incumbent FS and FMS licensees in the 18 GHz band “to the maximum extent possible while at the same time providing for the growth of both satellite and terrestrial services.” *18 GHz Report and Order*, 15 FCC Rcd at 13432 ¶ 2; see also *id.* at 13470 ¶ 82 (noting that the adopted rules should lead to efficient relocation and thereby serve the public interest).

⁷ See *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

⁸ See 47 C.F.R. §§ 101.85, 101.95; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-67 ¶¶ 61-75. With the exception of incumbent licensees in the 19.26-19.3 GHz band, FS and FMS licensees have until June 8, 2010 – ten years from the adoption of the *18 GHz Report and Order* – to relocate. See *18 GHz Report and Order*, 15 FCC Rcd at 13462-65 ¶¶ 65-72. Incumbent FS and FMS licensees in the 19.26-19.3 GHz have until October 31, 2011 to relocate. See *Redesignation of the 17.7-19.7 GHz Frequency Band, Blanket Licensing of Satellite Earth Stations in the 17.7-20.2 GHz and 27.5-30.0 GHz Frequency Bands, and the Allocation of Additional Spectrum in the 17.3-17.8 GHz and 24.75-25.25 GHz Frequency Bands for Broadcast Satellite-Service Use, First Order on Reconsideration*, IB Docket No. 98-172, 16 FCC Rcd 19808, 19820-19821 ¶ 25 (2001).

⁹ See 47 C.F.R. §§ 101.85(a), 101.89-101.99.

¹⁰ See 47 C.F.R. §§ 101.83, 101.97. Secondary operations may not cause interference to operations authorized on a primary basis and are not protected from interference from primary operations. Thus, an incumbent operating on a secondary basis must cease operations if it causes interference to an FSS or MSS licensee.

¹¹ See 47 C.F.R. § 101.97; see also *18 GHz Report and Order*, 15 FCC Rcd at 13460-70 ¶¶ 61-84.

¹² See 47 C.F.R. § 101.147(r)(7)-(8).

¹³ See *Petition* at 2.

was authorized for a path on frequency 19280 MHz, and Station WPNH670 was authorized for paths on frequencies 17720 MHz, 17800 MHz, and 18142-18150 MHz. Cheektowaga-Sloan used the stations to carry voice, data, and video communications among the school district's three buildings.¹⁴ Cheektowaga-Sloan's licenses for the stations expired by their own terms on November 10, 2002. On January 7, 2003, Cheektowaga-Sloan filed applications to renew the licenses.¹⁵ On January 11, 2003, the Branch dismissed the applications as untimely filed.¹⁶

4. On February 21, 2003, the Branch granted Cheektowaga-Sloan's requests for Special Temporary Authority (STA) to continue operating the stations while it attempted to relicense them on a permanent basis.¹⁷ On March 5, 2003, Cheektowaga-Sloan filed applications for new licenses, along with requests for waiver of Sections 101.147(r) and 101.97 of the Commission's Rules.¹⁸ The waiver requests stated only that the licenses "were mistakenly not renewed in a timely manner, and then subsequently expired As a result, we are trying to re-instate the service to its original operating parameters."¹⁹ On April 29, 2003, the Branch dismissed the applications on the grounds that the requested frequencies were not available for new FMS stations, and that the waiver requests did not provide adequate justification.²⁰

5. On May 13, 2003, Cheektowaga-Sloan filed the instant *Petition*. The *Petition* offers additional justification for the waiver request. Specifically, Cheektowaga-Sloan states that the manufacturer of its microwave equipment is no longer in business, and parts are scarce.²¹ It asserts that retuning the equipment would be very difficult and costly, if not impossible.²² Cheektowaga-Sloan's equipment vendor estimates that it would cost \$100,000 to purchase and install a new microwave system.²³ Cheektowaga-Sloan represents that it lacks the necessary funding.²⁴ It also states that its schools could potentially be shut down if voice and data

¹⁴ *See id.*

¹⁵ *See* FCC File Nos. 0001149729 (WPNH669), 0001149730 (WPNH670).

¹⁶ *See* Dismissal Letters Ref. Nos. 1691266 (WPNH669), 1691267 (WPNH670); *see also* 47 C.F.R. § 1.949 (renewal applications must be filed prior to the expiration date of the license).

¹⁷ *See e.g.* FCC File Nos. 0001179546 (WPXA636), 0001179589 (WPXA638). The STAs subsequently were renewed twice, but expired by their own terms on May 3, 2004.

¹⁸ *See* Waiver request attachment to FCC File Nos. 001220304, 0001220313.

¹⁹ *Id.*

²⁰ *See* Dismissal Letters Ref. Nos. 1834058, (0001220304), 1834059 (0001220313).

²¹ *See Petition* at 2.

²² *See id.* at 3.

²³ *See id.*

²⁴ *See id.*

communications were cut off.²⁵ In addition, Cheektowaga-Sloan states that, while it would prefer that the stations be relicensed on a primary basis, it is willing to accept secondary status.²⁶

6. *Discussion.* Pursuant to Section 1.925 of the Commission's Rules, we may grant a waiver if it is shown that either: (1) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (2) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁷ Section 101.147(r) prohibits new applications for Part 101 licenses in the 18.3-19.3 GHz band.²⁸ Because no new FS licenses are to be granted in this portion of the 18 GHz band, we conclude that the Branch was correct in dismissing Cheektowaga-Sloan's applications to obtain such authorizations based on the information that was presented to the Branch. Therefore, we deny Cheektowaga-Sloan's *Petition* to this extent. In light of the additional information provided in the *Petition*,²⁹ however, we conclude that Cheektowaga-Sloan's 18 GHz applications should be granted on a secondary basis to FSS and MSS systems.³⁰

7. Based on the record before us, Cheektowaga-Sloan has not met its burden of demonstrating that grant of a waiver is warranted in order to allow Cheektowaga-Sloan to re-license its facilities on a primary basis. A licensee's involvement in public service communications alone does not justify grant of a waiver after a license is inadvertently or mistakenly allowed to expire.³¹ The only explanation given for the lapse of the licenses here is that they were mistakenly not renewed in a timely manner or that they were delayed in arriving at the Commission.³² Licensees must abide by the Commission's filing deadlines, and are responsible for filing renewal applications in a timely manner. A licensee's mistaken failure to

²⁵ See *id.* at 2.

²⁶ See *id.* at 3.

²⁷ 47 C.F.R. § 1.925(b)(3).

²⁸ 47 C.F.R. § 101.147(r)(7)-(8).

²⁹ The Commission's Rules generally prohibit the introduction of additional information in a petition for reconsideration, unless the information was not available earlier or consideration of the information is in the public interest. See 47 C.F.R. § 1.106(c). Because Cheektowaga-Sloan's applications were dismissed without prejudice, it would be able to file new applications and waiver requests setting forth the additional information. See Amendment of Section 1.937 of the Commission's Rules Concerning Repetitious or Conflicting Applications, *Report and Order*, WT Docket No. 02-57, 18 FCC Rcd 7190, 7193 ¶ 6 (2003). We therefore conclude that, for reasons of administrative efficiency, it is in the public interest for us to consider the merits of Cheektowaga-Sloan's modified requests for waiver. See *Goosetown Enterps., Inc., Memorandum Opinion and Order*, 16 FCC Rcd 12792, 12794-95 ¶ 7 (2001).

³⁰ See *Rye Telephone Company, Inc., Memorandum Opinion and Order*, 19 FCC Rcd 18648, 18650-51 ¶ 5 (WTB BD 2004); *City of San Diego, Order on Reconsideration*, 17 FCC Rcd 20331, 20336 ¶ 10 (WTB PSPWD 2002) (San Diego).

³¹ Amendment of Parts 1 and 90 of the Commission's Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7301 ¶ 20 (1991).

³² See *Petition* at 1.

renew its license in a timely manner is not a unique or unusual circumstance³³ that would render application of the rules inequitable, unduly burdensome, or contrary to the public interest.³⁴

8. We note that, even if we were to relicense the stations at issue on a primary basis, they would lose primary status on June 8, 2010.³⁵ We also appreciate Cheektowaga-Sloan's concern that complete denial of its request would impair its educational mission by requiring significant expenditures and potentially be shutting down its school buildings. In light of these circumstances, we conclude that it would not undermine the purpose of the rules, and would further the public interest, to license the stations on a secondary basis to FSS and MSS stations.³⁶ We further conclude that this action will not adversely affect or impose additional costs on FSS and MSS licensees in the 18 GHz band.

9. Accordingly IT IS ORDERED that pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections 1.925 and 101.147(r) of the Commission's Rules, 47 C.F.R. §§ 1.925, 101.147(r), the Petition for Reconsideration, including the modified request for waiver, filed by Cheektowaga-Sloan Union Free School District on May 13, 2003 IS GRANTED IN PART AND DENIED PART to the extent indicated above.

10. IT IS FURTHER ORDERED that applications FCC File Nos. 0001220304 and 0001220313 SHALL BE PROCESSED in accordance with this *Order on Reconsideration* and the Commission's Rules.

11. 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

Michael J. Wilhelm
Chief, Public Safety and Critical Infrastructure Division
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³³ The presence of unique or unusual circumstances is a prerequisite to relief under the second prong of the Commission's waiver standard. *See* 47 C.F.R. § 1.925(b)(3)(ii). *See also, e.g.*, Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000).

³⁴ *See, e.g.*, Sierra Pacific Power Company, *Order*, 16 FCC Rcd 188 (WTB PSPWD 2001); First National Bank of Berryville, *Order*, 15 FCC Rcd 19693 (WTB PSPWD 2000); Sierra-Plumas Rural Electric Cooperative, *Order*, 15 FCC Rcd 5572 (WTB PSPWD 2000); Duke Power Company, *Order*, 14 FCC Rcd 19431 (WTB PSPWD 1999).

³⁵ *See* 47 C.F.R. § 101.147(r)(6).

³⁶ *See San Diego*, 17 FCC Rcd at 20336 ¶ 10 (granting waiver to allow relicensing of 18 GHz stations on a secondary basis to FSS and MSS licensees, in part because the licensee's current equipment could not be returned, and the cost of replacing the equipment would place an undue burden on the public).