

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

In the Matter of Application of)	
)	
GOOSETOWN ENTERPRISES, INC.)	
)	File Number D076472
To operate a land mobile radio system in)	
the 470-512 MHz band in Beacon, New York)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2001

Released: June 15, 2001

By the Commission:

1. *Introduction.* We have before us an Application for Review,¹ filed by Goosetown Enterprises, Inc. (Goosetown) on December 10, 1999. The AFR requests review of the Wireless Telecommunications Bureau, Public Safety and Private Wireless Division's (Division) *Order* denying Goosetown's petition for reconsideration in the above-captioned matter.² For the reasons stated below, we affirm the *Order*'s ruling but, on our own motion, consider the merits of Goosetown's AFR and grant its request for waiver.

2. *Background.* Pursuant to Section 90.305(a) of the Commission's Rules,³ base stations operating in the 470-512 MHz band must be located within 80 kilometers (50 miles) of the geographic center of the urbanized areas listed in Section 90.303 of the Commission's Rules.⁴ This mileage restriction was established to protect over-the-air broadcast operations on television (TV) channels 14-21 from harmful interference by land mobile radio systems operating in the 470-512 MHz band.⁵ On April 1, 1997, Goosetown submitted an application to operate a five-channel private land mobile radio (PLMR) system in the 470-512 MHz band.⁶ Because the proposed base station would be more than 50 miles from the geographic center of the New York City area, Goosetown also submitted a request for waiver of Section

¹ Goosetown Enterprises, Inc., Application for Review, filed Dec. 10, 1999 (AFR).

² Goosetown Enterprises, Inc., *Order*, released Nov. 10, 1999, 14 FCC Rcd 18997 (WTB PSPWD 1999) (*Order*).

³ 47 C.F.R. § 90.305(a).

⁴ 47 C.F.R. § 90.303.

⁵ See Further Sharing of the UHF Television Band by Private Land Mobile Radio Services, *Notice of Proposed Rule Making*, Gen. Docket No. 85-172, 101 FCC 2d 852 (1985).

⁶ Goosetown seeks use of the following frequency pairs 472/475.1625 MHz, 472/475.3375 MHz, 471/774.7375 MHz, 472/475.2675 MHz, and 472/475.0375 MHz. See File No. D076472.

90.305(a) of the Commission's Rules.⁷ On May 20, 1998, the Division's Licensing and Technical Analysis Branch (Branch) denied the waiver request and dismissed the associated application.⁸ The Branch based its conclusion for denial and dismissal on the ground that unavailability of frequencies in a specific band in a particular geographic area did not meet the threshold requirement of a unique circumstance warranting a waiver.

3. Goosetown requested reconsideration of the Branch's May 20, 1998, waiver request denial and application dismissal.⁹ A facsimile was received by the Branch in Gettysburg, Pennsylvania, on June 19, 1998. A hard copy of the reconsideration request was received in Gettysburg on June 22, 1998. In an *Order*, adopted and released on November 10, 1999, denying Goosetown's petition for reconsideration, the Division stated that the last day to submit a timely-filed petition for reconsideration was June 19, 1998. In its *Order*, the Division cited a paper-filed petition bearing a Commission date stamp of June 22, 1998,¹⁰ and concluded that, because Goosetown had not filed its reconsideration request until June 22, 1998, it was untimely filed.¹¹ Therefore, the Division denied Goosetown's petition for reconsideration.¹² On December 10, 1999, Goosetown filed the subject AFR seeking review of the Division's decision denying Goosetown's petition for reconsideration.

4. *Discussion.* Section 405 of the Communications Act, as amended, requires a petitioner to request reconsideration within thirty days of the date of public notice of the Commission action.¹³ The Division concluded, and Goosetown does not dispute, that this period was triggered by the May 20, 1998, letter denying Goosetown's waiver request, and that the last day to submit a timely filed petition for reconsideration was June 19, 1998.¹⁴

5. On review, Goosetown maintains that it sent a copy of its petition to the Branch via facsimile on June 19, 1998, and, thus, it made a timely filing that the Division failed to acknowledge in the *Order*.¹⁵

⁷ The original waiver request became separated from the application before the application was filed with the Commission. See Letter from Rick D. Rhodes, Esq., Irwin, Campbell and Tannenwald, P.C. to Kelly S. Lawver, Chief, Special Facilities Section, Land Mobile Branch, Licensing Division (May 5, 1997). Thus, the request for a rule waiver was received later in a letter, dated May 5, 1997, to the FCC's Land Mobile Branch, Licensing Division, from applicant's counsel. *Id.*

⁸ Letter from Michael J. Regiec, Acting Chief, Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division to Rick D. Rhodes, Esq., Irwin, Campbell and Tannenwald, P.C. (May 20, 1998) (Branch Letter).

⁹ Request for Reconsideration, filed June 22, 1998, at 1 (Reconsideration Request).

¹⁰ *Order*, 14 FCC Rcd at 18998 n.6, citing Reconsideration Request at 1.

¹¹ *Id.* ¶ 4.

¹² *Id.* ¶ 5.

¹³ 47 U.S.C. § 405; See also 47 C.F.R. § 1.106(f).

¹⁴ See *Order*, ¶ 4.

¹⁵ AFR at 2. Goosetown also submitted copies of a facsimile transmission sheet and a Federal Express receipt to support its claim. *Id.*, Exhibits C and D. The Federal Express tracking receipt indicates that a package was picked up on June 19 but not delivered until June 22 – after the deadline.

We conclude that the Division properly denied Goosetown's petition as untimely. The Commission has held that a facsimile transmission does not constitute proper filing for the purposes of complying with statutory time limits, and Goosetown offers no sufficient reason to question that conclusion.¹⁶ Thus, Goosetown's petition for reconsideration was untimely.¹⁷ Because the requirement that petitions for reconsideration be filed within thirty days of the public notice date is prescribed by the Communications Act, we do not have the general authority to waive or extend the filing deadline.¹⁸

6. Moreover, even if the facsimile did constitute a timely filing, Goosetown's petition for reconsideration was nonetheless subject to dismissal for having been filed in the wrong location. We require petitioners to file petitions for reconsideration with the Office of the Secretary in Washington, D.C.,¹⁹ and we warn persons filing documents with the Commission that filings submitted in the wrong location will not be processed.²⁰ Thus, Goosetown did not make a proper filing when it forwarded its petition to the Branch in Gettysburg.²¹ Accordingly, we affirm the *Order's* conclusion that Goosetown's petition for reconsideration was untimely.

7. Nonetheless, we note that Goosetown also argues that even if we affirm the Division's decision, we should consider its waiver request on our own motion.²² Specifically, Goosetown maintains that it could file a new waiver request even if we uphold the dismissal of its petition.²³ Consequently, for administrative efficiency, Goosetown requests that we consider its waiver request in this proceeding. Under Section 1.934(a) of our Rules, when an application has been dismissed with prejudice, an applicant may not file another application for the same purpose for a period of one year.²⁴ In this instance, the dismissal of the application was without prejudice. Thus, Goosetown may file another application for the same

¹⁶ Arthur P. Baumgarden, *Memorandum Opinion and Order*, 11 FCC Rcd 4071, 4072 ¶ 9 (1996); *see also, e.g.*, Memorandum of Agreement Between the Federal Communications Commission and Elkins Institute, Inc., *Order on Reconsideration*, 14 FCC Rcd 5080, 5081 ¶ 3 (WTB 1999) (*Elkins*). Although Goosetown states that "it became customary and routine practice to lodge documents in Gettysburg via facsimile (often followed up by other means, such as express service)," AFR at 3, we distinguish between the informal filing of courtesy copies (such as via facsimile) and the reliance upon those documents as official Commission filings.

¹⁷ 47 C.F.R. § 0.401; *see also* 47 C.F.R. § 1.7 ("documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission.").

¹⁸ Steven E. Powell, *Memorandum Opinion and Order*, 11 FCC Rcd 11925, 11926 ¶ 5 (1996) (citing *Reuters Ltd. v. FCC*, 781 F.2d 946 (D.C. Cir. 1986)).

¹⁹ 47 C.F.R. § 1.106(i).

²⁰ 47 C.F.R. § 0.401.

²¹ *See, e.g., Elkins*, 14 FCC Rcd at 5081 ¶ 3 (citing *Houston Mobilefone, Inc., Memorandum Opinion and Order*, 52 FCC 2d 1009, 1011 (1975)).

²² AFR at 4.

²³ *Id.*

²⁴ 47 C.F.R. § 1.934(a).

purpose within a year of the dismissal of the subject application.²⁵ Accordingly, for reasons of administrative efficiency, we shall consider Goosetown's waiver request on our own motion.²⁶

8. A request for a rule waiver in the Wireless Telecommunications Services may be granted if it is shown that (a) 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 (b) 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 Although Goosetown suggests that grant of its waiver request "should have been routine,"²⁸ we emphasize that grant of a waiver represents a deviation from our rules. Thus, we do not consider it a "routine" action.²⁹ In fact, a waiver is granted only upon a finding that the applicable waiver standard has been met.

9. We conclude that Goosetown has made a sufficient showing that grant of the requested waiver is warranted under the first prong of the waiver standard set forth in Section 1.925 of the Commission's Rules. The purpose of the 50-mile limitation is to ensure that television stations and land mobile stations do not interfere with one another.³⁰ Sections 90.305(a) and (b) of the Commission's Rules provide that PLMR base stations operating in the 470-512 MHz band (which also constitutes TV channels 14 through 20) may be located only within 50 miles of the geographic centers of certain cities listed in Section 90.303, and associated mobile units shall operate within 30 miles of the base station, thus creating a circular area with a radius of 80 miles (80-mile area) within which PLMR stations may operate without interference from television stations.³¹ The rules specify effective radiated power and antenna height limits to ensure that PLMR stations will not interfere with existing full-power television stations.³² In order to protect land mobile radio stations operating within this 80-mile area, the Commission historically has evaluated proposals for new full-power analog television stations to determine whether such stations would protect land mobile operations on a case-by-case basis.³³ Under those standards, the transmitter site of a new analog television station must be at least 345 kilometers (212 miles) from the geographic center of co-channel land mobile allotment and at least 230 kilometers (140 miles) from the geographic center of an adjacent channel land mobile allotment.³⁴ Digital television stations (DTV) must be located at least 250

²⁵ *Id.*

²⁶ See JSM Tele-Page, Inc., *Memorandum Opinion and Order*, 14 FCC Rcd 19516 (WTB CWD 1999).

²⁷ 47 C.F.R. § 1.925(b)(3) (formerly 47 C.F.R. § 90.151).

²⁸ AFR at 2.

²⁹ See *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

³⁰ See Further Sharing of the UHF Television Band by Private Land Mobile Radio Services, *Notice of Proposed Rulemaking*, Gen. Docket No. 85-172, 101 FCC 2d 852 (1985).

³¹ 47 C.F.R. §§ 90.305(a), 90.305(b).

³² 47 C.F.R. §§ 90.307, 90.309.

³³ See Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service, MM Docket No. 87-268, *Sixth Report and Order*, 12 FCC Rcd 14588, 14658-59 n.275 (1997).

³⁴ *Id.*

kilometers (155 miles) from the geographic center of a co-channel land mobile allocation and 176 kilometers (110 miles) from the geographic center of an adjacent land mobile allocation.³⁵ Low power television (LPTV) stations are required to protect co-channel or first adjacent channel PLMR operations located within a contour radiating approximately 130 kilometers (approximately 80 miles) from the geographic center in question.³⁶

10. Against this backdrop, we have performed our own engineering analysis to determine whether Goosetown's proposed operation is likely to cause interference to protected full service TV facilities. Specifically, we have confirmed that the proposed Goosetown base station will satisfy all the protection criteria of 47 C.F.R. § 90.307 with respect to full service³⁷ co-channel and adjacent-channel TV stations. In addition, we have determined that the service contour will extend only 22.7 miles from the proposed Goosetown base station.³⁸ Given the fact that the base station is located 50.9 miles from the geographic center for the New York City area under Section 90.303, the service contour will extend only 73.6 miles from the associated coordinates. Therefore, despite the fact that the base station is located beyond the 50-mile limit, the service area for the proposed Goosetown base station will remain within the 80-mile area where land mobile operations are primary. In addition, Goosetown proposes to limit the range of the mobile units to 24.8 miles (40 kilometers) from the proposed base station. Therefore, all mobile operations will remain within the 80-mile area where land mobile operations are primary. Accordingly, because Goosetown would fully protect all television stations that are entitled to protection, we conclude that granting a waiver in this case would not frustrate the underlying purpose of the rule.

11. We also conclude that Goosetown has shown that grant of the requested waiver would be in the public interest. Goosetown states that there is a need for additional telecommunications services in the Beacon, New York, area and that it requires a waiver of Section 90.305 because the only suitable site is located 50.9 miles from the geographic center of New York City.³⁹ In support of its waiver request, Goosetown argues that the distance in question is only 0.9 miles beyond the 50-mile distance limitation set

³⁵ 47 C.F.R. § 73.623(e).

³⁶ 47 C.F.R. §§ 73.6020, 74.709.

³⁷ We note that subsequent to the filing of Goosetown's application, various applications were filed by LPTV stations seeking Class A status pursuant to the Communications Broadcasters Protection Act of 1999 (CBPA). *See* 47 U.S.C. § 336(f). The CBPA provides that no Class A LPTV station may cause interference to PLMR systems operating within 80 miles of the geographic coordinates of the urban areas referred to in 47 C.F.R. § 90.303, within which PLMR systems (or point-to-multipoint systems operating pursuant to 47 C.F.R. § 22.621) are allowed to operate. *See* 47 U.S.C. § 336(f)(7)(C). Since we find that Goosetown's area of operation is wholly within 80 miles of the designated center of the New York/northeastern New Jersey urban area, any television stations (whether full- power, Class A LPTV, or LPTV) must fully protect Goosetown's operation.

³⁸ This is based on a service contour for a land mobile station operating between 450-470 MHz of 39 dBu. *See* 47 C.F.R. §§ 90.187 and 90.205. The distance to this contour was calculated, based on the proposed effective radiated power (125 watts) and antenna height above average terrain (337 meters), using the standard FCC curves. *See* 47 C.F.R. § 73.699, Figure 10b. An adjustment factor of 9 dB was made to reflect the fact that land mobile receiver antennas are usually located lower in height than the assumed 30 feet above ground used in the FCC curves.

³⁹ Goosetown Enterprises, Inc., Request for Rule Waiver, AFR Exhibit A at 1-2.

forth in Section 90.305(a) and that this minor variation from the rule should be considered *de minimis*.⁴⁰ In addition, Goosetown states that it filed the application so that it could enhance and improve its service to public safety entities, such as ambulance services; public conveyances, such as taxicab and van companies; and commercial users.⁴¹ While we disagree with Goosetown that a waiver should be granted solely because the distance in question is only 0.9 miles, we believe that Goosetown has shown that its proposed operation would serve the public interest by increasing the availability of communications services in the Beacon, New York area.

12. As a general matter, in considering these waiver requests, we must balance important conflicting policy concerns. On the one hand, we note that many of the waivers of Section 90.305 we have granted have allowed public safety entities to operate stations that meet critical communications needs.⁴² On the other hand, given the transition to DTV and the reallocation of spectrum in channels 52-69, it is critical that sufficient spectrum remains available to allow all existing full power television stations to receive a new DTV channel that replicates their existing service area to the maximum extent possible. Another relevant consideration is the Community Broadcasters Protection Act of 1999, which established a Class A television service for LPTV stations that met certain criteria.⁴³ Those LPTV stations that have certified their eligibility for Class A status and are operating on Channels 52-69 must file applications to move to a core channel (Channels 2-51) in order to receive Class A status.⁴⁴ We believe it is appropriate to distinguish between those land mobile applicants that propose to contain their area of operation within 80 miles of the geographic center of the urban area in question and those applicants that propose to operate further than 80 miles from the geographic center.

13. We are more inclined to consider favorably requests for waiver of Section 90.305(a) when the applicant proposes to contain its area of operation within 80 miles of the geographic center of the urban area in question. Such operation would not adversely impact television stations because television stations are already required to protect land mobile stations operating within that area. By contrast, new and pending applicants seeking a waiver of Section 90.305 whose area of operation extends outside the 80-mile area could negatively impact the availability of DTV spectrum for television stations. We expect that such proposals will be closely scrutinized to determine whether grant of a waiver is warranted under Section 1.925 of the Commission's Rules. Any applicant seeking a waiver to operate outside the 80-mile area must demonstrate that it would provide full protection to any existing full-power or low power TV station, including allotments and pending applications for such stations, at the time the waiver is filed.⁴⁵ If an

⁴⁰ AFR at 2.

⁴¹ AFR at 1.

⁴² A review of our licensing records show that 111 (out of a total of 155) waivers of Section 90.305(a) have been issued to public safety entities.

⁴³ Community Broadcasters Protection Act of 1999, Pub. L. No. 106-113, 113 Stat. Appendix I at pp. 1501A-594 – 1501A-598 (1999), *codified at* 47 U.S.C. § 336(f).

⁴⁴ *See* Establishment of a Class A Television Service, MM Docket No. 00-10, *Report and Order*, 15 FCC Rcd 6355, 6396-97 (2000).

⁴⁵ This requirement is limited to pending requests for waivers and requests filed after the date of this *Order*. Licensees that have already received waivers may continue to operate pursuant to the terms of their authorization, including any conditions placed on those authorizations, until and unless the Commission modifies such authorizations and/or waivers.

applicant that proposes to operate further than 80 miles from the geographic center sufficiently demonstrates that grant of a waiver is warranted, its operation would be secondary to current and future full power and low power TV stations.⁴⁶

14. *Conclusion.* We affirm the dismissal of Goosetown's petition for reconsideration. We also conclude, however, that it is appropriate to consider Goosetown's waiver request on the merits and that Goosetown has made the requisite showing that a waiver of Section 90.305(a) of the Commission's Rules, under the circumstances presented. Accordingly, we will grant Goosetown's Application for Review to the extent discussed herein.⁴⁷

15. For the foregoing reasons, IT IS ORDERED that, pursuant to the authority of Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Sections 1.115 and 1.925 of the Commission's Rules, 47 C.F.R. §§ 1.115, 1.925, the Application for Review filed by Goosetown Enterprises, Inc. on December 10, 1999, IS GRANTED to the extent stated herein and DENIED in all other respects.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁴⁶ As part of the waiver request, the applicant must state that it is willing to accept a license on the basis of not interfering with existing and future full power and low power TV stations. Absent such a statement, the request will be dismissed.

⁴⁷ We note that subsequent to the dismissal of Goosetown's application, four of the frequency pairs specified in Goosetown's 1997 application have been fully or partially loaded. See 47 C.F.R. § 90.313 (establishing maximum channel loading on frequencies on the 450-512 MHz band). Our licensing records reveal that only frequency pair 472/475.1625 MHz has not been loaded. Goosetown may use the waiver we grant in this order to apply for other available 470-512 MHz frequency pairs, so long as the other technical parameters it specifies are identical to the parameters specified in its 1997 application.