

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

In the Matter of)	
)	
Request for Waiver by Midport Electronics, Inc. to)	FCC File No. 0000998539
Allow Operation on Frequencies in the 421-430)	
MHz Band in the Detroit, Michigan Area)	

ORDER

Adopted: July 28, 2004

Released: August 5, 2004

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

I. INTRODUCTION

1. In this *Order*, we address an application and accompanying request for waiver of the Commission's Rules filed by Midport Electronics, Inc. ("Midport")¹ seeking authorization to operate on certain frequencies in the 421-430 MHz band,² beyond 50 miles of the geographic center of Detroit, Michigan. For the reasons stated herein, we grant the waiver request.

II. BACKGROUND

2. On August 15, 2002, Midport filed an application for authorization to commence land mobile operations on various 421-430 MHz frequencies³ at a distance of 52.8 miles from the geographic center of Detroit, Michigan.⁴ Midport also requested a waiver of Section 90.273 of the Commission's Rules⁵ to permit its proposed operations.⁶ Section 90.273(c) and (d) of the Commission's Rules require that base and control stations and mobiles, respectively, operating in the 421-430 MHz frequency band in

¹ See FCC File No. 0000998539 (Application) and accompanying waiver request (filed Aug. 15, 2002, amended on Aug. 20, 2002, and Jan. 31, 2003) (Request).

² Midport seeks authorization to operate on the following frequencies: 422/427.47500 MHz, 424/429.45000 MHz, and 424/429.55000 MHz.

³ See *supra*, note 1.

⁴ *Id.* We note that several of the frequencies on which Midport now seeks authorization had been previously authorized to Midport and GRH, Associates, Inc., an affiliated entity, under various licenses. However, these earlier licenses were cancelled for failure to construct or construct in substantial accordance with its authorizations, *e.g.*, constructed facilities at an unauthorized location. See Midport Electronics, Inc., *Order*, 17 FCC Rcd. 13778 (WTB PSPWD 2002) (*Midport Order*). In its waiver request, Midport states that it inadvertently operated on the 421-430 MHz band at coordinates 41-39-20.9 N. latitude and 83-31-51.0 W. longitude. See Request at 1. Midport's current license application proposes to operate at essentially the same coordinates: 41-39-21.0 N. latitude and 83-31-52.0 W. longitude. See FCC File No. 0000998539 (as amended, Jan. 31, 2003).

⁵ 47 C.F.R. § 90.273.

⁶ Request at 1.

the vicinity of Detroit be located within 80 kilometers (50 miles) of the center of the city.⁷ Stations operating within these distance restrictions are authorized to transmit at a maximum of 250 watts ERP.⁸

3. With its proposed site approximately 53 miles from the center of Detroit, Midport proposes to operate at a reduced power of no more than 80 watts output power (TPO).⁹ Midport contends that the proposed service area would be equivalent to, or less than, the geographic area served if its proposed station were to operate at 90 watts TPO within the 50-mile geographic restriction area.¹⁰ Consequently, Midport requests a waiver of Section 90.273(c) of the Commission's Rules.¹¹

4. Midport argues that grant of the requested waiver would not undermine the fundamental purpose served by Section 90.273(c).¹² Midport states that the rule was adopted "to provide for the most intensive use possible of this spectrum by land mobile entities throughout the Buffalo, Detroit, and Cleveland areas."¹³ Midport states that grant of the requested waiver would result in more extensive land mobile usage, and would make its land mobile service available, at no cost, to various charitable agencies and organizations in Ohio, such as the American Red Cross, food banks, and kitchens for the homeless.¹⁴ Midport also submits that a secondary purpose of the rule is to avoid unduly impeding operations in the Amateur Radio Service.¹⁵ Midport indicates that its proposed station location would constitute a mere *de minimis* extension of the 50-mile standard.¹⁶ Coupled with its proposed reduced output power and its distance from authorized Amateur stations in the Detroit area, Midport contends that there would be no adverse impact on stations in the Amateur Radio Service.¹⁷

5. On January 15, 2003, the former Public Safety & Private Wireless Division, Wireless Telecommunications Bureau issued a *Public Notice* seeking comment on Midport's proposal.¹⁸ On February 14, 2003, Futronics, Inc. (Futronics) filed comments opposing Midport's Request.¹⁹ Futronics

⁷ 47 C.F.R. §§ 90.273 (c), (d). The geographic center coordinates for Detroit, MI are 42-19-48.1 N. latitude and 83-2-56.7 W. longitude. See 47 C.F.R. § 90.273 (c).

⁸ 47 C.F.R. § 90.279(a). We note that while Midport's waiver request proposes to operate at 80 watts TPO, Midport's application, however, proposes to operate at 90 watts TPO (250 watts ERP). See FCC File No. 0000998539 (as amended, Jan. 31, 2003).

⁹ Request at 2.

¹⁰ *Id.* Midport proposes to operate mobile units within a 20-mile (32 kilometer) radius of coordinates very close to Detroit's geographic center (*i.e.* 42-18-48.1 N. latitude and 83-2-56.7 W. longitude). See FCC File No. 0000998539 (as amended Jan. 31, 2003).

¹¹ See Request at 2.

¹² Request at 2.

¹³ *Id.*

¹⁴ *Id.* at 4.

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 3.

¹⁷ *Id.*

¹⁸ See Wireless Telecommunications Bureau Seeks Comment on Request for Waiver by Midport Electronics, Inc. to Allow Operation on Frequencies in the 421-430 MHz Band in the Detroit, Michigan Area, *Public Notice*, 18 FCC Rcd. 219 (WTB PSPWD rel. Jan. 15, 2003). 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 (Division). See Reorganization of the Wireless Telecommunications Bureau, *Order*, FCC 03-0291, ¶ 2 (rel. Nov. 25, 2003).

¹⁹ See Futronics Comments at 1.

suggests that Midport's Request presumably must be premised on a factual demonstration that it is not possible, or would be unduly burdensome, for Midport to operate its system in conformance with the Commission's Rules.²⁰ In its comments, Futronics argues that Midport has not made a sufficient showing as to why it cannot operate its system within the permitted 50-mile area.²¹ Therefore, Futronics argues, Midport's Request should be denied.²² Futronics also suggests that it would be a novel interpretation of the Commission's waiver standard if a party were to establish good cause for waiver relief on the basis that it had filed an application with erroneous site information and had operated at that site illegally for some period of time, but now needed a waiver to validate the illegal operation.²³ Futronics asserts that Midport does not show that its customers would not be served from a permissible location, but, rather, Midport's entire showing addresses its claim that the waiver relief requested would not have an adverse impact on amateur operations in the area.²⁴ Such assertion, Futronics contends, would only have been relevant if the Commission determined that Midport had presented some compelling rationale for a deviation from the Commission's Rules.²⁵ However, Futronics contends that Midport does not present unique or unusual factual circumstances that would render application of the rule inequitable, unduly burdensome or contrary to the public interest, or that Midport has no reasonable alternative.²⁶

6. Futronics states that the *Report and Order* adopting the 50-mile rule does not provide for a waiver of the distance requirement, and that Futronics's research did not identify any instance in which the Commission had waived this 50-mile area requirement.²⁷ Additionally, Futronics contends that the public interest would not be served by granting the Request under the circumstances presented because the spectrum beyond the 50-mile geographic area center of Detroit is allocated on a primary basis to Federal Government radiolocation operations²⁸ pursuant to an agreement between the Commission and the National Telecommunications and Information Administration (NTIA).²⁹ Futronics points out that the Commission previously rejected proposals to allow for land mobile operations outside the 50-mile area because it would conflict with the Government Radiolocation allocation.³⁰ Additionally, Futronics notes

²⁰ See *id.* at 1-2 citing 47 C.F.R. § 1.925(b)(3).

²¹ Futronics essentially argues that the Commission adheres strictly to its rules unless a party can demonstrate that "in the public interest the rule should be waived", that the Commission may only waive a provision of its rules for good cause shown, and that the applicant has the burden of showing good cause for waiver: "an applicant [for a waiver] faces a high hurdle even at the starting gate." See Futronics Comments at 6.

²² *Id.*

²³ See *id.* at 7. Futronics observes that Midport only states that it "inadvertently operated on frequencies in this band at the requested location." *Id.* Futronics suggests that presumably the Commission would need evidence that Midport has not operated on these frequencies subsequent to license cancellation. *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 5-6, citing Amendment of the Part 90 of the Commission's Rules to Provide for Private Land Mobile Operation in the 421-430 MHz Band in Detroit, Cleveland, and Buffalo, *Report and Order*, 2 FCC Rcd 825 (1987) (*Report and Order*).

²⁸ *Id.* at 2, 8.

²⁹ *Id.* at 8. See Implementation of the Arrangement With Canada for Use of the 406.1-430 MHz Band in the Border Areas, and Use of the 421-430 MHz Band by Land Mobile Users in Detroit, Cleveland, and Buffalo, *Report and Order*, 58 RR 2d 1566, 1567 ¶ 4 (1985).

³⁰ *Id.* at 8. Futronics observed that in commenting in the rulemaking proceeding that reallocated this spectrum from the Federal Government to land mobile use, land mobile commenters argued for a land area larger than a 50-mile radii allocation. *Id.* However, the Commission said that while this allocation would not conflict with the Canadian Arrangement, it would conflict with the other primary allocation in this band, Government radiolocation and,

(continued...)

that non-government stations may only be authorized to use Federal Government frequencies above 25 MHz if the Commission finds, after consultation with the appropriate government agency, that such use is necessary for coordination of government and non-government activities.³¹ In this connection, Futronics observes that there is no indication that such consultation has been initiated or that it would likely be successful.³² Further, Futronics suggests that NTIA and other governmental entities are unlikely to permit use of these frequencies for purposes other than national defense and homeland security.³³

7. On March 3, 2003, Midport filed reply comments.³⁴ With regard to Futronics' assertion that Midport has failed to make a showing as to why it cannot operate within the 50-mile area, Midport notes that according to some distance calculation programs, such as Javanet, Midport's proposed station location is within 50 miles of Detroit.³⁵ Additionally, Midport suggested that although the *Report and Order* that adopted the 50-mile distance requirement did not provide a waiver standard, such an omission is of no consequence, as Commission rulemaking proceedings typically do not provide for waivers, given that the permissibility of waivers is addressed in Section 1.925 of the Commission's Rules.³⁶

8. Midport observes that when the Commission adopted the rules for use of the 421-430 MHz band in Detroit, the Commission had considered whether the rules would be unduly restrictive on land mobile operations.³⁷ In that proceeding, land mobile commenters suggested that the Commission permit the operation of base and control stations anywhere within the 50-mile radius subject to certain technical requirements to control interference and that the Commission, in fact agreed with this proposal.³⁸ Midport states that its proposal to operate with no more than 80 watts TPO is consistent with such an approach.³⁹

9. Midport states that the Commission expressed no concern regarding the potential for interference from land mobile systems to U.S. Government operations, and only identified interference potential from Federal Government operations to land mobile systems.⁴⁰ In fact, Midport contends, the Commission stated that "pursuant to an agreement between the Commission and NTIA," land mobile use of the 421-430 MHz band is subject to accepting interference from U.S. Government radiolocation operations.⁴¹ Further, Midport observes that Futronics has presented no evidence to demonstrate that

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therefore, such a requirement was not adopted. *See id.*, citing Amendment of Part 2 of the Commission's Rules to Permit Land Mobile Use of the Band 421-430 MHz in Detroit, Cleveland and Buffalo, *Report and Order*, 58 RR 2d 1566 (1985).

³¹ Futronics Comments at 8.

³² *Id.* at 8-9.

³³ *Id.* at 9 citing Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum for Wind Profiler Radar Systems, *Notice of Proposed Rulemaking and Notice of Inquiry*, 8 FCC Rcd 2546 ¶ 6 (1993).

³⁴ Midport Reply Comments (filed March 3, 2003).

³⁵ *Id.* at 2 n.1. Midport argues that at the core of this proceeding is the assumption that the Commission's distance calculation program is correct and that the results of Midport's distance calculation program are erroneous. At the very least, Midport suggests, it should be recognized that there is a lack of unanimity.

³⁶ *Id.* at 3.

³⁷ *Id.*

³⁸ *See Report and Order*, 2 FCC Rcd 825 ¶¶ 25-28.

³⁹ Midport Reply Comments at 3.

⁴⁰ *Id.* at 4.

⁴¹ *Id.*

locating a base station approximately 53 miles from the geographic center creates a more significant interference threat to homeland security than a station located 49.9 miles from Detroit's geographic center.⁴² Absent evidence of harmful interference, Midport states that granting the instant waiver request would not only be consistent with the underlying purpose of Section 90.273(c), but also would provide Midport the operational flexibility to locate its base and control stations through the Detroit metropolitan area.⁴³

III. DISCUSSION

10. The Commission is responsible for the licensing of radio frequencies to non-Government entities,⁴⁴ and the NTIA is responsible for the licensing of radio frequencies to Federal Government departments and agencies. As a general matter, the shared use of frequencies with the Federal Government requires coordination with, and the concurrence of, the Federal Government. With regard to the 421-430 MHz band, the shared use of this band by both private land mobile radio services and the Government Radiolocation service is made permissible by an agreement resulting from discussions between the Commission and the NTIA.⁴⁵ The NTIA has agreed to allow the United States portion of this band to be used for non-Government purposes in the Buffalo, Detroit, and Cleveland areas, while retaining the primary United States allocation for Radiolocation in regions outside of the areas of these three cities.⁴⁶ By way of clarification, we note that our grant of authority herein related to Midport's proposed use of the 421-430 MHz band is made subject to NTIA's approval.

A. Waiver Standard

11. 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 will not be served or would be frustrated by its application in the particular case, and that grant of the waiver is in the public interest; or (b) the unique facts or unusual circumstances of a particular case render application of the rule inequitable, unduly burdensome, or otherwise contrary to the public interest, or the applicant has no reasonable alternative.⁴⁷ Alternatively, pursuant to Section 1.3 of the Commission's Rules, the Commission has authority to waive its rules if there is "good cause" to do so.⁴⁸ While Futronics argues that no provision for a waiver is

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 47 C.F.R. § 2.106 shows the United States Table of Allocations. On the table, Columns 4 through 7 are divided into the Government Table of Frequency Allocation and the Non-Government Table of Frequency Allocations. The Government plan (shown in column 4) is administered by the NTIA, and the non-Government plan (shown in column 5) is administered by the Commission. See 47 C.F.R. § 2.105. "Non-Government" means an entity which is not a Federal entity. Thus, for example, Alaska is deemed a non-Government entity because it is not a Federal entity.

⁴⁵ See *Report and Order*, 2 FCC Rcd 825 (1987).

⁴⁶ In an earlier Commission order, the 422.1875-425.4875 MHz and 427.1875-429.9875 MHz bands were allocated for private land mobile use on a primary basis within 50 miles of Detroit, Michigan. This allocation was made permissible after negotiations with Canada, which employs the 421-430 MHz band for land mobile operation, and with the Federal Government, which uses the band for radiolocation. See Amendment of the Rules To Permit Land Mobile Use of the Band 421-430 MHz, *Report and Order*, 50 FR 40016 (Oct. 1, 1985).

⁴⁷ See 47 C.F.R. § 1.925(b)(3). See also *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). This standard was formerly codified at section 22.119(a) of the rules, 47 C.F.R. § 22.119(a) (1997). See Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Service, *Report and Order*, 13 FCC Rcd. 21027 (1998) (streamlining and recodifying rules governing wireless license application procedures).

⁴⁸ See 47 C.F.R. § 1.3. See also *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

provided in the *Report and Order* establishing the defined 50-mile area within which the subject frequencies may be assigned, we agree with Midport that rulemaking proceedings typically do not include specific provisions for a waiver of the rules being adopted because Section 1.925 of the Commission's Rules already provides a standard for waiver of rules. Additionally, Part 1, Subpart F of the Commission's Rules establishes the requirements and conditions under which entities may be licensed in the Wireless Radio Services as described in Part 90, including the applicable waiver standard codified at 47 C.F.R. § 1.925.⁴⁹

12. Midport argues that grant of its Request is warranted under the first prong of Section 1.925(b)(3), on grounds that denial of its Request would frustrate the underlying purpose of Section 90.273.⁵⁰ As discussed more fully below, we conclude that Midport has made a sufficient showing that grant of the requested waiver is warranted. Specifically, we conclude that the underlying purpose of the subject rule would not be served by application to the instant case, and that grant of the requested waiver would be in the public interest. In this regard, we note that Midport is only required to satisfy one prong of Section 1.925.⁵¹ Because we find that Midport's waiver request satisfies the first prong of the applicable waiver standard, we need not address whether unique or unusual circumstances exist, whether application of the rules would be inequitable or unduly burdensome, or whether no reasonable alternative exists, since such condition(s) constitute the prerequisite to relief under the second prong of the Commission's waiver standard.⁵²

B. Underlying Purpose

13. In light of the record in this proceeding and our analysis thereof, we believe that a waiver of Section 90.273(c) of the Commission's Rules would further the underlying purpose to the Commission's 50-mile distance limitation. In adopting the 50-mile limit, the Commission wanted to provide for the most intensive use possible of this spectrum by land mobile entities throughout the Buffalo, Detroit, and Cleveland areas, while minimizing interference potential.⁵³ The Commission recognized the contributions of the Amateur Radio Service, and did not wish to unduly impede amateur radio operations.⁵⁴ In balancing these objectives, the Commission noted that the relationship between land mobile and amateur operations varies among the three urban areas. In view of the above, the Commission believed it appropriate to tailor its rules concerning allowable locations for base and control stations to best fit the situation that exists in each of the three areas.⁵⁵ In Detroit, the Commission

⁴⁹ See 47 C.F.R. § 1.901.

⁵⁰ Waiver Request at 2.

⁵¹ See, e.g., State of Alaska, *Memorandum Opinion and Order*, 29 Communications Reg. (P&F) 1209, n.61 (WTB 2003).

⁵² 47 C.F.R. § 1.925(b)(3)(ii); see also, e.g., City of San Diego, *Order*, 17 FCC Rcd. 8005, n.15 (WTB PSPWD 2003); Fresno City and County Housing Authorities, *Order on Reconsideration*, 15 FCC Rcd 10998 (WTB PSPWD 2000).

⁵³ In the *Report and Order* allocating the 421-430 MHz band to land mobile operations, the Commission noted that the purpose of this action is to help satisfy communications capacity needs of the private land mobile radio services in the vicinities of Detroit, Cleveland and Buffalo, by allocating portions of the 421-430 MHz band for land mobile use near these cities. See Amendment of the Part 90 of the Commission's Rules to Provide for Private Land Mobile Operation in the 421-430 MHz Band in Detroit, Cleveland, and Buffalo, *Report and Order*, 2 FCC Rcd 825 (1987). This allocation, the Commission said, is desirable because it will reduce land mobile channel congestion near these cities and is possible without further disrupting amateur operations beyond that already proposed in other proceedings. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 827.

believed maximum flexibility in locating base and control stations could be provided with little or no potential for conflict between land mobile and amateur operations.⁵⁶ Accordingly, the Commission allowed base or control stations to be located anywhere within a 50-mile radius of Detroit.⁵⁷ Even with this additional flexibility, land mobile base and control stations in the Detroit area, the Commission observed, will be at least 40 miles from the nearest amateur station.⁵⁸

14. We find that requiring Midport to operate within the specified 50-mile area limit under the circumstances presented to be unnecessary. Midport's proposed land mobile radio operations are intended to facilitate more extensive use of the spectrum and provide service. Additionally, Midport's proposed operation with a reduced antenna height and output power than that permitted under the Commission's Rules, if authorized, would decrease the risk of interference to amateur operations when compared to licensees' operations at the edge of the 50-mile area and at the maximum permissible antenna height and output power. Additionally, the NTIA does not oppose the grant of Midport's waiver request to locate a base station outside the 50-mile zone provided Midport utilizes a four-meter antenna, limits its output power to eighty watts, and accepts a condition on its license prohibiting modification to raise the proposed antenna height and output power. With these conditions, we conclude that it is not necessary to require Midport to locate its base station within the 50-mile zone to avoid interference to amateur operations, as Midport proposes to essentially confine its operations to an area equivalent to the maximum service area allowable under the Commission's rules. A waiver appears warranted under these circumstances because the purpose underlying the 50-mile rule would not be served by applying it to Midport when it is unlikely that either amateur or Federal Government licensees would experience interference from its proposed operations, as modified by the aforementioned conditions.

15. We also note a discrepancy between the 80 watts TPO proposed by Midport in the Request on the one hand, and the 90 watts TPO and 250 watts ERP it proposed in its Application on the other.⁵⁹ Because Midport seeks to operate outside of the 50-mile circle around Detroit, and states that it will reduce its power below 250 watts ERP in order to reduce potential interference to other users, we will hold Midport to the ERP equivalent of 80 watts TPO, as proposed in its Request, rather than the 90 watts TPO and 250 watts ERP proposed in its Application.⁶⁰ Using the ratio of 90 watts TPO to 250 watts ERP to determine the equivalent ERP of 80 watts TPO, we determine that the appropriate ERP is approximately 220 watts ERP. We therefore limit Midport's base station to 220 watts ERP.

16. Futronics' suggestion that the Commission had previously denied requests for larger allocation areas because it would conflict with the Federal Government Radiolocation allocation is inapposite. Unlike the instant Application, in the matters cited by Futronics, the Commission considered requests that sought to expand the land mobile allocation in the 421-430 MHz band to include an entire

⁵⁶ *Id.* at 828.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See* n.8 *supra*.

⁶⁰ In arriving at this conclusion, we assume that Midport's antenna gain minus any loss factors will convert 90 watts TPO to 250 watts ERP. *See* Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band, *Report and Order*, 18 FCC Rcd 3948, 3954 ¶ 12 (2003). *See* In the Matter of 1998 Biennial Review-47 C.F.R. Part 90-Private Land Mobile Radio Services, *Memorandum Opinion and Order and Second Report and Order*, 17 FCC Rcd 9830, 9840 ¶ 23 (2002); *See* Amendment of Part 90 of the Commission's Rules and Policies for Applications and Licensing of Low Power Operations in the Private Land Mobile Radio 450-470 MHz Band, *Notice of Proposed Rulemaking*, 16 FCC Rcd 14946, 14951 ¶ 10 (2001).

state.⁶¹ Here, Midport seeks only to locate its base station an approximately three-mile distance outside of the geographic area ordinarily permitted by the 50-mile limit. Furthermore, Midport has proposed technical parameters that would essentially confine its operations to avoid interference. We also note that the NTIA does not oppose Midport's proposal, subject to certain conditions.⁶²

17. Although Futronics contends that it has been unable to find any instance in which the Commission has waived Section 90.273's 50-mile limitation, we believe that Midport's waiver request is similar to that of 470-512 MHz licensees for whom the Commission has granted requests for waiver of analogous distance requirements in the 470-512 MHz band.⁶³ To minimize interference potential between land mobile and television operations in the 470-512 MHz band, Section 90.305 of the Commission's Rules provides that land mobile operations must operate subject to certain distance requirements.⁶⁴ However, to promote more extensive land mobile use of this band in congested spectrum environments, the Commission has, in certain instances, waived Section 90.305's distance requirement, provided that such land mobile operations limit their service area within certain parameters to avoid harmful interference to neighboring television operations.⁶⁵ In a similar manner, as discussed *infra*, Midport proposes measures to protect neighboring operations by reducing power and antenna height in order to confine its service area.⁶⁶ Further, Midport's operations will be licensed subject to certain conditions, including that of operating on a non-interference basis with respect to Federal Government operations.⁶⁷

18. We also disagree with Futronics' argument that it would be a novel interpretation of the Commission's waiver standard to grant Midport's request.⁶⁸ As noted above, Midport seeks authorization with respect to frequencies that had been previously licensed to Midport. In this connection, Midport previously requested waiver of Section 90.273(c)'s distance requirements to retain these frequencies.⁶⁹ However, we dismissed as moot Midport's waiver request and underlying application because we found that the authorization for those frequencies cancelled automatically.⁷⁰ Therefore, we did not reach the

⁶¹ See *Report and Order*, 50 Fed. Reg. 40018 ¶ 25 (Oct. 1, 1985).

⁶² In this connection, we observe that should Midport seek to specify that its mobiles center around its base station coordinates, Midport would then be required to seek a waiver justifying such a location. 47 C.F.R. § 90.273(d) (confining mobile operations in the 421-430 MHz band to within 50 miles of Detroit). Similarly, should Midport seek to expand the mobile area of operation beyond 20 miles of Detroit, it would be required to file a license modification application.

⁶³ See, e.g., *Goosetown Enterprises, Memorandum Opinion and Order*, 16 FCC Rcd 12792 (2001) (*Goosetown*) (470-512 MHz band is shared by land mobile radio operations and television operations).

⁶⁴ See 47 C.F.R. § 90.305(a) (location of station). Pursuant to Section 90.305(a) of the Commission's Rules, 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. See 47 C.F.R. § 90.303. This mileage restriction was established to protect over-the-air broadcast operations on television channels 14-21 from harmful interference by land mobile radio systems operating in the 470-512 MHz band. See *Further Sharing of the UHF Television Band by Private Land Mobile Radio Services, Notice of Proposed Rule Making*, 101 FCC 2d 852 (1985).

⁶⁵ See, e.g., *Goosetown*, 16 FCC Rcd 12792 ¶ 12. Indeed, the Commission has indicated that it is more inclined to consider favorably requests for waiver of Section 90.305(a) of its rules when the applicant proposes to contain its area of operation within certain distances of the geographic center of the urban area in question. *Id.* at ¶ 13.

⁶⁶ See *infra* ¶ 3.

⁶⁷ See *infra* ¶ 10.

⁶⁸ See *Futronics Comments* at 7.

⁶⁹ See *Midport Order*, 17 FCC Rcd. 13778.

⁷⁰ *Id.*

merits of Midport's waiver request. Additionally, our Part 90 rules generally contemplate that after a license terminates, that the previous licensee may file a new application for use of those frequencies subject to any service specific rules. Indeed, our recently concluded Private Land Mobile spectrum audit provides that applicants may file new applications and seek to be re-licensed on frequencies that had cancelled automatically for failure to construct.⁷¹ Futronics points to nothing in our rules that would bar Midport from filing a new application with waiver request setting forth new information to justify use of frequencies that had been licensed previously to Midport and GRH.⁷² Moreover, as discussed *infra*, Section 1.925 of the Commission's Rules is the applicable waiver standard in the instant matter, and we believe a waiver is appropriate here because granting such relief would not disserve the underlying purpose of the distance requirement and would better serve the public interest than enforcing the requirement.⁷³ Indeed, we observe that this waiver request is different from the previous request as Midport now proposes measures to avoid interference to other users and NTIA consents to the grant of this request subject to certain conditions. Accordingly, we believe that granting the requested relief is consistent with the Commission's rules and licensing policies and procedures.⁷⁴

C. Public Interest

19. We also conclude that Midport has shown that grant of the Request would be in the public interest. Midport states that there is a need for additional telecommunications services in the Detroit area and that the only suitable site is located 52.8 miles from the geographic center of Detroit.⁷⁵ Indeed, in the *Report and Order* allocating the 421-430 MHz band to land mobile operations, the Commission noted that the purpose of its action is to help satisfy the communications capacity needs of the private land mobile radio services in the vicinity of Detroit by allocating portions of the 421-430 MHz band for land mobile use near this city.⁷⁶ In addition, Midport states that it will make its land mobile service available, at no cost, to various charitable agencies and organizations in Ohio, such as the American Red Cross, food banks, and kitchens for the homeless.⁷⁷ We believe that Midport has shown that its proposed operation would serve the public interest by increasing the availability of communications services near Detroit, without resulting in interference to amateur and Federal Government operations.

D. Other Matters

20. *Section 2.106 footnote US230.* An authorization of Midport's proposed operations also

⁷¹ See e.g., Wireless Telecommunications Bureau Lists Private Land Mobile Licenses Cancelled as a Result of the Spectrum Audit, *Public Notice*, DA 04-1553 (WTB, PSCID June 8, 2004).

⁷² Moreover, Futronics has presented no evidence that Midport has operated on the frequencies and at the site in question subsequent to the cancellation of Midport's previous licenses. Nonetheless should evidence surface that Midport has operated without authorization on 421-430 MHz frequencies subsequent to the *Midport Order*, we reserve the right to initiate enforcement action.

⁷³ See *infra*, ¶¶15, 19.

⁷⁴ While we disagree with Midport that a waiver should be granted solely because the distance in question is only 2.8 miles, we believe that Midport has shown that its proposed operation would serve the public interest. See, e.g., *Goosetown*, 16 FCC Rcd at 12797 ¶ 11.

⁷⁵ See *infra* ¶ 4.

⁷⁶ See *Report Order*, 2 FCC Rcd at 825. While Futronics contends that Midport fails to explain why it cannot operate within the prescribed distance requirements, Midport notes that according to some distance calculation programs, Midport's proposed station location is within fifty miles of Detroit. See Reply Comments at 2.

⁷⁷ See *infra* ¶ 4.

requires a waiver of footnote US230 of Section 2.106 of the Commission's Rules.⁷⁸ This section provides that non-government land mobile service be allocated on a primary basis in the bands 422.1875-425.4875 MHz and 427.1875-429.9875 MHz within 50-miles of Detroit.⁷⁹ For the reasons stated above with regard to Midport's waiver request, we believe that granting Midport a waiver of Section US230 would serve the public interest. Therefore, we will, on our own motion, waive US230 in order to permit Midport's operation.⁸⁰

IV. CONCLUSION

21. We conclude that Midport has made the requisite showing that a waiver of the 50-mile distance restriction is warranted under the circumstances presented. In order to further ensure that this waiver is consistent with the public interest, we will impose the following conditions: Midport shall (1) utilize a four-meter antenna, (2) limit its output power to 80 watts TPO or its equivalent 220 watts ERP, (3) have as a condition on its license be prohibited from any modification to raise the proposed antenna height and TPO/ERP, and (4) be licensed on a secondary basis to Federal Government users. For the reasons stated herein, we therefore grant Midport's request for waiver.

V. ORDERING CLAUSES

22. 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 Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925 the Waiver Request of Midport Electronics, Inc., for waiver of Section 90.273(c), 47 C.F.R. §§ 90.273(c), is GRANTED to the extent described above and, on our own motion, we waive Section 2.106 US 230 of the Commission's Rules, 47 C.F.R. §§ 2.106 US 230.

23. IT IS FURTHER ORDERED, that pursuant to Sections 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), the associated license application for frequency pairs in the 421-430 MHz band, FCC File No. 0000998539, SHALL BE PROCESSED in accordance with this *Order*.

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

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau

⁷⁸ 47 C.F.R. § 2.106 footnote US230.

⁷⁹ *Id.*

⁸⁰ 47 C.F.R. 1.925(a) (the Commission may grant rule waivers on its own motion or upon request).