

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

In the Matter of	)	
	)	
Navopache Electric Cooperative, Inc.	)	FCC File Nos. 0000321564, 0000321587
	)	
Request for Waiver of Section 101.81 of the	)	
Commission's Rules and Petition for Reinstatement	)	
of Fixed Microwave Service (FMS) Stations	)	
WEH416 and WEH418, Lakeside, Arizona	)	

**ORDER**

**Adopted: June 1, 2001**

**Released: June 4, 2001**

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

**I. INTRODUCTION**

1. On January 11, 2001, Navopache Electric Cooperative, Inc. (Navopache Electric) filed the above-captioned applications seeking reinstatement of its licenses for Operational Fixed Microwave Service (FMS) Stations WEH416 and WEH418, Lakeside, Arizona, and a Request for Waiver of Section 101.81 of the Commission's Rules.<sup>1</sup> For the reasons discussed below, we grant the Petition and reinstate the licenses with primary status.

**II. BACKGROUND**

2. The Commission has reallocated portions of the 2 GHz band from FMS to emerging technology (ET) services, including the personal communications services.<sup>2</sup> To this end, the Commission has adopted certain transition rules.<sup>3</sup> In doing so, the Commission balanced the needs of incumbent FMS licensees to continue operating their systems with the need to conserve vacant 2 GHz spectrum for use by ET licensees, to provide ET licensees with a stable environment in which to plan and implement new services, and to prevent ET licensees from bearing any additional costs of relocating FMS licensees.<sup>4</sup>

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<sup>1</sup> See FCC File Nos. 0000321564, 0000321587 (filed Jan. 11, 2001). Navopache Electric operated Station WEH416 on 2184.80 MHz and Station WEH418 on 2147.60 MHz.

<sup>2</sup> See Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Docket No. 92-9, 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 accommodate 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 ¶ 5.

<sup>4</sup> *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5, 6891 ¶ 30; Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, *First Report and Order and Further Notice of* (continued....)

Thus, 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 significant length of time, by the end of which the incumbents are to relocate to other spectrum.<sup>5</sup> ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.<sup>6</sup> In addition, we authorize new FMS stations, extensions of existing FMS systems, and major modifications of existing FMS stations only on a secondary basis to ET systems.<sup>7</sup> Most minor modifications of FMS 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 ET licensee.<sup>8</sup> The result is that while incumbent FMS 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.

3. Navopache Electric's licenses to operate Stations WEH416 and WEH418 were due to expire on August 23, 2000. On August 11, 2000, Navopache Electric electronically submitted two renewal applications via the Commission's Universal Licensing System (ULS).<sup>9</sup> The Public Safety and Private Wireless Division, Licensing and Technical Analysis Branch (Branch) dismissed the applications on August 30, 2000 because payments were not received for the applications within the required time period.<sup>10</sup> Navopache Electric states that it timely submitted payment to the Commission's lockbox agent, Mellon Bank, but Mellon Bank did not associate the payment with the renewal applications because Navopache Electric's payment remittance form failed to reference the application numbers.<sup>11</sup> On November 21, 2000, Navopache Electric filed applications for special temporary authority (STA) to operate the stations,<sup>12</sup> which the Branch granted on December 7, 2000 under Call Signs WPQY968 and WPQY969. On January 11, 2001, Navopache Electric filed the instant applications and Petition.

4. Navopache Electric seeks relicensing of Stations WEH416 and WEH418 with primary

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*Proposed Rule Making*, WT Docket No. 95-157, 11 FCC Rcd 8825, 8867-69 ¶¶ 86-88 (1996) (*Cost Sharing First Report and Order*).

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

<sup>6</sup> See 47 C.F.R. §§ 101.69(a), 101.71-101.77.

<sup>7</sup> See 47 C.F.R. § 101.81. Secondary operations may not cause interference to operations authorized on a primary basis (e.g., the new ET licensees), and they are not protected from interference from primary operations. See *Cost Sharing and First Report and Order*, 11 FCC Rcd at 8869 ¶ 89. Thus, an incumbent operating under a secondary authorization must cease operations if it poses an interference problem to an ET licensee. See *id.*

<sup>8</sup> See 47 C.F.R. § 101.81.

<sup>9</sup> See FCC File Nos. 0000204109, 0000204110 (filed Aug. 11, 2000) (collectively, August 11 Applications)

<sup>10</sup> See Letter from Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Navopache Electric Cooperative, Inc., Licensee of WEH416 (Aug. 30, 2000) (automated dismissal letter); Letter from Licensing and Technical Analysis Branch, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau to Navopache Electric Cooperative, Inc., Licensee of WEH418 (Aug. 30, 2000) (automated dismissal letter).

<sup>11</sup> See Petition at 1.

<sup>12</sup> See FCC File Nos. 0000268092, 0000268219 (filed November 21, 2000) (collectively, STA Applications). Navopache Electric amended its STA Applications on December 1, 2000.

status. Navopache Electric has operated Stations WEH416 and WEH418 with primary status since 1981. Stations WEH416 and WEH418 are part of a six-station point-to-point microwave network that monitors and controls the delivery of electric services to remote locations.<sup>13</sup> Navopache Electric states that it uses the facilities “to monitor and control the safe, reliable and efficient delivery of electric service,” and if they are licensed only on a secondary basis, “25,000 homes and businesses in Lakeside and remote regions of eastern Arizona could be left without power by a failure [of] the communications system.”<sup>14</sup> Moreover, Navopache Electric argues that “no reasonable communications alternatives exist in the remote area of operations.”<sup>15</sup>

### III. DISCUSSION

5. 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(s) 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(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.<sup>16</sup> For the reasons discussed below, we agree with Navopache Electric that grant of the requested waiver of Section 101.81 is warranted.

6. We conclude that Navopache Electric has demonstrated that under the circumstances presented, application of the rule would be inequitable and contrary to the public interest. We agree with Navopache Electric that the circumstances of this case are similar to those that we found to warrant a waiver in *Florida Power and Light Company (Florida Power)*.<sup>17</sup> In *Florida Power*, a 2 GHz licensee timely filed its renewal application, but the application was returned for correction of antenna structure information.<sup>18</sup> When the licensee, an electric utility that depended on its authorizations to operate 2 GHz FMS stations with primary status to ensure the safe and reliable provision of services to the public, failed to submit the information within the required time, the renewal application was dismissed.<sup>19</sup> About four months after the dismissal, the licensee filed a new application, and requested a waiver of Section 101.81 to allow the station to be re-licensed on a primary basis.<sup>20</sup> We concluded that the waiver should be granted, because it was clear from the timely filing of the renewal application that the licensee intended to renew the license, and the defect in the application did not relate to the licensee’s actual operations.<sup>21</sup> We also concluded that granting the station primary status would neither undermine the Commission’s 2 GHz

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<sup>13</sup> See Petition at 1-3; STA Applications, Exhibit A at 1.

<sup>14</sup> Petition at 3.

<sup>15</sup> *Id.* at 1.

<sup>16</sup> 47 C.F.R. § 1.925(b)(3).

<sup>17</sup> See *Florida Power and Light Company, Order*, 15 FCC Rcd 13607 (WTB PSPWD 2000) (*Florida Power*); see Petition at 1-2 (discussing *Florida Power*).

<sup>18</sup> See *Florida Power*, 15 FCC Rcd at 13608 ¶ 3.

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See *id.* at 13609 ¶ 5.

policies nor increase the cost of relocating the licensee's facility.<sup>22</sup>

7. Similarly, Navopache Electric, an electric utility, timely filed applications to renew its licenses. It is clear that Navopache Electric intended to continue operating Stations WEH416 and WEH418 with primary status when it filed the August 11 Applications, despite its failure to specify the application numbers on its payment remittance form—an error unrelated to the actual operation of the stations. In fact, in both *Florida Power* and the present case the licensees were simply renewing their licenses without modification. Consistent with *Florida Power*, we conclude that it is appropriate to grant Navopache Electric's waiver request and allow the stations to be licensed on a primary basis.<sup>23</sup>

#### IV. CONCLUSION

8. For the reasons discussed above, we conclude that application of the rule according secondary status to all new 2 GHz applications would be inequitable, unduly burdensome and contrary to the public interest under the circumstances presented in this matter. We therefore grant Navopache Electric's request for a waiver of Section 101.81 of the Commission's Rules and forward the applications to the Branch for processing in accordance with this decision and the applicable Commission Rules.

#### V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to Section 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 Request for Waiver of Section 101.81 of the Commission's Rules and Petition for Reinstatement filed by Navopache Electric Cooperative, Inc. on January 11, 2001 IS GRANTED to the extent indicated above.

10. IT IS FURTHER ORDERED that Navopache Electric Cooperative, Inc.'s pending applications, FCC File Nos. 0000321564 and 0000321587, shall be processed in accordance with this *Order* and the applicable Commission 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

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

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<sup>22</sup> See *id.*

<sup>23</sup> See also, e.g., City of Henderson, Nevada, *Order*, DA 99-2005, ¶ 7 (WTB PSPWD rel. Sept. 29, 1999) (granting primary status for 2 GHz station for which licensee attempted to renew prior to expiration date); Motorola, Inc., *Order on Reconsideration*, DA 99-1987, ¶¶ 10-12 (WTB PSPWD rel. Sept. 28, 1999) (granting primary status for 2 GHz station for which timely renewal application was rejected because licensee failed to include payment remittance form with payment); Pacific Gas and Electric Company, *Memorandum Opinion and Order*, 14 FCC Rcd 13400, 13407-08 ¶¶ 17-20 (WTB PSPWD 1999) (affirming grant of primary status for 2 GHz station for which timely renewal application was rejected because accompanying credit card authorization could not be processed).