

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

In the matter of
FLORIDA ATLANTIC UNIVERSITY
Educational Broadband Service Stations
WHR877 (A-Group) Boca Raton, FL
WHR894 (A-Group) Boca Raton, FL
WHR895 (A-Group) Boca Raton, FL
WLX269 (A-Group) Boca Raton, FL
Request for Confirmation of Geographic
Licensing and
Request for Waiver

ORDER ON RECONSIDERATION

Adopted: July 10, 2007

Released: July 11, 2007

By the Deputy Chief, Broadband Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a petition for reconsideration filed by Florida Atlantic University (FAU) on January 3, 2007. FAU seeks reconsideration of a staff action taken on December 4, 2006 and recorded on the Universal Licensing System (ULS) database indicating that the licenses for Educational Broadband Service Stations WHR877, WHR894, WHR895, and WLX269 (collectively, the Stations) do not have a Geographic Service Area "because the stations were originally licensed as studio-to-transmitter links on a secondary basis" In the alternative, FAU requests that we grant FAU a waiver and grant each of the Stations a Geographic Service Area (GSA). For the reasons stated below, we dismiss in part and deny in part the Petition and Waiver Request.

II. BACKGROUND

2. Florida Atlantic University (FAU) is the licensee of the Stations. On June 17, 1987, FAU filed three applications to construct and operate new relay stations (studio-to-transmitter links (STL)) on the A-Group Channels, the D-Group Channels, and the G-Group Channels in Boca Raton, Florida.

1 Petition for Reconsideration or Alternatively Waiver Request of Florida Atlantic University (filed Jan. 3, 2007). When referring to the portion of the document that is a petition for reconsideration, we will refer to the document as "Petition." When referring to the portion of the document that is a waiver request, we will refer to the document as "Waiver Request."

2 Petition at 1.

3 Waiver Request at 1-2.

4 File Nos. BPIFB-198770617DH, BPIFB-198770617DB, and BPIFB-198770617DD.

FAU's applications for the A-Group and G-Group Channels were granted on February 1, 1988 under Call Signs WHR894 and WHR895, respectively. FAU's application for the D-Group Channels was granted on November 24, 1987 under Call Sign WHR877. On August 14, 1989, FAU filed an application to change the frequency assignments of Station WHR895 from the G-Group Channels to the A-Group Channels, which was granted on October 26, 1989.⁵ On April 21, 1989, FAU filed an application to change the frequency assignment of Station WHR877 for the D-Group to the A-Group Channels, which was granted on August 28, 1989.⁶

3. On May 29, 1990, FAU filed a fourth application to construct and operate a new STL station on the A-Group Channels in Palm Beach Gardens, Florida, which was granted on September 14, 1992 under Call Sign WLX269.⁷ On September 14, 1992, FAU filed an application for extension of time to construct, which was granted on September 28, 1992.⁸ On March 28, 1993, the extension of time to construct expired.

4. The licenses for each of the Stations contained the following condition: "Permittee shall make adjustments or take whatever corrective action may be necessary in the event operation of the facilities herein causes interference to or receives interference from other ITFS stations operating on co-channel or adjacent channel frequencies in the proposed area."

5. On September 25, 1998, the Commission released the *Two-Way Order*, which, among other things, granted all Instructional Television Fixed Service (ITFS) licensees a Protected Service Area (PSA) and individual protection to all receive sites registered through the date of the adoption of the *Two-Way Order*.⁹ In the *Two-Way Reconsideration Order*, the Commission affirmed its decision.¹⁰ In the *Two-Way Second Reconsideration Order*, however, the Commission reversed its decision and concluded that point-to-point ITFS stations authorized on a secondary basis should not receive PSA protection because secondary stations, usually studio to transmitter links, have not traditionally been given protection relative to primary stations.¹¹

6. On July 29, 2004, the Commission released the *BRS/EBS R&O*, which granted all ITFS incumbents a GSA based on their existing PSA.¹² On June 28, 2005, the Wireless Telecommunications Bureau released a Public Notice announcing that the Commission's Universal Licensing System would

⁵ File No. BNPIFB-19890814DJ.

⁶ File No. BMPIFB-19890421DB.

⁷ File No. BPIFB-19900529DG.

⁸ File No. BEIFB-19920914DI.

⁹ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order*, MM Docket No. 97-217, 13 FCC Rcd 19112, 19173 ¶ 114 (1998).

¹⁰ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Order on Reconsideration*, MM Docket No. 97-217, 14 FCC Rcd 12764, 12773-12774 ¶ 20 (1999).

¹¹ Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions, *Report and Order on Further Reconsideration and Further Notice of Proposed Rulemaking*, MM Docket No. 97-217, 15 FCC Rcd 14566, 14572 ¶ 24 (2000) (*Two-Way Second Reconsideration Order*).

¹² Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, *Report and Order and Further Notice of Proposed Rulemaking*, WT Docket No. 03-66, 19 FCC Rcd 14165, 14190-14191 ¶ 55 (2004).

implement the adoption of geographic licensing for the Broadband Radio Service and the Educational Broadband Service.¹³ The Public Notice stated that “[a]ny BRS or EBS main station license listed on ULS with a protected service area (PSA) based on a 35 mile radius, will be converted to a geographic license with a P35 geographic service area GSA based on the PSA coordinates listed on the license.”¹⁴ On July 9, 2005, as part of the conversion of BRS and EBS to ULS, the license records for these licenses were changed to state that the licenses for the Stations were converted to GSAs “in accordance with Rule 27.1206.”¹⁵ On September 11, 2006, FAU asked the Division for confirmation that the Stations had received a GSA based on the *BRS/EBS R&O*.¹⁶ On December 4, 2006, the licenses for the Stations were amended to note that “[b]ecause these stations were originally licensed as studio-to-transmitter links on a secondary basis, the station does not have a geographic service area.”¹⁷

7. FAU argues that the staff’s action of July 9, 2005 constituted a “final action” and cannot be set aside under Section 1.113(a) of the rules because the period for the staff to take action on its own motion has passed.¹⁸ In the alternative, if it is decided that the July 9, 2005 conversion can be revisited, FAU seeks a waiver of the ruling in the *Two-Way Second Reconsideration Order* that STLs licensed on a secondary basis were not entitled to a PSA or a GSA.¹⁹ FAU argues that the stations should be entitled to protection because they “were part of a dynamic educational system which was intended to interconnect and serve the changing needs of [FAU’s] various Colleges and campuses.”²⁰ FAU argues that it is unclear that the original authorizations were intended to be secondary in nature.²¹ With respect to future operations, FAU contends that a waiver would be in the public interest because it would facilitate the movement of the analog video programming currently offered by the School Board of Broward County (Broward County) to the Middle Band Segment (MBS).²² FAU argues that if its stations do not receive a GSA, Broward County will only have three MBS channels available to it, which will substantially increase the difficulty and/or cost of transitioning Broward County’s system to the MBS.²³ Broward County supports FAU’s Waiver Request.²⁴ FAU also notes that The School Board of Palm Beach County (Palm Beach) is licensed on the A Group channels in the area and alleges that denying FAU GSAs would result in “a large portion of Palm Beach County” not having any coverage on the A Group channels.²⁵

¹³ Wireless Telecommunications Bureau Announces Change to the Universal Licensing System (ULS) to Accommodate the Broadband Radio Service and Educational Broadband Service and Reminds Licensees the Use of ULS Forms and Electronic Filing for These Service Becomes Mandatory on July 11, 2005, *Public Notice*, 20 FCC Rcd 11554 (2005).

¹⁴ *Id.*, 20 FCC Rcd at 11554-11555.

¹⁵ 47 C.F.R. § 27.1206.

¹⁶ Waiver Request at 2.

¹⁷ See Universal Licensing System records for Stations WHR877, WHR894, and WHR895.

¹⁸ Petition at 3, *citing* 47 C.F.R. § 1.113(a).

¹⁹ Waiver Request at 4-10.

²⁰ Waiver Request at 5.

²¹ Waiver Request at 7.

²² Waiver Request at 8-9.

²³ Waiver Request at 8-9.

²⁴ See Letter from Phyllis Schiffer-Simon, Ed.D, Director, BECON to Marlene H. Dortch, Secretary, Federal Communications Commission (dated Mar. 3, 2007, filed Mar. 26, 2007).

²⁵ Waiver Request at 9.

FAU argues that granting its stations GSAs “would preserve maximum utility of the A-group with Broward and Palm Beach counties” and would therefore serve the public interest.²⁶

III. DISCUSSION

8. Initially, we dismiss the Petition and Waiver Request as moot with respect to Station WLX269. The license for Station WLX269 expired on January 18, 2000, and FAU did not file an application for renewal of that authorization. Furthermore, FAU failed to seek an extension of the construction deadline for that station, and we have no indication that the station was ever constructed.

9. We reject FAU’s argument that the July 9, 2005 conversion of these licenses, which resulted in an indication that the stations received GSAs, is a final action that cannot be revisited at this time. The staff action of December 14, 2006 updating ULS to reflect that the stations did not have a GSA was not an action setting aside the July 9, 2005 conversion but was a correction of a ministerial error that occurred when BRS and EBS licenses were fully converted to the ULS database. As explained above, in the *Two-Way Second Reconsideration Order*, the Commission decided that secondary point-to-point stations would not be granted a PSA. Moreover, it is clear from the condition placed on the licenses for the Stations that they were secondary STLs because they were required to take corrective action when they caused interference to or received interference from a co-channel or adjacent channel licensee. The condition in question was the standard condition issued for point-to-point stations licensed on a secondary basis. Thus, the intent was that the Stations should never have received a PSA. Consequently, they never should have been granted a GSA because the Commission decided in the *BRS/EBS R&O* to grant GSAs to those licensees with PSAs.²⁷ Courts have long recognized the authority of administrative agencies to correct ministerial, inadvertent errors.²⁸ A ministerial error is an error involving arithmetic functions, clerical errors and any other type of unintentional error.²⁹ In this case, the notation that the stations had a GSA was the result of an error in the ULS conversion process. Given the Commission’s clear directive that secondary STLs should not receive PSAs, we conclude that the ULS notation was a ministerial error that could be corrected at any time. We therefore conclude that staff was not barred from correcting ULS to reflect that the stations did not have a GSA.

10. We also deny FAU’s Waiver Request. An applicant seeking a waiver of the Commission’s Rules must demonstrate either that: (i) the underlying purpose of the rule(s) will not be served or would be frustrated by application to the instant case, and that a grant of the waiver would be in the public interest,³⁰ or (ii) 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.³¹ We conclude that the underlying purpose of the rule would best be served by applying the rule. The purpose of denying a GSA to secondary point-to-point stations is to maintain their traditional subordinate role to primary stations.³² As FAU recognizes, Palm Beach is licensed on the A group channels under call sign KZB28. If we granted FAU GSAs for the three stations

²⁶ Waiver Request at 9-10.

²⁷ See *Two-Way Second Reconsideration Order*, *supra*.

²⁸ See *American Trucking Ass'n v. Frisco Transp. Co.*, 358 U.S. 133, 145 (1958); *City of Long Beach v. Department of Energy*, 754 F.2d 379, 387 (1985); *Chlorine Inst. v. Occupational Safety and Health Administration*, 613 F.2d 120, 123 (1980); *Howard Sober, Inc. v. I.C.C.*, 628 F.2d 36, 40-42 (D.C. Cir. 1980); *United States v. Civil Aeronautics Bd.*, 510 F.2d 769, 772-73 (D.C. Cir. 1975).

²⁹ *Zenith Electronics Corporation v. United States*, 884 F.2d 556, 561 (1989).

³⁰ 47 C.F.R. § 1.925(b)(3)(i).

³¹ 47 C.F.R. § 1.925(b)(3)(ii).

³² *Two-Way Second Reconsideration Order*, 15 FCC Rcd at 14572 ¶ 24.

in question, Palm Beach would lose part of its GSA for Station KZB28 because its GSA would overlap with the new GSAs for FAU's stations.³³ Palm Beach has not supported FAU's Waiver Request. Granting FAU GSAs under these circumstances would be inconsistent with the underlying purpose of the Commission's pronouncement in the *Two-Way Second Reconsideration Order*.

11. We also conclude that FAU has failed to show that it faces unique circumstances or that denying it GSAs would be inequitable or unduly burdensome. FAU has always been licensed on a secondary basis, and it chose to accept the license with a condition that made its operations secondary. Acceptance of a license constitutes an agreement to the conditions set forth.³⁴ We believe it would be manifestly unfair to Palm Beach to require it to lose part of its GSA to a licensee who had accepted a secondary condition on its licenses and whose argument is based on an error in the Commission's database. We therefore deny FAU's Waiver Request.

IV. CONCLUSION AND ORDERING CLAUSES

12. We dismiss FAU's pleading with respect to Station WLX269 because that license has expired. With respect to the remaining licenses, we deny FAU's argument that the correction to ULS to reflect that its licenses did not receive a GSA was impermissibly untimely. We also deny FAU's request for waiver because granting a waiver would be inconsistent with the underlying purpose of the policy announced in the *Two-Way Second Reconsideration Order* and would be unfair to the adjacent co-channel licensee.

13. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 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 that the Petition for Reconsideration or Alternatively Waiver Request of Florida Atlantic University of Florida Atlantic University filed on January 3, 2007 IS DISMISSED IN PART and IS DENIED IN PART.

14. 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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³³ Incumbent site-based stations receive GSAs with a 35-mile radius. See 47 C.F.R. § 27.1206(a)(1). The center point of the GSA for Station KZB28 is 42.5 miles from the designated transmit coordinates for Stations WHR877 and WHR894, and 52.4 miles from the designated transmit coordinates for Station WHR895. Because the distance in question is fewer than 70 miles, if FAU received GSAs, there would be overlap between the respective GSAs. The overlap area would be split by drawing a line between the intersection points of the respective areas, a process known as "splitting-the-football." *Id.*

³⁴ *P&R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984) (Licensee's acceptance of license constitutes accession to all conditions contained in FCC's regulations and in license. "A licensee may not accept only the benefits of the license while rejecting the corresponding obligations."); see also *MMDS, Inc., Memorandum Opinion and Order*, 18 FCC Rcd 15147, 15150 ¶ 11 (2003) ("The *MMDS Order* correctly states that when *MMDS, Inc.* accepted its conditional license, it agreed to be subject to those conditions.").