

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 FURTHER RECONSIDERATION

Adopted: April 25, 2008

Released: April 25, 2008

By the Chief, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us a Petition for Further Reconsideration filed by Florida Atlantic University (FAU) on August 10, 2007. FAU seeks reconsideration of a July 11, 2007 Reconsideration Order denying FAU's petition for reconsideration and waiver request challenging a staff determination regarding certain FAU licenses. Specifically, staff determined that the licenses for Educational Broadband Service (EBS) Stations WHR877, WHR894, WHR895, and WLX269 (collectively, the Stations) do not have Geographic Service Areas (GSA) "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. For the reasons stated below,

1 Petition for Further Reconsideration or Alternatively Waiver Request of Florida Atlantic University (filed Aug. 10, 2007) (Second Petition).

2 See Florida Atlantic University, Order on Reconsideration, 22 FCC Rcd 12839 (WTB BD 2007) ("Reconsideration Order").

3 Petition for Reconsideration or Alternatively Waiver Request of Florida Atlantic University (filed Jan. 3, 2007) (First Petition).

4 FAU no longer seeks any relief with respect to Station WLX269 because that station was never constructed and the license expired. Second Petition at 2 n.4. Stations WHR877, WHR894, and WHR895 will be referred to collectively as the Stations.

5 First Petition at 1.

6 Waiver Request at 1-2.

we grant the Second Petition in part and grant FAU's Waiver Request in part, subject to certain conditions.

## II. BACKGROUND

2. On June 17, 1987, FAU filed three applications to construct and operate new Instructional Television Fixed Service (ITFS) 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.<sup>7</sup> 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 the Commission granted on October 26, 1989.<sup>8</sup> 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.<sup>9</sup> 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."

3. On September 25, 1998, the Commission released the *Two-Way Order*, which, among other things, granted all 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*.<sup>10</sup> In the *Two-Way Reconsideration Order*, the Commission affirmed its decision.<sup>11</sup> 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.<sup>12</sup>

4. On July 29, 2004, the Commission released the *BRS/EBS R&O*, which granted all ITFS incumbents a GSA based on their existing PSA.<sup>13</sup> On June 28, 2005, the Wireless Telecommunications Bureau released a Public Notice announcing that the Commission's Universal Licensing System would implement the adoption of geographic licensing for the Broadband Radio Service and the EBS.<sup>14</sup> The

<sup>7</sup> File Nos. BPIFB-198770617DH, BPIFB-198770617DB, and BPIFB-198770617DD.

<sup>8</sup> File No. BNPIFB-19890814DJ.

<sup>9</sup> File No. BMPIFB-19890421DB.

<sup>10</sup> 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) ("*Two-Way Order*").

<sup>11</sup> 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) ("*Two-Way Reconsideration Order*").

<sup>12</sup> 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*").

<sup>13</sup> 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) ("*BRS/EBS R&O*").

<sup>14</sup> 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 (continued....)

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.”<sup>15</sup> 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.”<sup>16</sup> On September 11, 2006, FAU asked the Division for confirmation that the Stations had received a GSA based on the *BRS/EBS R&O*.<sup>17</sup> 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.”<sup>18</sup>

5. On January 3, 2007, FAU filed a petition for reconsideration of the December 4, 2006 action.<sup>19</sup> In the alternative, FAU sought a waiver to allow it to obtain a GSA for the stations in question.<sup>20</sup> On July 11, 2007, the Broadband Division (Division) of the Wireless Telecommunications Bureau (Bureau) dismissed the First Petition in part and denied it in part.<sup>21</sup> The Division dismissed the First Petition as moot with respect to Station WLX269 because that license expired in 2000.<sup>22</sup> With respect to the remaining stations, the Division rejected FAU’s argument that the July 9, 2005 conversion of these licenses, which resulted in an indication that the stations received GSAs, was a final action that could not be revisited.<sup>23</sup> The Division also concluded that granting a waiver would be inconsistent with the underlying purposes of making FAU’s licenses secondary because granting FAU a GSA would require the School Board of Palm Beach County (Palm Beach) to lose part of its GSA for Station KZB28 because the GSAs would overlap.<sup>24</sup> The Division also noted that “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.”<sup>25</sup>

6. FAU filed the instant Second Petition on August 10, 2007.<sup>26</sup> FAU argues that Wireless Telecommunications Bureau’s actions implementing the *BRS/EBS R&O*, its actions on December 4, 2006, and its actions responding to the September 11, 2006 letter from FAU, constitute staff actions.<sup>27</sup> Therefore, FAU contends, the Bureau’s actions on December 4, 2006 did not constitute a ministerial

---

(...continued from previous page)

ULS Forms and Electronic Filing for These Service Becomes Mandatory on July 11, 2005, *Public Notice*, 20 FCC Rcd 11554 (2005).

<sup>15</sup> *Id.*, 20 FCC Rcd at 11554-11555.

<sup>16</sup> 47 C.F.R. § 27.1206.

<sup>17</sup> See Letter from Evan J. Carb, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (filed Sep. 11, 2006).

<sup>18</sup> See Universal Licensing System records for Stations WHR877, WHR894, and WHR895.

<sup>19</sup> First Petition.

<sup>20</sup> *Id.*

<sup>21</sup> *Reconsideration Order*.

<sup>22</sup> *Id.*, 22 FCC Rcd at 12842 ¶ 8.

<sup>23</sup> *Id.*, 22 FCC Rcd at 12842 ¶ 9.

<sup>24</sup> *Id.*, 22 FCC Rcd at 12842-12843 ¶ 10.

<sup>25</sup> *Id.*, 22 FCC Rcd at 12843 ¶ 11.

<sup>26</sup> Second Petition.

<sup>27</sup> *Id.* at 5.

correction and were therefore improper.<sup>28</sup> In addition, FAU argues that the Staff's issuance of GSAs to all EBS stations did not exclude secondary stations.<sup>29</sup> FAU notes that the failure to account for secondary EBS stations in the ULS database makes that database unreliable.<sup>30</sup> FAU also argues the Bureau is singling it out for disparate treatment.<sup>31</sup>

7. Alternatively, FAU argues that the Division should grant it a waiver.<sup>32</sup> FAU provides a letter from Palm Beach stating that it does not object to FAU's stations receiving a GSA so long as Stations KZB28 does not lose any portion of its GSA.<sup>33</sup> The School Board of Miami-Dade County (Miami-Dade), licensee of co-channel EBS Station WHA956, "supports any reasonable waiver relief the Commission might grant FAU," so long as the GSA of its Station WHA956 is not reduced.<sup>34</sup> Miami-Dade contends that granting FAU a waiver "could advance the process of EBS spectrum coordination" in south Florida.<sup>35</sup> FAU suggests that the Commission grant it GSAs limited to areas outside the GSAs of pre-existing neighboring stations.<sup>36</sup>

### III. DISCUSSION

8. It is Commission policy that "reconsideration will not be granted merely for the purpose of again debating matters on which the agency has once deliberated and spoken. The public interest in expeditious resolution of Commission proceedings is done a disservice if the Commission readdresses arguments and issues it has already considered."<sup>37</sup> In this case, much of FAU's Second Petition raises arguments already considered and rejected in the *Reconsideration Order*. In particular, we reject FAU's argument that the Division erred in initially refusing to award it a GSA. The conditions placed on the Stations make it clear that they were secondary STLs<sup>38</sup> and, accordingly, it is consistent with the *Two-Way Second Reconsideration Order* that the Stations not receive a PSA. In the *BRS/EBS R&O*, the Commission decided that only licensees with a PSA would receive a GSA.<sup>39</sup> A ministerial error (the former notation in the ULS database that the Stations had a GSA, which resulted from an error in the ULS conversion process) does not lead to the conclusion that the Stations are entitled to PSAs and, accordingly, GSAs.<sup>40</sup>

9. We believe that further consideration of FAU's Waiver Request is considered, however,

---

<sup>28</sup> *Id.* at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 9.

<sup>33</sup> *Id.*, Exhibit 1 (Letter from Arthur C. Johnson, Ph.D. to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 2, 2007)).

<sup>34</sup> School Board of Miami-Dade County, Florida's Comments on Petition for Further Reconsideration or Alternatively Waiver Request of Florida Atlantic University Board of Trustees (filed Aug. 17, 2007) at 2.

<sup>35</sup> *Id.*

<sup>36</sup> Second Petition at 10.

<sup>37</sup> Policies Regarding Detrimental Effects of Proposed New Broadcasting Stations on Existing Stations, *Memorandum Opinion and Order*, 4 FCC Rcd. 2276, 2277 (1989).

<sup>38</sup> *Reconsideration Order* at 4.

<sup>39</sup> See *Two-Way Second Reconsideration Order*, *supra*.

<sup>40</sup> Second Petition at 6.

because Palm Beach and Miami-Dade now indicate that they support FAU's Waiver Request so long as their GSAs are not reduced. 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;<sup>41</sup> 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.<sup>42</sup> We believe that the first prong of the waiver standard is met in this case.

10. The purpose of denying secondary STLs a PSA was to ensure that they remain "subordinate" to neighboring EBS stations.<sup>43</sup> In this case, however, FAU's neighbors support its Waiver Request so long as their GSAs are not reduced. Furthermore, the licensees have agreed "that the normal FCC rules affecting neighboring co-channel and adjacent-channel stations shall henceforth govern the operation of these neighboring GSA facilities including, as applicable, those contained in Sections 27.53, 27.55, and 27.1221."<sup>44</sup> Under those circumstances, we conclude that granting FAU a waiver to allow Stations WHR877, WHR894, and WHR895 to have GSAs would be consistent with the policy underlying the *Two-Way Second Reconsideration Order*, so long as those GSAs exclude any area that would overlap with existing GSAs of neighboring co-channel licensees.

11. We also conclude that a waiver would be in the public interest. FAU has shown that a waiver would allow it to provide service to areas of Palm Beach and Broward Counties that otherwise would not be able to receive service on the A channel group.<sup>45</sup> Moreover, a waiver would provide FAU and its neighbors with additional possibilities for meeting the educational and broadband needs of those institutions and its students. We therefore grant FAU's Waiver Request in part and grant GSAs to Stations WHR877, WHR894, and WHR895, subject to the condition that the GSAs do not include any area that overlaps with the GSA of a neighboring co-channel EBS licensee.

#### IV. CONCLUSION AND ORDERING CLAUSES

12. FAU has failed to show that the *Reconsideration Order* was incorrect. In light of Palm Beach's and Miami-Dade's support for its Waiver Request, however, we will grant its Waiver Request in part and grant GSAs to Stations WHR877, WHR894, and WHR895, subject to the condition that the GSAs do not include any area that overlaps with the GSA of a neighboring co-channel EBS licensee.

13. For the reasons stated above, IT IS 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 Further Reconsideration or Alternatively Waiver Request of Florida Atlantic University filed on August 10, 2007 IS GRANTED IN PART and IS DENIED IN PART.

---

<sup>41</sup> 47 C.F.R. § 1.925(b)(3)(i).

<sup>42</sup> 47 C.F.R. § 1.925(b)(3)(ii).

<sup>43</sup> *Two-Way Second Reconsideration Order*, *supra*, 15 FCC Rcd at 14572 ¶ 24.

<sup>44</sup> Joint Comments, Florida Atlantic University, School Board of Broward County, Florida, School Board of Palm Beach County, Florida, and School Board of Miami-Dade County, Florida (filed Mar. 5, 2008).

<sup>45</sup> Second Petition at 11.

14. IT IS ORDERED, pursuant to Sections 4(i) and of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and Sections and 1.925 and 27.1206 of the Commission's Rules, 47 C.F.R. §§ 1.925, 27.1206 that EBS Stations WHR877, WHR894, and WHR895 shall be granted Geographic Service Areas, subject to the condition that the Geographic Service Areas shall not include any area that overlaps with the Geographic Service Area of a neighboring co-channel EBS licensee.

15. 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

Fred B. Campbell, Jr.  
Chief, Wireless Telecommunications Bureau