

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

In the Matter of Application of )
EMORY UNIVERSITY ATLANTA/NETWORK ) File No. 0000569873
COMMUNICATIONS )
Request for Waiver of Section 101.1331(c) of the )
Commission's Rules )

ORDER

Adopted: May 31, 2002

Released: June 3, 2002

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

1. Introduction. On August 23, 2001, Emory University Atlanta/Network Communications (Emory) filed an application for authorization to modify its Multiple Address System (MAS) Station WNTU906, Atlanta, Georgia. In connection with this application, Emory requested waiver of Section 101.1331(c) of the Commission's Rules on November 19, 2001. For the reasons stated herein, we deny the request for waiver of Section 101.1331(c) of the Commission's Rule, and direct that the application will be dismissed.

2. Background. On February 27, 1997, the Commission initiated a comprehensive examination of the MAS service, seeking comment on a variety of issues including the current and potential uses of MAS spectrum, modifications designed to streamline MAS licensing procedures to better accommodate such uses, spectrum allotment, and licensing. In the Notice, the Commission proposed to designate the 928/959 MHz band for subscriber-based services, and temporarily suspended the acceptance and processing of MAS applications, including major modifications, for the 928/959 MHz band. The Commission concluded that a suspension of the acceptance of applications in this band would permit the orderly and effective resolution of the issues in this proceeding and noted that applications for new licenses might limit the effectiveness of the decisions made and standards developed in the proceeding. In the subsequent Report and Order in the MAS proceeding, the Commission determined

1 FCC File No. 0000569873.

2 See FCC File No. 0000569873, Letter from Joseph Massey, Emory University Atlanta/Network Communications, Requesting Waiver of Section 101.1331(c) of the Commission's Rules (Emory Waiver Request).

3 47 C.F.R. § 101.1331(c).

4 See Amendment of the Commission's Rules Regarding Multiple Address Systems, Notice of Proposed Rule Making, WT Docket No. 97-81, 12 FCC Rcd 7973 (1997).

5 Id. at 8003-04 ¶¶ 68-71.

6 Id. We note that a Further Notice of Proposed Rule Making was released in this proceeding on July 1, 1999, to assess the effects of the 1997 Balanced Budget Act on the proposals in the Notice. See Amendment of the (continued....)

that a geographic area licensing approach would best accommodate the current and future uses of the 928/959 MHz MAS band.<sup>7</sup> The Commission also concluded that site-based incumbents should be grandfathered indefinitely, but would not be permitted to expand their operations beyond their current service areas except through participation in the competitive bidding licensing process or pursuant to an agreement with the geographic licensee.<sup>8</sup> The auction of MAS spectrum commenced on November 14, 2001<sup>9</sup> and concluded on November 27, 2001.<sup>10</sup>

3. Emory operates incumbent MAS Station WNTU906 in the 959 MHz band in the area of Atlanta, Georgia. Emory is the largest health care provider in Atlanta, and it uses the station to operate a paging system for over 10,000 doctors and other health care professionals.<sup>11</sup> On August 23, 2001, Emory filed an application to modify Station WNTU906.<sup>12</sup> In the application, Emory proposed to relocate the station approximately one mile, and increase the antenna height from 59.4 meters to 312 meters.<sup>13</sup> On September 28, 2001, Emory amended its modification application by adding contour studies.<sup>14</sup> The Public Safety and Private Wireless Division's Licensing and Technical Analysis Branch (Branch) returned the amended application to Emory and requested further amendments to Emory's modification application.<sup>15</sup> In the letter, the Branch noted that there were discrepancies between the actual license data, the data on the application and the data used in the contour studies.<sup>16</sup> The Branch also stated that the contour studies indicated that the proposed modifications would result in an increase in the signal strength and the overall contour of the station and would, thus, violate Section 101.1331(c) of the Commission's Rules.<sup>17</sup>

4. On November 19, 2001, Emory further amended its application by attaching additional

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Commission's Rules Regarding the Multiple Address Systems, *Further Notice of Proposed Rule Making*, WT Docket 97-81, 14 FCC Rcd 10744 (1999). The suspension was not affected by the *Further Notice*.

<sup>7</sup> See Amendment of the Commission's Rules Regarding Multiple Address Systems, *Report and Order*, WT Docket No. 97-81, 15 FCC Rcd 11956 (2000) (*Report and Order*).

<sup>8</sup> *Id.* at 11978 ¶¶ 57-58; see 47 C.F.R. § 101.1331(c).

<sup>9</sup> See Auction of Licenses for Multiple Address Systems Spectrum, *Public Notice*, 16 FCC Rcd 17900 (2001).

<sup>10</sup> See Multiple Address Systems Spectrum Auction Closes, *Public Notice*, 16 FCC Rcd 21011 (2001) (*Auction Closing Notice*).

<sup>11</sup> See Emory University Atlanta/Network Communications, Request for Waiver at 1 (filed Nov. 19, 2001) (Emory Waiver Request).

<sup>12</sup> See FCC File No. 0000569873 (filed Aug. 23, 2001).

<sup>13</sup> *Id.* Emory also proposed to reduce the effective isotropic radiated power. *Id.*

<sup>14</sup> See FCC File No. 0000569873 (as amended Sept. 28, 2001).

<sup>15</sup> ULS Automated Letter to Keith Nation, Emory University Atlanta/Network Communications, Reference No. 1092735 (dated Oct. 3, 2001).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

contour studies and the subject request for waiver of Section 101.1331(c) of the Commission's Rules to the application.<sup>18</sup> Emory's "main reason" for seeking to relocate the station is that increased building construction around the current site has limited the ability of the master station transmitter to reach its remote sites.<sup>19</sup> Emory contends that this link is critical for notifying doctors of medical emergencies in the Atlanta area<sup>20</sup> and that, without the proposed modifications, the system would be ineffective and could put the lives of citizens dependent on the health care provider at risk.<sup>21</sup>

5. *Discussion.* Section 101.1331(c) of the Commission's Rules provides, *inter alia*, that incumbent MAS operators in the 959 MHz band are grandfathered as of January 19, 2000 and may expand their systems only if the signal level does not increase the composite contour that occurs at a 40.2-kilometer (25-mile) radius from the center of each master station transmitter site.<sup>22</sup> As stated earlier, Emory's contour studies show that the proposed modifications will result in an increase in the signal strength and overall contour of the station. Therefore, without waiver of Section 101.1331(c), Emory's modification application is defective.<sup>23</sup> We may grant a request for waiver of a rule if the requesting party shows (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and a grant of the requested waiver would be in the public interest; or (ii) in view of the 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.<sup>24</sup> We do not believe that Emory has demonstrated that waiver of Section 101.1331(c) of the Commission's Rules is warranted.

6. We note, as an initial matter, that we have in the past granted waivers to licensees who were forced by new construction or other circumstances to relocate a station.<sup>25</sup> However, in those cases, the licensees have demonstrated that, because of their rural location, the newly proposed sites were the closest suitable location from which to transmit. The licensees also demonstrated that they would not expand their systems, change equipment or carry new traffic at the new location.<sup>26</sup> In contrast, Emory

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<sup>18</sup> See FCC File No. 0000569873 (as amended Nov. 19, 2001).

<sup>19</sup> Emory Waiver Request at 1.

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

<sup>21</sup> See Emory University Atlanta/Network Communications, Explanation Letter (filed Aug. 23, 2001).

<sup>22</sup> 47 C.F.R. § 101.1331(c).

<sup>23</sup> Contrary to Emory's suggestion, a waiver of Section 101.1331(c) is required even though Emory does not propose to exceed a signal strength of 40 dB $\mu$ V/m at its 25-mile radius contour. While 47 C.F.R. § 101.1333(c) provides that geographic licensees are prohibited from exceeding a signal strength of 40 dB $\mu$ V/m at incumbent licensees' 40.2-kilometer (25-mile) radius contour, it does not authorize incumbent licensees to increase their power levels to that level at their 25-mile radius. Rather, as noted above, pursuant to 47 C.F.R. § 101.1333(c), incumbent licensees may not exceed the signal strength currently authorized at their 25-mile radius, even if it is below 40 dB $\mu$ V/m.

<sup>24</sup> 47 C.F.R. § 1.925(b)(3).

<sup>25</sup> See Range Telephone Cooperative, Inc., *Order*, 15 FCC Rcd 23772, 23774 ¶ 5 (WTB PSPWD 2000) (*Range Telephone*); Telcom Systems, Ltd., *Order*, DA 99-2296, ¶¶ 5-6 (WTB PSPWD rel. Oct. 25, 1999) (*Telcom*).

<sup>26</sup> *Range Telephone*, 15 FCC Rcd at 23774-775 ¶ 6; *Telcom*, ¶ 6.

does not provide such information. Thus, we are unable to find that Emory has made a sufficient showing that a waiver is warranted. Specifically, it has not demonstrated that there is no other location, or combination of locations, in Atlanta from which Emory can operate its system without substantially<sup>27</sup> increasing Station WNTU906's signal strength at the 25-mile radius contour. Unlike the licensees in the cases discussed above, Emory operates in a major urban area with, presumably, numerous options for a transmission location that would not reduce the territory available to the geographic licensee.

7. Furthermore, Emory did not explain why it did not or could not bid in the MAS auction. We note that no auction licenses were awarded on Emory's frequency (959.9375 MHz) in the proposed operating area, and these licenses will be re-auctioned in the future.<sup>28</sup> Emory is free to bid on the relevant licenses at that time,<sup>29</sup> or to attempt to reach an agreement regarding expanding its contours with the ultimate geographic licensee.<sup>30</sup> Therefore, we do not believe that Emory has demonstrated that it has no reasonable alternatives. Accordingly, we deny Emory's request for waiver of Section 101.1331(c) of the Commission's Rules.

8. 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 filed by Emory University Hospital on November 19, 2001, IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and Section 1.934(d)(2) of the Commission's Rules, 47 C.F.R. § 1.934(d)(2), FCC File No. 0000569873, filed August 23, 2001, SHALL BE DISMISSED.

10. 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>27</sup> A comparison of Emory's current and proposed contours indicates that if the modification application were granted, the area encompassed by Station WNTU906's 40 dB $\mu$  contour would more than double.

<sup>28</sup> *Auction Closing Notice*, 16 FCC Rcd at 21013.

<sup>29</sup> We note that the minimum opening bid for licenses in the Atlanta market did not exceed \$1,500. *See* Multiple Address Systems Spectrum Auction Scheduled for November 14, 2001, *Public Notice*, 16 FCC Rcd 12990, 13003 (2001).

<sup>30</sup> *See* 47 C.F.R. § 101.1331(c); *Report and Order*, 15 FCC Rcd at 11980 ¶ 62.