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DA 14-774

In Reply Refer to:

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Board of Trustees of Eastern Mennonite University
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In re: **WEMC(FM), Harrisonburg, VA**
Facility ID No. 4308
File No. BPED-20110211AAO

Petition for Reconsideration

Dear Applicant and Counsel:

We have before us a Petition for Reconsideration (“Petition”) filed by Stu-Comm, Inc. (“Stu-Comm”) on April 18, 2011, seeking reconsideration of the March 14, 2011, grant of the above-captioned application for a minor change to a licensed facility (“Application”) of the Board of Trustees of Eastern Mennonite University (“EMU”). We also have before us an Opposition filed by EMU on May 5, 2011 (“Opposition”), and a Reply filed by Stu-Comm on May 16, 2011 (“Reply”). For the reasons stated below, we grant the Petition, rescind grant of the EMU Application, and return the EMU Application to pending status.

Background. On September 7, 2007, EMU filed an application to upgrade noncommercial educational (“NCE”) station WEMC(FM), Harrisonburg, Virginia (the “Station”), from Channel 219A to 219B.¹ This minor change application was granted on February 11, 2008 (“Construction Permit”).² By its express terms, the Construction Permit expired at 3:00 a.m. local time, February 11, 2011. EMU did not complete construction before expiration of the Construction Permit but “re-filed” a minor change application, the EMU Application, at 3:00:30 a.m. on Friday, February 11, 2011.³ The next business day, Monday, February 14, 2011, Stu-Comm filed a competing minor change application to install a directional antenna and increase power for first adjacent channel NCE station WNRN(FM), Charlottesville, Virginia (“Stu-Comm Application”).⁴ The EMU Application was granted on March 14, 2011.⁵ On April 18, 2011, Stu-Comm filed its Petition for Reconsideration.

In the Petition, Stu-Comm states that that it has been the Commission’s practice and policy to require that permittees must wait until the day after the day on which a construction permit expires before

¹ File No. BPED-20070907AAU.

² *Broadcast Actions*, Public Notice, Report No. 46673 (Feb. 14, 2008).

³ File No. BPED-20110211AAO; *see also* Opposition at Exhibit 1.

⁴ File No. BPED-20110214AAX. The Stu-Comm Application remains in “pending” status.

⁵ *Broadcast Actions*, Public Notice, Report No. 47445 (March 17, 2011).

filing a replacement modification application for the same station.⁶ This practice, according to Stu-Comm, “ensures that potential competing applicants have an opportunity to file applications and essentially allows for a one-day filing window for proposals blocked by the earlier construction permit.”⁷ Stu-Comm argues that grant of the EMU Application was thus “inconsistent with the guidance of *Ashbacker* and *Bachow*, which require that other potential applicants have the opportunity to file competing applications.”⁸ Therefore, Stu-Comm requests that grant of the EMU Application be rescinded and the EMU Application be dismissed as premature and conflicting with the Construction Permit.⁹ Procedurally, Stu-Comm claims that “as formal Petitions to Deny do not lie against minor modification applications, this is the first opportunity Stu-Comm has had to participate formally and become a party to the proceeding.”¹⁰

In its Opposition, EMU contends that, since the Construction Permit expired at 3 a.m. on February 11, 2011, the EMU Application, which was filed immediately thereafter, was not premature and did not conflict with the Construction Permit.¹¹ The first-come, first-served rules applicable in this case, EMU points out, state that only applications filed on the same day as the lead applicant (i.e., February 11) will be considered mutually exclusive.¹² Therefore, according to EMU, Stu-Comm had the opportunity to file a mutually-exclusive application but chose not to. Moreover, EMU argues, these rules “appear to have been written with *Ashbacker* in mind.”¹³ Finally, EMU claims that Stu-Comm failed to satisfy the requirement in Section 1.106(b)(1) of the Rules to show good reason why it was not possible to participate earlier in the proceeding.¹⁴

In its Reply, Stu-Comm states that it did not file an informal objection to the EMU Application because it had “more than a reasonable expectation that the [EMU Application] would be returned as unacceptable for filing.”¹⁵ Furthermore, Stu-Comm claims, its “interests were not injured until the Commission acted to grant, rather than dismiss, the [EMU Application].”¹⁶ Accordingly, Stu-Comm argues, it was reasonable for it to decide not to file an informal objection to the EMU Application.

Discussion. The Commission will consider a petition for reconsideration only when the petitioner shows either a material error in the Commission's original order or raises additional facts not known or existing at the time of the petitioner's last opportunity to present such matters.¹⁷ In this case, for the reasons given below, we find that the staff erred in granting the EMU Application without consideration of the pending Stu-Comm Application.

⁶ Petition at 2.

⁷ *Id.*

⁸ *Id.* at 3 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (“*Ashbacker*”); *Bachow Communications, Inc. v. FCC*, 237 F.3d 683 (D.C. Cir. 2001) (“*Bachow*”).

⁹ *Id.* at 2.

¹⁰ *Id.*, n.4 (citing 47 C.F.R. § 73.3584(a)).

¹¹ Opposition at 3, Exhibit 1.

¹² *Id.* at 3-5 (citing 47 C.F.R. § 73.3573(e)(1)).

¹³ *Id.* at 5.

¹⁴ 47 C.F.R. § 1.106(b)(1) (“Section 1.106(b)(1)”).

¹⁵ Reply at 2.

¹⁶ *Id.*

¹⁷ See 47 C.F.R. § 1.106(c),(d). See also *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 387 U.S. 967 (1966).

Procedural issues. As a threshold issue, Stu-Comm has failed to satisfy the requirement in Section 1.106(b)(1) to show good reason why it was not possible for it to have participated earlier in the proceeding. Stu-Comm contends that it could not have participated in the proceeding earlier because a petition to deny does not lie against a minor change application. However, the appropriate vehicle for objecting to a minor change application is an informal objection.¹⁸ Stu-Comm had an opportunity to file such an objection, but chose not to because it claimed to have a “reasonable expectation” that the EMU Application would not be granted.¹⁹ As a result, the issues that Stu-Comm raised in the Petition for Reconsideration were not before the staff when the EMU Application was processed. It is axiomatic that an adjudicatory process cannot operate efficiently or accurately if a party does not participate in a proceeding but is permitted to “sit back and hope that a decision will be in its favor and, when it isn't, to parry with an offer of more evidence.”²⁰ Furthermore, the Commission has long maintained that “[surprise] is no basis for a new party to file a petition for reconsideration. Interested parties must timely file a petition to deny any application they oppose and record their opposition, and the reasons for the opposition, however remote they perceive the chance that the application would be granted.”²¹ We likewise reject Stu-Comm’s suggestion that Section 1.106(b)(1) only comes into play after an interested party is “injured” by an adverse decision. Such a policy would undermine the basic objective of Section 1.106(b)(1) that all relevant information be on the record *before* action is taken on an application. For these reasons, we conclude that Stu-Comm has not shown that it had “good reason,” within the meaning of Section 1.106(b)(1), to refrain from participating earlier in this proceeding. However, we will not dismiss the Petition for Reconsideration, because we believe that the public interest would be best served by exercising our discretion to address Stu-Comm’s claims and reconsider our grant of the EMU Application.²²

Substantive issues. In *Ashbacker*, the Supreme Court held that where two applications are mutually exclusive, the grant of one without considering the other violates the statutory right of the second applicant to comparative consideration.²³ It is well established, however, that the Commission may promulgate procedural rules that limit the ability of parties to file mutually exclusive applications,

¹⁸ See 47 C.F.R. § 73.3587.

¹⁹ Stu-Comm had 26 days—from February 16, 2011, the date on which the EMU Application was placed on public notice, until March 14, 2011, when the application was granted—to file an informal objection. See *Broadcast Applications*, Public Notice, Report No. 27425 (Feb. 16, 2011).

²⁰ See, e.g., *Canyon Area Residents for the Environment*, Memorandum Opinion and Order, 14 FCC Rcd 8152, 8154 (1999) (quoting *Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941)).

²¹ See, e.g., *Press Broadcasting Co.*, Memorandum Opinion and Order, 3 FCC Rcd 6640, 6640 (1988), *aff'd on other grounds sub nom. United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990); *Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984) (“If we were to require the Commission to accept surprise as a sufficient justification for a new party to seek reconsideration, the Commission’s—and indeed the public’s—interest in finality of licensing decisions would be eviscerated.”) (subsequent history omitted).

²² See, e.g., *New York Telephone Co.*, Memorandum Opinion and Order on Reconsideration, 6 FCC Rcd 3303, 3304 (1991), *aff'd sub nom. New York State Department of Law v. FCC*, 984 F.2d 1209 (D.C. Cir. 1993) (declining to dismiss a petition for reconsideration that did not satisfy the requirements of Section 1.106(b)(1) because the public interest would be best served by “exercising our discretion to address petitioners’ claims and clarify our action in this proceeding”); see generally 47 C.F.R. § 1.106(c)(2) (A procedurally-defective petition for reconsideration may be granted “if the Commission or the designated authority determines that consideration of the facts or arguments relied on is required in the public interest”).

²³ *Ashbacker*, 326 U.S. at 332-33; see also *Bachow v. FCC*, 237 F.3d 683, 689-90 (D.C. Cir. 2001) (“*Bachow*”) (holding that *Ashbacker* rights inhere in potential applicants whose right to file a timely competing application is frustrated by a Commission freeze order).

such as the first-come, first-served procedure in effect here.²⁴ Applicants subject to such procedures must be treated equally and fairly, including being provided with due notice of the operation of the procedure.²⁵

We agree with Stu-Comm that the Bureau's longstanding policy and practice has been to accept competing applications on the first business day *after* the date on which a construction permit expires. In accordance with *Ashbacker* and *Bachow* and to deter spectrum warehousing, our first-come, first-served processing system preserves a window—albeit a brief window—in which competing applications may be filed after a construction permit has expired even when the prior permittee opts to file a replacement modification application. In practice, this opportunity would be materially circumscribed if we required competing applicants to file within the remaining hours on the same day that the construction permit expires, without notice of whether a last-minute license to cover application or request to toll the construction deadline had been filed. Because such submissions are not publicly accessible in the Media Bureau's Consolidated Data Base System (“CDBS”) until overnight processing has occurred, the earliest that an interested party could be reasonably certain that the expiration was effective would be the day after the scheduled expiration date. Therefore, in order to afford Stu-Comm a meaningful opportunity to have its application considered, we will treat the Stu-Comm Application as mutually exclusive with the EMU Application. We will not dismiss the EMU Application as conflicting with the Construction Permit, as Stu-Comm urges, because, at the time the EMU Application was filed, the Construction Permit had expired according to its express terms. Because we find the Stu-Comm and EMU Applications to be acceptable and mutually exclusive, we expect the applicants to use engineering solutions and good faith negotiation to resolve their mutual exclusivity.²⁶

Conclusion/Actions. We find that Stu-Comm has shown a material error in the Bureau's grant of the EMU Application. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Stu-Comm on April 18, 2011, IS GRANTED, the grant of the EMU Application IS RESCINDED, and the EMU Application IS RETURNED TO PENDING STATUS.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁴ See *Ashbacker*, 326 U.S. at 333 n.9; *Revision of Procedures Governing Amendments to FM Table of Allotments and Changes of Community of License in the Radio Broadcast Services*, 21 FCC Rcd 14212, 14217 (2006) (finding that in the community of license change context “the use of first come-first served procedures is consistent with the *Ashbacker* doctrine”).

²⁵ See, e.g., *Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1555 (D.C. Cir. 1987) (“The *Ashbacker* decision . . . held that the Commission must use the same set of procedures to process the applications of all similarly situated persons who come before it seeking the same license”); *Processing of FM and TV Broadcast Applications*, Report and Order, 50 FR 19936-01, 19939 (1985) (“[T]he use of cut-off procedures has been acknowledged by the Court as a reasonable and necessary limitation on the statutory right to a comparative hearing. However, any regulations limiting the right to a hearing must give fair notice to the public of what is being cut-off. Therefore, although the Commission can be flexible in establishing “housekeeping” rules, applicants must be treated equally and fairly by giving them notice of the due dates for their applications.”) (internal citations omitted).

²⁶ *Streamlining Radio Technical Rules*, First Report and Order, 14 FCC Rcd 5272, 5273 n.4 (1999) (stating that mutually exclusive applications must be disposed of by elimination of the mutual exclusivity through “technical amendment, settlement between the applicants, auction or other means”); see generally 47 U.S.C. § 309(j)(6)(E). Grant of the Applications will be subject to the condition that if either permittee does not construct within the authorized construction period, the other Applicant may apply to modify its construction permit or license authorization, without being subject to competing applications, to specify its originally-proposed facilities.