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AUDIO DIVISION
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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re:)
)
Application for Minor Change of Licensed)
Facility of WEMC(FM), Harrisonburg, VA)
(FIN-4308))
)
Filed by Board of Trustees of Eastern)
Mennonite University)

BPED-20110211AAO

RECEIVED

FILED/ACCEPTED

APR 18 2011

Federal Communications Commission
Office of the Secretary

To: Office of the Secretary
Attn: Audio Division, Media Bureau

PETITION FOR RECONSIDERATION

Stu-Comm, Inc. (“Stu-Comm”), by its attorney and pursuant to Section 1.106 of the Commission’s Rules,¹ hereby seeks reconsideration of the grant of the above-captioned construction permit for a minor modification of WEMC(FM), Harrisonburg, Virginia, licensed to the Board of Trustees of Eastern Mennonite University (“EMU”).² The above-captioned application was filed the exact same day on which the earlier construction permit held by WEMC(FM) expired.³ Accordingly, WEMC(FM)’s application was filed prematurely as it failed to allow for competing applications to be filed by other interested parties. Commission precedent requires that in such instances prospective applicants must be provided an opportunity to file competing applications for mutually exclusive facilities. By filing on the same day that the previous construction permit expired, EMU failed to provide the necessary opportunity to other prospective applicants and

¹ 47 C.F.R. § 1.106.

² Public notice of the action granting the construction permit was given on March 17, 2011, pursuant to Public Notice, Report No. 47445. Accordingly, this Petition for Reconsideration is timely filed consistent with Section 1.106.

³ See FCC File No. BPED-20070907AAU, which expired on February 11, 2011.

effectively precluded any competing proposals. Therefore, the recent grant of the above-captioned application should be rescinded. Further, EMU's application should be dismissed, as it was filed prematurely and in conflict with the construction permit that the licensee still held at the time of filing.⁴

EMU previously held a construction permit authorizing a minor modification of WEMC(FM)'s facilities, FCC File No. BPED-20070907AAU. That construction permit was granted on February 8, 2008, and expired on February 11, 2011. A copy of the construction permit is attached hereto at Exhibit 1. EMU apparently did not implement the facilities changes authorized by that permit. Rather, on February 11, 2011, the same day that the earlier permit was set to expire, EMU filed the above-captioned minor modification application seeking another construction permit to modify the station's facilities.

Consistent with the underlying case law,⁵ it has been the Commission's practice and policy to require that parties wait until the day after the day on which a construction permit expires before seeking to re-apply for another, conflicting modification of the same station. This 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. The opportunity

⁴ Stu-Comm is the licensee of WNRN(FM), Charlottesville, Virginia, which operates on 91.9 MHz, first adjacent to WEMC(FM)'s channel 91.7 MHz. Stu-Comm filed an application to modify the facilities of WNRN(FM) on February 14, 2011, the next business day after the expiration of WEMC(FM)'s earlier permit. *See* FCC File No. BPED-20110214AAX. As Stu-Comm's pending application would be potentially adversely impacted by the grant of the above-captioned application, it has standing to file the instant Petition for Reconsideration. Further, 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. *See* 47 C.F.R. § 73.3584(a).

⁵ *Ashbacker Radio Corp. v. FCC*, 326 US 327 (1945). *See also* *Bachow Communications, Inc. v. FCC*, 237 F3d 683 (D.C. Cir. 2001). In *Bachow*, the Court found that the due process rights established in *Ashbacker* also protect potential applicants that would be precluded from filing competing proposals.

for competing applications, however, did not occur in this case, as WEMC(FM) failed to wait until the day after the day on which the construction permit expired. As such, the grant of its application is inconsistent with the guidance of *Ashbacker* and *Bachow*, which require that other potential applicants have an opportunity to file competing applications.⁶

EMU's submission of a new modification application on the same day that the mutually exclusive construction permit expired was premature and prevented competing applicants from filing conflicting proposals. Accordingly, Stu-Comm respectfully requests that the Media Bureau reconsider its action in this matter and rescind the grant of the above-captioned application to modify WEMC(FM).

Respectfully submitted,

STU-COMM, INC.

By: 

Brendan Holland

Its Attorneys

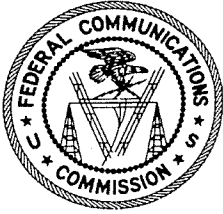
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W., Suite 800
Washington, D.C. 20006
(202) 973-4200

Dated: April 18, 2011

⁶

Id.

EXHIBIT 1



United States of America
FEDERAL COMMUNICATIONS COMMISSION
FM BROADCAST STATION CONSTRUCTION PERMIT

Authorizing Official:

Official Mailing Address:

BOARD OF TRUSTEES OF EASTERN MENNONITE UNIV
1200 PARK RD
HARRISONBURG VA 22802

Rodolfo F. Bonacci
Assistant Chief
Audio Division
Media Bureau

Facility ID: 4308

Grant Date: February 11, 2008

Call Sign: WEMC

This permit expires 3:00 a.m.
local time, 36 months after the
grant date specified above.

Permit File Number: BPED-20070907AAU

Subject to the provisions of the Communications Act of 1934, as amended, subsequent acts and treaties, and all regulations heretofore or hereafter made by this Commission, and further subject to the conditions set forth in this permit, the permittee is hereby authorized to construct the radio transmitting apparatus herein described. Installation and adjustment of equipment not specifically set forth herein shall be in accordance with representations contained in the permittee's application for construction permit except for such modifications as are presently permitted, without application, by the Commission's Rules.

Commission rules which became effective on February 16, 1999, have a bearing on this construction permit. See Report & Order, Streamlining of Mass Media Applications, MM Docket No. 98-43, 13 FCC RCD 23056, Para. 77-90 (November 25, 1998); 63 Fed. Reg. 70039 (December 18, 1998). Pursuant to these rules, this construction permit will be subject to automatic forfeiture unless construction is complete and an application for license to cover is filed prior to expiration. See Section 73.3598.

Equipment and program tests shall be conducted only pursuant to Sections 73.1610 and 73.1620 of the Commission's Rules.

Name of Permittee: BOARD OF TRUSTEES OF EASTERN MENNONITE UNIVERSITY

Station Location: VA-HARRISONBURG

Frequency (MHz): 91.7

Channel: 219

Class: B

Hours of Operation: Unlimited

Callsign: WEMC

Permit No.: BPED-20070907AAU

Transmitter: Type Accepted. See Sections 73.1660, 73.1665 and 73.1670 of the Commission's Rules.

Transmitter output power: As required to achieve authorized ERP.

Antenna type: Directional

Antenna Coordinates: North Latitude: 38 deg 33 min 40 sec
West Longitude: 78 deg 56 min 56 sec

	Horizontally Polarized Antenna	Vertically Polarized Antenna
Effective radiated power in the Horizontal Plane (kW):	9.5	9.5
Height of radiation center above ground (Meters):	31	31
Height of radiation center above mean sea level (Meters):	715	715
Height of radiation center above average terrain (Meters):	199	199

Antenna structure registration number: Not Required

Overall height of antenna structure above ground: 56 Meters

Obstruction marking and lighting specifications for antenna structure:

It is to be expressly understood that the issuance of these specifications is in no way to be considered as precluding additional or modified marking or lighting as may hereafter be required under the provisions of Section 303(q) of the Communications Act of 1934, as amended.

None Required

Special operating conditions or restrictions:

- 1 BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee shall submit the results of a complete proof-of-performance to establish the horizontal plane radiation patterns for both the horizontally and vertically polarized radiation components. This proof-of-performance may be accomplished using the complete full size antenna, or individual bays therefrom, mounted on a supporting structure of identical dimensions and configuration as the proposed structure, including all braces, ladders, conduits, coaxial lines, and other appurtenances; or using a carefully manufactured scale model of the entire antenna, or individual bays therefrom, mounted on an equally scaled model of the proposed supporting structure, including all appurtenances. Engineering exhibits should include a description of the antenna testing facilities and equipment employed, including appropriate photographs or sketches and a description of the testing procedures, including scale factor, measurements frequency, and equipment calibration.
- 2 BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee shall submit an affidavit from a licensed surveyor to establish that the directional antenna has been oriented at the proper azimuth.

Special operating conditions or restrictions:

- 3 BEFORE PROGRAM TESTS ARE AUTHORIZED, permittee/licensee shall submit an affidavit that the installation of the directional antenna system was overseen by a qualified engineer. This affidavit shall include a certification by the engineer that the antenna was installed pursuant to the manufacturer's instructions and list the qualifications of the certifying engineer.
- 4 The relative field strength of neither the measured horizontally nor vertically polarized radiation component shall exceed at any azimuth the value indicated on the composite radiation pattern authorized by this construction permit.

A relative field strength of 1.0 on the composite radiation pattern herein authorized corresponds to the following effective radiated power:

9.5 kilowatts.

Principal minima and their associated field strength limits:

149 degrees True: 1.45 kilowatts

329 degrees True: 1.10 kilowatts

- 5 THE AUTOMATIC PROGRAM TEST PROVISIONS OF 47 C.F.R. SECTION 73.1620 DO NOT APPLY IN THIS CASE. A FORMAL REQUEST FOR PROGRAM TEST AUTHORITY MUST BE FILED IN CONJUNCTION WITH FCC FORM 302-FM, APPLICATION FOR LICENSE, BEFORE PROGRAM TESTS WILL BE AUTHORIZED. This request must contain documentation which demonstrates compliance with the following special operating condition(s):
- 6 The permittee/licensee shall, upon completion of construction and during the equipment test period, make proper radiofrequency electromagnetic (RF) field strength measurements throughout the transmitter site area to determine if there are any areas that exceed the FCC guidelines for human exposure to RF fields. If necessary, a fence must be erected at such distances and in such a manner as to prevent the exposure of humans to RF fields in excess of the FCC Guidelines (OET Bulletin No. 65, Edition 97-01, August 1997). The fence must be a type which will preclude casual or inadvertent access, and must include signage at appropriate intervals which describe the nature of the hazard. Any areas within the fence found to exceed the recommended guidelines must be clearly marked with appropriate additional signage. Documentation demonstrating compliance with the FCC radiofrequency electromagnetic field exposure guidelines shall be submitted when filing the FCC Form 302-FM.
- 7 Documentation demonstrating compliance with the special operating condition(s) may be submitted in advance of the filing of FCC Form 302-FM.
- 8 The permittee/licensee in coordination with other users of the site must reduce power or cease operation as necessary to protect persons having access to the site, tower or antenna from radiofrequency electromagnetic fields in excess of FCC guidelines.

*** END OF AUTHORIZATION ***

CERTIFICATE OF SERVICE

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that I have this 18th day of April 2011, mailed by first-class United States mail, postage prepaid, copies of the foregoing "**PETITION FOR RECONSIDERATION**" to the following:

Peter H. Doyle*
Chief, Audio Division
Media Bureau
Federal Communications Commission
audiodivisionpleadings@fcc.gov

Twila K. Yoder
Board of Trustees of Eastern Mennonite University
1200 Park Road
Harrisonburg, VA 22802



Rhea Lytle

*Stamp & Return copy to be provided the following day upon receipt from the Secretary's Office.