

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re application of)
)
BOARD OF TRUSTEES OF)
EASTERN MENNONITE UNIVERSITY)
)
For Authority to Make a)
Minor Change in)
FM Broadcast Station WEMC,)
Harrisonburg, Virginia)

File No. BPED-20110211AAO

Received & Inspected

MAY 05 2011

FCC Mail Room

To: Chief, Audio Services Division Media Bureau

OPPOSITION TO PETITION FOR RECONSIDERATION

The Board of Trustees of Eastern Mennonite University, licensee of WEMC, Harrisonburg, Virginia ("**WEMC**"), respectfully submits this opposition to a *Petition for Reconsideration* filed¹ by Stu-Comm, Inc. ("**Stu-Comm**").

In that petition, **Stu-Comm** states that "the above-captioned application was filed the exact same day on which the earlier

¹ See Public Notice 27472, dated April 25, 2011.

construction permit held by WEMC(FM) expired" (emphasis ours). In an apparent contradiction, **Stu-Comm** also states that "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" (emphasis ours). We welcome the opportunity to address these assertions with a point of fact. As seen in Exhibit 1, the new application was filed after the expiration of the unfulfilled construction permit. **Stu-Comm's** exhibit to their Petition correctly states that BPED-20070907AAU expired at 3:00 am on February 11, 2011. The Commission's record affirms that the application was filed *after* the expiration of the unfulfilled construction permit.

Taking another tack, **Stu-Comm** states that "*Commission precedence requires that in such instances prospective applicants must be provided an opportunity to file competing applications for mutually exclusive facilities.*" Later in their narrative, they suggest that the Commission policy requires a one-day filing window. In fact, we find that this *filing window* is specifically addressed in Section 73.3573 (e)(1) of the Rules:

Conflicting applications received on the same day will be treated as simultaneously filed and mutually exclusive. Conflicting applications received after the filing of the first acceptable application will be grouped, according to

filing date, behind the lead application in the queue. The priority rights of the lead applicant, against all other applicants, are determined by the date of filing, but the filing date for subsequent conflicting applicants only reserves a place in the queue. The right of an applicant in a queue ripens only upon a final determination that the lead applicant is unacceptable and that the queue member is reached and found acceptable. The queue will remain behind the lead applicant until the construction permit is finally granted, at which time the queue dissolves.

Under this rule, **Stu-Comm** had the very opportunity they demand to file a conflicting application which would have been deemed mutually exclusive and instead chose not to do so. Because they did *not* file on the date of the *lead application*, they were placed in the queue, which dissolved upon the grant to **WEMC**.

Furthermore, according to this rule, **WEMC's** action could not have actually or "effectively" precluded "any competing proposals." To the contrary, any conflicting applications made on the same date, including **Stu-Comm's**, would have been considered mutually exclusive. **Stu-Comm's** application was precluded simply because they chose to file a day late.

We note that in a similar situation, *WCOV, Inc., v. FCC*²,

² *WCOV, Inc. v. FCC*, 150 U.S.App.D.C. 303, 464 F.2d 812 (1972)

the court stated: "Instead, appellant chose to sleep on its rights and, having done so, it should not be heard to complain about the consequences of its negligence." We agree.

*Ashbacker*³ and *Bachow*⁴, cited by the petitioner, have no specific application to this case; the current rules concerning mutually exclusive Part 73 applications appear to have been written with *Ashbacker* in mind and include the "same day" provision cited above.

Additionally, **Stu-Comm** has attempted to make a case that they have legitimate standing to file a *Petition for Reconsideration*. They state, in footnote 4 of their *Petition*, "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)" (emphasis ours).

We note that **Stu-Comm** had 30 days between the date that

³ *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 90 L.Ed.2d 108, 66 S.Ct. 148 (1945)

⁴ *Bachow Communications, Inc. v. FCC*, 345 U.S.App.D.C. 45, 237 F.3d 683 (2001)

WEMC's application was accepted for filing and the date on which the construction permit was awarded; ample time to file an Informal Objection. Stu-Comm has not explained why it was not possible to file such an objection; such explanation is required by Section 1.106(b)(1) of the Rules. Reading further, Section 1.106(b)(2) of the Rules states:

(2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present:

(i) The petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or

(ii) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

In regard to paragraph (i) above, **Stu-Comm** had opportunity to file an informal objection and did not. In regards to paragraphs (i) and (ii) above, **Stu-Comm** has not uncovered any new facts which could have been discovered through the exercise of ordinary diligence, and in fact had they exercised ordinary diligence they would have filed their conflicting application on February 11, 2011, rendering this entire proceeding moot.

Citing *WCOV* again, in that case the court stated: "We need hardly elaborate on the importance to the agency of having the arguments against an application before it at the time the

initial decision is made."

In several ways **Stu-Comm** has been caught asleep at the switch; they have missed their opportunities. The level playing field established by the Commission requires a simple application of the current Rules, not a convoluted application of 1945 case law. The record shows that **WEMC's** application was made after the expiration of its unfulfilled Construction Permit and that **Stu-Comm** did not file their application in time to be considered mutually exclusive. For these reasons, **WEMC** requests that **Stu-Comm's** *Petition for Reconsideration* be denied.

Respectfully Submitted,
**BOARD OF TRUSTEES OF
EASTERN MENNONITE UNIVERSITY**

May 4, 2011

By: 
Twila King Yoder
Corporate Secretary to the Board

Board of Trustees of Eastern Mennonite University
Twila King Yoder, Secretary
1200 Park Road
Harrisonburg, Virginia 22802

Subject: FW: Time Stamp for BPED-20110211AA0
From: "Konrad Herling" <Konrad.Herling@fcc.gov>
Date: Mon, 2 May 2011 16:07:46 -0400
To: <william.fawcett@emu.edu>

-----Original Message-----
From: Jean Chamberlain
Sent: Monday, May 02, 2011 4:07 PM
To: Konrad Herling
Cc: CDBS-Support
Subject: RE: Time Stamp for BPED-20110211AA0

Hi Konrad,
Here is the stamped_date for this application: 2/11/2011 03:00:30
Jean Chamberlain
FCC Licensing Systems Support task
OMD/ITC
202 418-7431
*** Non-Public: For Internal Use Only ***

-----Original Message-----
From: Konrad Herling
Sent: Monday, May 02, 2011 3:55 PM
To: Amir Habib; Jean Chamberlain
Cc: Konrad Herling
Subject: FW: Time Stamp for BPED-20110211AA0
Here it is.

-----Original Message-----
From: Bill Fawcett [mailto:william.fawcett@emu.edu]
Sent: Monday, May 02, 2011 3:40 PM
To: Konrad Herling
Subject: Time Stamp for BPED-20110211AA0
Konrad,
WEMC filed a construction permit application on February 11, 2011 at approximately 3:01 AM.
I will need the actual time stamp for that filing. Thank You.

-Bill Fawcett
Chief Operator. WEMC

Received & Inspected

MAY 05 2011

FCC Mail Room

AFFIDAVIT

Commonwealth of Virginia)
)
City of Harrisonburg)

ss:

Twila King Yoder, having been first duly sworn upon oath, states that she is the Corporate Secretary to the Board of Trustees of Eastern Mennonite University and that as an Officer of the Corporation she has signature authority on their behalf concerning filings such as this with the Federal Communications Commission.

She further states that she has read the Opposition document to which this is attached, and that to the best of her knowledge, information, and belief there is good ground to support it.

Twila K. Yoder
Twila King Yoder

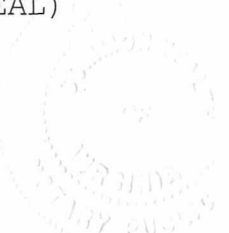
Subscribed and sworn to before me this 3rd day of May 2011.

Lois B. Shank

Notary Registration Number
362663

Lois R. Shank
NOTARY PUBLIC (SEAL)

My commission expires
November 30, 2013



AFFIRMATION OF SERVICE

I, Twila King Yoder, Corporate Secretary to the Board of Trustees of Eastern Mennonite University, do certify that on this date, by United States Postal Service First Class mail, a copy of this *Opposition to Petition for Reconsideration* was sent to:

Mr. Brendan Holland, Esq.
DAVIS WRIGHT TREMAINE LLP
1919 Pennsylvania Avenue, N.W.
Suite 800
Washington, DC 20006-3041

May 4, 2011

By: 
Twila King Yoder
Corporate Secretary to the Board