

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

POSTED
10/15/09

Received & Inspected

OCT 8 - 2009

FCC Mail Room

In re application of)

STU-COMM, INC.)

For Authority to Construct)
or Make Changes in)
FM Translator Station W218BZ,)
Crozet, Virginia)

File No. BPFT-20090819AHH

9/28/09

2009 OCT -8 P 2:58

To: Chief, Audio Services Division

Media Bureau

PETITION FOR RECONSIDERATION

The Board of Trustees of Eastern Mennonite University, licensee of WEMC, Harrisonburg, Virginia ("**WEMC**") pursuant to Section 1.106 (b) (1) of the Rules, hereby files a *Petition for Reconsideration* concerning the grant by the Commission of a construction permit in response to the above referenced application (the "**application**") of STU-COMM, INC. ("**permittee**").

Legal Standing

Section 1.106 (b) (1) of the Rules states that "any other person whose interests are adversely affected by any action taken by the Commission" shall "state with particularity the manner in which the person's interest are adversely affected by the action taken."

WEMC is currently involved in proceedings¹ against the licensee of the primary (parent) station referenced in the instant **application**. Those proceedings concern, among other things, the same appeal to an exemption from prohibited interference where "negligible population" is involved. Again, we would like to address that issue as a *party of interest*.

Section 1.106 (c) of the Rules states that "A petition for reconsideration which relies on facts not previously presented to the Commission or to the designated authority may be granted only under the following circumstances: (1) The facts fall within one or more of the categories set forth in § 1.106(b)(2); or (2) The

¹ Re: Application of Virginia Tech Foundation, Inc. for Authority to Construct an FM Translator Station, Harrisonburg, Virginia, File No. BNPFT-20080612ABJ.

Commission or the designated authority determines that consideration of the facts relied on is required in the public interest."

Section 1.106 (b) (2) (ii) states that "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."

Section 1.106 (b) (2) (i) states "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." Historically, a Minor Change application specifying a frequency change not permitted to be approved as a Minor Change would have under been procedurally dismissed, making any objection unnecessary. That fact has changed with the grant of the instant **application** within a 14 day timetable.

In preparing our objections to the **application** we determined that the application fit the criteria for a major change and would in fact require the most of the 30-day time period normally allocated to diligently raise objections to such an application.

We did not imagine that the Commission would process this major change application in a shorter time period, or even process it at all.

Public notice of the most recent amendment to the **application** was given by the Commission on August 24, 2009. After a cursory review of the **application**, field work - entailing a site visit to verify the claims of both the **permittee** and the representative of the parent station - was scheduled and performed on September 4, 2009. We were in fact prepared to file, with signed affidavit on hand, a Petition to Deny on September 8, 2009, when we became aware of the grant of the instant application was made on September 4, 2009, and public notice of the grant was released on September 10, 2009 (*Broadcast Actions*, Report No. 47067).

Concerning the "public interest" we do not think that it is in the public interest for a Major Change to be processed as a Minor Change under a two-week timetable without sufficient time for concerned parties to prepare an adequate response. Furthermore, we consider the processing of a Major Change without local public notice, required by Section 73.3580 of the Rules, as not being in the "public interest."

For these reasons we present our Petition for Reconsideration and maintain that it fulfills multiple requirements of Section 1.106 (c) of the Rules.

Minor Change Issue

The **permittee** has filed the proposed modification from Channel 218 to Channel 266 as a "Minor Change." In *1998 Biennial Regulatory Review*² the Commission determined that only frequency changes to an adjacent channel or an I.F. related (+/- 53 or 54) channel would be treated as "minor."³ The change does not meet the requirement for a minor change as stated in Section 74.1233 (a)(1) of the Rules and therefore cannot be processed as a minor change.

² *First Report and Order*, in MM Docket 98-93, FCC 99-55, 64 FR 19498

³ The FCC has summarized this regulation on its website, stating:

"Applications will be treated as major changes if ...the application proposes to change to a channel which is not an adjacent channel (an *adjacent channel* is one, two, or three channels above or below the authorized channel) or an I.F. channel (an intermediate frequency or *I.F.* channel is 53 or 54 channels above or below the authorized channel)"

<http://www.fcc.gov/mb/audio/translator.html> as posted 10/7/2009.

If indeed, there has been a policy change at the Commission concerning this matter, such policy is in contradiction to the current Rules, which constitutes the "level playing field" for all licensees. The Commission should initiate a new Rulemaking to make such a change, or at very least issue a Public Notice. Otherwise, the assumption can only be that the published Rule applies.

The negligible population issue

Moreover, we submit that the **application** does not meet the requirements of Section 74.1204 of the Rules, as conceded by the **permittee**: Within the body of the engineering exhibit, the **permittee** states *"a waiver for this interference is requested under the provision of §74.1204(d) on the basis that no actual interference will occur due to a lack of population."*

In *Living Way Ministries*, the Commission states "The Section 74.1204(d) exception is designed to be narrow in scope."⁴

⁴ *Living Way Ministries*, 17 FCC Rcd 17056

In *State of Oregon*⁵ the Commission states that the exception for a "lack of population" under Section 74.1204(d) is applicable only if there is "**no** population, not merely low or negligible population."⁶ However, the **permittee** states that there will indeed be negligible affected population, to wit: "*Any person inside the proposed 106 dBu contour would generally be either an electronic technician visiting one of the communications facilities on an irregular basis or a hiker passing by the electronic site on an irregular basis*" (emphasis ours).

We are compelled to point out that the proposed transmitter site in the instant case is not some ordinary isolated mountaintop electronic site with restricted access. Rather it is located within public recreational lands owned by the United States Government (National Park Service) as shown in Exhibit A. The partially paved road from the parking area at BM2578 to the tower site allows unrestricted hiker access from the highly-traveled Skyline Drive in the Shenandoah National Park. The

⁵ The State of Oregon, Acting By and Through the State Board of Higher Education for the Benefit of Southern Oregon State College, 15 FCC Rcd 11842 (2000) ("State of Oregon") recon. denied 16 FCC Rcd 4344 (2001) ("Oregon Recon").

⁶ 18 State of Oregon, 15 FCC Rcd 11844 (emphasis in original).

ridge trail shown on the **permittee's** topographic map, winding some 788 meters within the interference zone, is the Appalachian National Scenic Trail, a popular hiking destination in itself.

As shown in Exhibit D., more than 500 documented 2000-mile thru-hikers pass through this interference zone annually, and presumably many more casual hikers and unsuccessful thru-hikers. Alongside the Appalachian Trail is a destination point: the Bear Den Tractor Seats as shown in Exhibit B. That this highly-popular destination is in fact within the interference zone, as defined by the **permittee**, is demonstrated in Exhibit C.

We urge the Commission to hold fast to their earlier determination that Section 74.1204(d) waivers will only be made when there is "no population, not merely low or negligible population." Because the Merriam-Webster dictionary defines negligible as "*so small or unimportant or of so little consequence as to warrant little or no attention*" we believe that transient hikers are a perfect example of "negligible population."

The cutoff, as with pregnancy or death, is absolute. The Commission has specified "no population."

Summary

In summary, the **Application** was improperly filed as a "Minor Change" when it does not meet the requirements of Section 74.1233 (a)(1) of the Rules.

Additionally, the **Application** specified a translator site which places the prohibited overlap of an interfering contour in an area which has a "negligible population." Therefore, the **Application** does not meet the narrowly defined standard required for such a waiver as set forth in Section 74.1204 of the Rules.

For these reasons **WEMC** requests that the construction permit issued to the **applicant** be rescinded.

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

October 7, 2009

By: Twila K. Yoder
Twila King Yoder
Corporate Secretary to the Board

Exhibits supporting
Petition for Reconsideration

The Board of Trustees of Eastern Mennonite University

In re application of STU-COMM, INC. For Authority to Construct
or Make Changes in FM Translator Station W218BZ, Crozet, Virginia.

TABLE OF CONTENTS

| | |
|---------------------------------|--|
| Exhibit A. | Land Ownership - Bear Den Site |
| Exhibit B. | A cursory survey of literature concerning the Bear Den Tractor Seats. |
| Exhibit C. | Tractor Seats Location - Bear Den Mountain |
| Exhibit D. | Hiker Statistics |
| Affidavit of William D. Fawcett | |
| Affirmation of Service | |

Exhibit A.

Land Ownership - Bear Den Site

From: Bob Gochenour [Bob_Gochenour@nps.gov]
Sent: Wednesday, July 25, 2001 7:22 AM
To: SHEN Superintendent; fawcetwd@jmu.edu
Subject: Re: Park Boundaries

_____ Reply Separator _____

Subject: Park Boundaries
Author: SHEN Superintendent at NP-SHEN
Date: 07/24/2001 9:47 AM

Mr. Fawcett,

The land that you are referring to I believe belonged to the Steppe heirs that takes in the open areas around the towers on Bear Den Mountain. The property was acquired by the UNITED STATES OF AMERICA (Appalachian Scenic Trail) in February of 1995. If you have any more questions you can call Doug Morris at 540-999-3100, or me at 540-999-3456.

Bob Gochenour
Surveying Tech
Shenandoeh Nat. Park

_____ Forward Header _____

Subject: Park Boundaries
Author: William Fawcett <fawcetwd@jmu.edu> at np--internet
Date: 07/23/2001 2:59 PM

Hello,

The SNP website shows a park map dated 8/29/2000, which shows the meadows at Bear Den Mountain as being private land. A friend tells me this land is now owned by the park. Is this true?

-Bill Fawcett
Harrisonburg, VA

Exhibit B.

A cursory survey of literature concerning the Bear Den Tractor Seats

The Bear Den Tractor Seats, located inside the East edge of the interference zone described in Stu-Comm's application, are a legendary destination and resting place in the lore of the Appalachian Trail. Over 500 'thru-hikers' pass through this zone annually¹, and perhaps thousands more who would be considered casual hikers.



The Speak UP! Photo Library
April 26, 2005
<http://www.speakupyouth.com/photo3.htm>

¹ Appalachian Trail Statistics by year
http://www.appalachiantrail.org/site/c.mqLTIYOWGlF/b.4805585/k.E18/2000Miler_Count_by_Year.htm

"The summit itself is mostly clear and views in nearly every direction can be had by simply walking around a few steps. Oddly enough, someone has installed several old tractor seats very near the summit. The views from these seats are more obscured now than in the past due to forest reclaiming a portion of the open meadow, but it would make a fine place to snack on those blackberries. If you read a thru-hiker journals, almost all of them mention these seats, so they are 'famous' in a way."

Bear Den Mountain

September 12, 2007

<http://www.summitpost.org/mountain/rock/238499/bear-den-mountain.html>



4 Hikers at Tractor seats

Taken while working on Exhibit C. of this report.

Otto Pebworth September 4, 2009

<http://home.ntelos.net/~archive/IMG1792.JPG>

"We headed up Bear Den Mountain and spotted six to eight old, steel tractor seats mounted in the ground overlooking the valley, and indication someone else must have been impressed with the views."

White Blaze Fever: Georgia to Maine on the Appalachian Trail Page 127

William Schuette

© 2003 ISBN 1-5-58939-430-5

Virtualbookworm.com Publishing, Inc.

College Station TX



"Well even though it was raining I had to have pic taken in one of the tractor seats that are near the radio towers up on Bear Den Mt in SNP just north of Rockfish Gap."

Bear Den Radio Towers

<http://whiteblaze.net/forum/vbg/misc.php?do=printimage&i=28091>



*"I've always thought these old tractor seats were cool too! I have no idea who put them here or how long they have been here. They face west and have a decent view over the Shenandoah Valley although I imagine that the views were probably even better when they were first installed as the trees would have been smaller. I must admit **Marilyn ** that the angle they have settled into is not entirely comfortable! Thanks again!"*

Front Row Seats on Bear Den Mountain
August 10, 2008
<http://www.panoramio.com/photo/12928045>

"Up on top of Bear Den Mountain, amongst the radio towers, repeaters and broadcasters, I found a bunch of tractor seats. All had been driven into the ground on a springy post, all facing west towards the valley. It was a nice spot for a break, what with that tough berry-picking session."

Rockfish Gap - 6.9 - Calf Mtn. Shelter
<http://at.waldo.net/journal/719.htm>



[Stu-Comm / WVTU tower in background -ed.]

Greylock on tractor seats on Bear's Den Mt.
Trail Journals
March 22, 2004
<http://www.trailjournals.com/photos.cfm?trailname=1961>

"Bill told us that the farmer who used to own the land on Bear Den Mountain had placed all his old tractor seats in a semi-circle for use during family reunions."



"The view was spectacular and I noted that a tractor seat is designed perfectly to hold the immense weight of my backpack as I checked out the scenery."



Birdcouple's A. T. Blog
<http://birdcoupleatblog.blogspot.com/2007/09/memorial-day-weekend-in-woods.html>

"Near the southern end of the park on the Appalachian Trail, you'll find Bear Den Mountain, with a field in which a farmer once planted seven tractor seats that even today command panoramic views of the immense Blue Ridge landscape."

and driving Skyline Drive—not to be confused with the Blue Ridge Parkway to the south—you will find evidence of other parts of Shenandoah's geological story, including vast inland seas and great volcanic activity.

Human history has been well preserved in Shenandoah. It begins with Dickey Ridge in the north, not far from the Dickey Ridge Visitor Center. Among the stories that unfold are episodes from the Civil War at Signal Knob, where old diaries tell us that Marcus Buck watched the Battle of Overall Run. Near the southern end of the park on the Appalachian Trail, you'll find Bear Den Mountain, with a field in which a farmer once planted seven tractor seats that even today command panoramic views of the

immense Blue Ridge landscape.

Shenandoah offers a full range of visitor services and accommodations from lodges to cabins to campsites. Come, visit, and linger—and allow the spirit of "the daughter of the stars" to touch your soul.



Old tractor seats still provide great panoramic views.

Shenandoah National Park Pocket Guide
By Bert Gildart, Jane Gildart
© 2008 ISBN 978-0-7627-4809-9
Morris Book Publishing, LLC Falcon Guides

"Shuttling back and forth with the moped, I never was sure if I was hiking north or south but I was sweating and knew I was going up hill on Bear Den Mountain, then put on a jacket while having a snack, sitting on reclaimed tractor seats, courtesy of some trail maintainer in the past."

Hiker Experiences 1.2
http://www.bmecc.org/lew_06_00.htm

"I was thrilled to find the tractor seats on Bear Den Mtn. Memories from 1977 came flooding back. I have thought of this place often and couldn't remember where it was along the trail. This time I was alone."

Mrs Gorps 2002
Appalachian Trail Journal
<http://www.trailjournals.com/entry.cfm?id=24230>



"Old tractor seats on the summit of Bear Den Mountain made for an excellent resting place and provided quite a view to the west." (6/9/99 4:38)

Day 56 - Day 67 of Reed's AT Adventure
<http://www.csh.rit.edu/~vance/reed/pages/at062599.html>

"I barely noticed the rows of tractor seats that someone had planted on a hill side as either a resting spot or as a work of art."

Life in the Green – The Appalachian Trail, Summer 2004 May 26, 2004
<http://cwilletts.imathas.com/at04/va3.html>

"Bear's Den Mountain did have its own bit of character. The top was filled with nearly a dozen communications towers of several types, which are always an eyesore but understandable necessary evils. The clearing for the towers did make for good views from the top, and some thoughtful, if not eccentric, individual had planted several old metal tractor seats into the ground in a semi-circle."

Trail Journals Mobile
's 2000 Appalachian Trail Journal
<http://trailjournals.mobi/index.cfm?entryid=256988>



The A.T. is a hiking trail, enjoyed by an estimated 4 million people each year. It is within a day's drive of 2/3rds of the U.S. population. People of all ages and abilities enjoy short walks, day hikes, and long-distance backpacking journeys. It offers a variety of opportunities for viewing spectacular scenery, for exploring, for adventure, for exercise, for nature study, and for renewal.

National Park Service Brochure

Exhibit C.

Tractor Seats Location - Bear Den Mountain

On September 4, 2009, the location of the Tractor Seats on Bear Den Mountain, relative to the interference contour stipulated by Stu-Comm, Inc. in application BPFT-20090819AHH was determined using a professional-grade transit and overlay fitting techniques using aerial photography.

The reference point is the point of the boulder located within the semi-circle prescribed by the tractor seats.

| Point | Angle |
|--------------|-----------|
| WVTF tower | 0.0 deg |
| AT&T tower | 9.9 deg |
| VSP tower | 51.9 deg |
| road | 84.4 deg |
| Dominion twr | 112.7 deg |



The various radials were plotted on a transparent overlay using CADD drafting techniques. The overlay was rotated and aligned for best fit using high resolution aerial photography showing a better view of the towers but at the same scale as the photography supplied by Stu-Comm. The location of easily identifiable trails were marked on the transparency to assist in aligning with Stu-Comm's exhibit. The overlay was then placed at the appropriate location on Stu-Comm's exhibit and plainly shows that the Tractor Seats on Bear Den Mountain are well within the interference zone as defined in Stu-Comm's application.



Exhibit D.

Hiker Statistics

An Appalachian Trail 2000-miler is a hiker who has completed the entire trail from Georgia to Maine. Each one of these hikers will, in the course of this endeavor, pass through the interference zone at Bear Den Mountain.

These are the statistics concerning 2000-milers, as provided by the Appalachian Trail Conservancy.

| Year | # Recorded |
|------|------------|
| 2008 | 532 |
| 2007 | 508 |
| 2006 | 515 |
| 2005 | 554 |
| 2004 | 584 |
| 2003 | 604 |
| 2002 | 597 |
| 2001 | 625 |
| 2000 | 635 |


Source:

http://www.appalachiantrail.org/site/c.mqLTIYOWGlF/b.4805585/k.E18/2000Miler_Count_by_Year.htm

AFFIDAVIT

Commonwealth of Virginia)
)
City of Harrisonburg) ss:

William D. Fawcett, having been first duly sworn upon oath, states that he is an *Electronic Manager I* employed by the Commonwealth of Virginia; and that he is the holder of a First Class Radiotelephone Operator License P1-23-12550, issued July 13, 1978 and replaced by a Lifetime General Radio Telephone Operator License number PG-4-10874; that his qualifications are a matter of record before the Federal Communications Commission; that the foregoing exhibits were prepared under his direction; and that the statements contained therein are true of his own personal knowledge, except those stated to be information on belief, and as to those, he believes them to be true.



William D. Fawcett

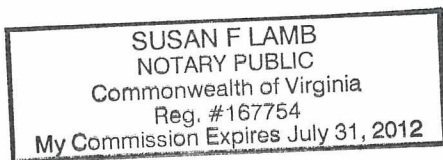
Subscribed and sworn to before me this 7th day of October 2009.



Notary Registration Number
167754

Susan F. Lamb
NOTARY PUBLIC (SEAL)

My commission expires
July 31, 2012



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 Petition for Reconsideration was sent to:

Mr. Michael C. Friend
General Manager
Stu-Comm, Inc.
2250 Old Ivy Road
Charlottesville, Virginia 22903

September 7, 2009

By: Twila K. Yoder
Twila King Yoder
Corporate Secretary