



**Federal Communications Commission
Washington, D.C. 20554**

Aug 8, 2017

In Reply Refer to:
1800B3-KV

William D. Fawcett
James Madison University
Board of Visitors
983 Reservoir Street
Harrisonburg, VA 22801

Twila King Yoder
The Board of Trustees of
Eastern Mennonite University
1200 Park Road
Harrisonburg, VA 22802

David D. Oxenford, Esq.
Wilkinson Barker Knauer, LLP
2300 N St NW
Washington, DC 20037

In re: Application for a Minor Modification of
W201CN, Afton, VA
Facility ID No. 93681
Virginia Tech Foundation, Inc.
File No. BPFT-20100629AXN

Informal Objections

Dear Counsel and Objectors:

We have before us the referenced application for a minor modification (Application) of FM translator Station W201CN, channel 201, Afton, Virginia (Station) filed by then-licensee Stu-Comm, Inc. (Stu-Comm).¹ Also before us are: 1) an Informal Objection, filed on July 16, 2010, by the Board of Trustees of Eastern Mennonite University (EMU and EMU Objection); and 2) an Informal Objection, filed on July 16, 2010,² by James Madison University Board of Visitors³ (JMU and JMU Objection).⁴ For

¹ On April 21, 2014, Stu-Comm assigned the Station to the current licensee the Virginia Tech Foundation, Inc. (Virginia Tech or Licensee). *See* File No. BALFT-20140117AAY.

² The Bureau's consolidated database (CDBS) erroneously lists the JMU Objection as filed on July 15, 2010, but it is date stamped as received on July 16, 2010. In addition, the JMU Objection, as originally filed, erroneously lists Station W218BZ, Crozet, Virginia in the caption. On September 3, 2010, JMU resubmitted the objection with a corrected caption.

³ Collectively, the EMU Objection and the JMU Objection will be referred to as the Objections.

the reasons set forth below, we deny the Objections and grant the Application.

Background. The Application seeks to change the Station's directional antenna, increase effective radiated power (ERP) to 0.125kW, and operate as a "fill-in" translator for the co-owned noncommercial educational (NCE) station WVTU(FM), channel 207B1, Charlottesville, Virginia.⁵ If granted, the Station will be co-located with WVTU(FM)⁶ and carry its HD-2 channel.⁷

The Application proposes a transmitter site that is within the protected contour of the co-owned NCE second-adjacent channel station WVTW(FM), channel 203B1, Charlottesville, Virginia.⁸ Specifically, the Station's 100 dBu interfering contour overlaps the 60 dBu protected contour of WVTW(FM) in violation of Section 74.1204⁹ of the FCC's rules (Rules). Because of the predicted overlap with WVTW(FM) the Application includes a request for waiver pursuant to Section 74.1204(d) which provides that "an application otherwise precluded by this section will be accepted if it can be demonstrated that no actual interference will occur due to . . . lack of population."¹⁰ Citing *Living Way Ministries, Inc.*,¹¹ which provides guidance on when an area will be found to lack population, the Application states:

As shown on the map, the interfering contour covers approximately 200 meters of the Appalachian Trail. The roads inside the 100 dBu contour are privately owned, and they are isolated from the Skyline Drive by locked gates, preventing vehicular access by the general public. There are several unoccupied buildings inside the contour that house communications and broadcast equipment, however, no building is occupied by any person as a dwelling

Any person inside the 100 dBu contour would generally be either an electronic technician visiting one of the communications or broadcast facilities on an irregular basis or a hiker passing through on an irregular basis. The general public is precluded from driving to the site by the locked gates on the access roads . . . [I]f a person were present inside the 100 dBu contour: (1) they would not live there, (2) they would not work there on a regular basis, and (3) they would not regularly travel there.¹²

In support of the contention that there are not regular listeners within the interfering contour, the Application includes engineering showings and an area U.S. Geological Survey Topographic Map (USGS Topographic Map).

In its Objection, EMU argues that the Application does not qualify for waiver under Section 74.1204(d) because "Section 74.1204(d) is applicable only if there is 'no population, not merely low or negligible population'"; and the interference area is not unpopulated.¹³ EMU claims that the Application

⁴ Neither the previous licensee nor the current licensee filed a response to the Objections.

⁵ Application, Exhibit 10.

⁶ On the shared tower, the Station will set its antenna at 28 meters; the WVTU(FM) antenna is set at 37 meters. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ 47 CFR § 74.1204.

¹⁰ 47 CFR §74.1204(d).

¹¹ *Living Way Ministries, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 17054 (2002), *recon. denied*, 23 FCC Rcd 15070 (2008) (*Living Way*).

¹² Application, Exhibit 10 at 1.

¹³ EMU Objection at 2 (quoting *State of Oregon Acting by and Through the State Bd. of Higher Educ. for the Benefit of Southern Oregon State Coll.*, Letter, 15 FCC Rcd 11842, 11844 (MB 2000) *recon. denied*, 16 FCC Rcd 4344, 4345 (MB 2001)).

incorrectly lists the interference area as covering 200 meters of Appalachian Trail, but in fact encompasses 370 meters.¹⁴ EMU asserts that the proposed site is used primarily for public recreation and “although specific hikers may visit on an irregular basis, *the presence of hikers in the interference zone is a regular daily occurrence.*”¹⁵ In addition, EMU claims that the roads in the interference area are partially paved; located on public land; and accessible by vehicle to National Park Service employees and by foot to said employees as well as hikers.¹⁶ EMU alleges that this part of the Appalachian Trail “is visited by hundreds, if not thousands of people on a *regular basis.*”¹⁷ EMU reports that during the year 2008, 1652 hikers registered at a hiker registration station located 3.5 miles south of the proposed site.¹⁸

In its Objection, JMU argues that the Application violates the purpose and permissible service of translator stations. JMU notes that the Station will be co-located with the primary station WVTU(FM). JMU alleges this violates Section 74.1231(a)¹⁹ which states that “FM translators provide a means whereby . . . stations may be retransmitted to areas in which *direct reception . . . is unsatisfactory due to distance or intervening terrain barriers.*”²⁰ JMU contends that “[s]ince the proposed station specifies the same distance and intervening terrain barriers to potential listeners as the parent station (at essentially the same power level) it does not comport with the Commission’s codified definition of ‘purpose and permissible service.’”²¹

Discussion. Informal objections, like petitions to deny, must provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the application would be prima facie inconsistent with the public interest, convenience, and necessity.²² As discussed below, the Objectors have failed to meet this standard.

Regarding the issue of predicted interference between the Station and WVTW(FM), Section 74.1204(d) of the Rules states that “an application otherwise precluded by this section will be accepted if

¹⁴ *Id.* at 4-5. EMU states that “the heavy dashed line on the topographical map in the applicant’s exhibit which is labeled ‘Hiking Trail’ is not a hiking trail but is actually the Albemarle/August County line.” *Id.* at 4. EMU declares that its map, which “was prepared from orthophotographs prepared in 2009 and that imagery was compared with 2007 and 2002 imagery” *Id.*, Exhibit B. shows the “actual current location of the Appalachian National Scenic Trail with approximately 370 meters of it located within the interference zone” *Id.* at 4-5.

¹⁵ *Id.* at 3. (emphasis original).

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* (emphasis original).

¹⁸ *Id.*, Exhibit C, Figure 1 (email from Karen Beck-Herzog, Management Assistant/Public Affairs Officer, Shenandoah National Park (dated Oct. 15, 2009)).

¹⁹ 47 CFR § 74.1231(a).

²⁰ JMU Objection at 5-6. (quoting 47 CFR § 74.1231(a) (emphasis added)).

²¹ *Id.* JMU also argues that: 1) the Station is not allowed to increase its ERP to more than 10 watts, because Section 74.1235(a) only permits fill-in translators to increase ERP up to 250 watts when the application is filed by the primary station licensee or permittee; and 2) the Application lacks a required technical need showing because then-licensee, Stu-Comm, had a second application to operate a fill-in translator station for WVTU(FM) on Station W266BQ, Crozet, Virginia (W266BQ and W266BQ Application) which was co-located with WVTU(FM) and the instant Station; JMU claims that Section 74.1232(b) only permits co-located, commonly owned translators when there is a technical need showing. We find these arguments to be moot. As noted *supra* note 1, on April 21, 2014, Virginia Tech acquired the Station license. Therefore, Section 74.1235(a) permits an ERP of up to 250 watts because Virginia Tech holds both the primary station licensee and the fill-in translator application. Similarly, JMU’s argument that there is a “multiple translator issue” is moot as Virginia Tech is not the licensee of the cited translator station, W266BQ, which remains licensed to Stu-Comm.

²² See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *reh’g denied* (Sept. 10, 1993); and *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 para. 6 (1986) (informal objection must contain adequate and specific factual allegations sufficient to warrant the relief requested).

it can be demonstrated that no actual interference will occur due to . . . lack of population.”²³ In *Living Way*, the Commission opined that Section 74.1204(d) is “designed to protect listeners and potential listeners . . . [i.e.] those who live, work or regularly travel in an area.”²⁴ The Commission noted “[t]hat this standard conforms to broadcast standing requirements”²⁵ which requires more than transient contacts with a station. The Commission further stated:

USGS Topographic Maps may be used to presumptively establish the presence or absence of population in an area where ‘actual interference will occur’ . . . Where a USGS Topographic Map depicts residences, commercial or industrial areas, or major roads, e.g. interstate highways, within an area of predicted interference, or other potentially occupied sites where one would expect listeners, we will presumptively conclude that the ‘lack of population’ exception does not apply. Conversely, where the USGS Topographic Map does not depict structures, major roads, or other potential listening sites within the area of predicted interference, and where there are no conflicting data such as information about recently developed structures, we will presume that the Section 74.1204(d) exception does apply.”²⁶

Licensee attaches an area USGS Topographical Map and states that, in the predicted interference area there are roads, but these are private and behind locked gates. Licensee further reports that there are structures in the predicted interference area, but these are unoccupied and used only to store communications and broadcast equipment.²⁷ Therefore, Licensee asserts that “any person [in the predicted interference area] . . . would generally be either an electronic technician visiting one of the communications facilities or broadcast facilities on an irregular basis or a hiker passing through on an irregular basis.”²⁸ EMU characterizes the roads in the predicted interference area as “partially paved” and accessible by vehicle only to National Park Service employees. Thus, by EMU’s own admission, they are not “major roads, e.g. interstate highways.”²⁹ Regarding the structures in the predicted interference area, EMU does not dispute Licensee’s claim that they are unoccupied. As to travelers in the predicted interference area, EMU states that “specific hikers may visit on an irregular basis, [but] the presence of hikers . . . is a regular daily occurrence.”³⁰ Hence, per EMU’s statement, these hikers are, at most, irregular listeners because, similar to a tourist, they do not “regularly travel in an area.”³¹ Therefore, we find that Licensee has met the requirements set forth in Section 74.1204(d) because the 100 dBμ interfering contour does not encompass any regular listeners.

With respect to the JMU Objection, we find its arguments concerning the permissible purpose and service of a translator station to be unpersuasive. JMU asserts that “co-location of the translator with the primary station is . . . an impermissible use under the present rules.”³² JMU declares that because the Station “specifies the same distance and intervening barriers to potential as the parent station . . . [it]

²³ 47 CFR § 74.1204(d).

²⁴ *Living Way*, 17 FCC Rcd at 17058-17059, para 11. (emphasis in original).

²⁵ *Id.* at 17060, note 30 (citing *Maumee Valley Broad., Inc.*, 12 FCC Rcd 3487, Memorandum Opinion and Order, (1997) as modified by *CHET-5 Broad., L.P.*, 14 FCC Rcd 13041, Memorandum Opinion and Order (1999) (broadcast standing requires residency in the station’s service area or regular listener or viewer of the station).

²⁶ *Id.* at 17059, para. 12.

²⁷ Application at Exhibit 10 at 1.

²⁸ *Id.*

²⁹ *Living Way*, 17 FCC Rcd at 17059, para. 12.

³⁰ EMU Objection at 3.

³¹ *Living Way*, 17 FCC Rcd at 17059, para. 11.

³² JMU Objection at 6.

does not comport with the . . . ‘purpose and permissible service’³³ of FM translators. We disagree. Collocation of the Station with the primary station to be rebroadcast is, for purposes of compliance with the Rules, irrelevant unless the applicant owns or proposes another FM translator serving substantially the same area which, as discussed above, is not the case here. Indeed, the staff has routinely authorized FM translator facilities to be collocated with the primary station rebroadcast.³⁴ Thus, we find no violation of the Rules by collocating the station and WVTU(FM).

Conclusion. Based on our review of the Application and the Objections, we find that EMU and JMU have failed to raise a substantial and material question of fact against grant of the Application. We also find that the Application comports with all pertinent statutory and regulatory requirements and that its grant would further the public interest, convenience, and necessity.

Accordingly, IT IS ORDERED, that the July 16, 2010, Informal Objection filed by the Board of Trustees of Eastern Mennonite University IS DENIED.

IT IS FURTHER ORDERED that the July 16, 2010, Informal Objection filed by James Madison University IS DENIED.

IT IS FURTHER ORDERED that the application of Virginia Tech Foundation, Inc. for a minor modification of FM translator Station W201CN, Afton, Virginia (File No. BPFT-20100629AXN) IS GRANTED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

cc: Mr. Michael C. Friend, General Manager, Stu-Comm, Inc
Mr. William D. Fawcett, Chief Engineer, WMRA

³³ *Id.*

³⁴ *See, e.g.*, File Nos. BPFT-20090108ACR, BPFT- 20100402ABS.