

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

**ORIGINAL**  
**FILED**  
**11/2/09**

In re Application of: )  
STU-COMM, INC. )  
For Authority to Construct or Make )  
Changes in FM Translator Station )  
W218BZ, Crozet, Virginia (FIN-91283) )

FILED/ACCEPTED  
OCT 21 2009  
File No. BPFT-20090819AHH Federal Communications Commission  
Office of the Secretary

To: Commission's Secretary, Office of the Secretary  
Attn: Media Bureau

**OPPOSITION TO PETITION FOR RECONSIDERATION**

Stu-Comm, Inc. ("Stu-Comm"), licensee of FM translator W218BZ, Crozet, Virginia, by its attorneys and pursuant to Section 1.106(g) of the Commission's Rules,<sup>1</sup> hereby opposes the Petition for Reconsideration ("Petition") filed by the Board of Trustees of Eastern Mennonite University ("EMU").<sup>2</sup> By its Petition, EMU ostensibly seeks reconsideration of the grant of the above-captioned construction permit authorizing W218BZ to modify its facilities in order to improve service to the community of Crozet, Virginia. In reality, however, EMU's Petition appears to simply be an abuse of the Commission's processes. It is noted that the Petition filed by EMU is strikingly similar to the Petition for Reconsideration filed by the James Madison University Board of Visitors ("JMU") in this matter, with the main exception that EMU has even

<sup>1</sup> 47 C.F.R. §1.106(g).

<sup>2</sup> The Petition appears to have been filed with the Commission on October 8, 2009. Accordingly, this Opposition is timely filed consistent with Sections 1.4 and 1.106 of the Commission's Rules.

less of a basis for standing in this case, and even fewer substantive grounds supporting its filing.<sup>3</sup>

Both Petitions appear to have been drafted by the same party, and appear to be an orchestrated attempt to delay, obfuscate, and harass Stu-Comm in its operation of the above-referenced translator.

First, the EMU Petition does not appear to be signed or contain the address of the signatory, rendering it unacceptable for filing.<sup>4</sup> The lack of an address or signature on the pleading raises significant concerns about whether this filing was truly authorized by the Board of Trustees of Eastern Mennonite University. Consistent with the Commission's Rules, the pleading should "be stricken as sham and false, and the matter proceed as though the document had not been filed."<sup>5</sup> Accordingly, EMU's Petition for Reconsideration should be summarily dismissed and the Petitioner admonished.

Moreover, this pleading contains no verification. The pleading was not filed by an attorney. Numerous Commission cases have held that a pleading filed by a party other than an

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<sup>3</sup> Simultaneously herewith, Stu-Comm is also filing an Opposition to the Petition for Reconsideration filed by JMU.

<sup>4</sup> The undersigned counsel obtained copies of both the EMU and JMU Petitions directly from the FCC's files. Consistent with the service copies received by Stu-Comm, the copies of the Petitions received by the FCC's mail room and retrieved from its records were unsigned and contained no address for the party listed as the signatory. Section 1.106(i) of the Commission's Rules states that Petitions for Reconsideration must conform, *inter alia*, to Section 1.52, which in turn states that "[t]he original of all petitions, motions, pleadings, briefs, and other documents filed by any party represented by counsel shall be signed by at least one attorney of record in his individual name, whose address shall be stated. **A party who is not represented by an attorney shall sign and verify the document and state his address.**" 47 C.F.R. § 1.52 (emphasis added).

<sup>5</sup> "If the original of a document is not signed or is signed with intent to defeat the purpose of this section, or an electronic reproduction does not contain a facsimile signature, **it may be stricken as sham and false, and the matter may proceed as though the document had not been filed.** An attorney may be subjected to appropriate disciplinary action, pursuant to §1.24, for a willful violation of this section..." 47 C.F.R. § 1.52 (emphasis added).

attorney must contain a verification under oath.<sup>6</sup> The Commission has made clear that in order to satisfy the verification requirement of Section 1.52 the verification must contain “a statement by [an officer/director of the petitioner] that he has read the document; that to the best of his knowledge, information, and belief, there is good ground to support the document, and that it has not been interposed for delay. Such statement must be sworn under oath before a notary public.”<sup>7</sup> As no such verification was submitted, the pleading must be dismissed.<sup>8</sup>

The Petition should also be dismissed on the grounds that EMU has utterly failed to demonstrate that it has been adversely affected by the grant of this construction permit or that it could not have participated earlier in this proceeding, and thus, it has no standing to seek reconsideration in this matter. Pursuant to Section 1.106(b)(1), an entity that was not a party to the proceeding, which EMU was not in this case, may nonetheless seek reconsideration if its interests are adversely affected by the underlying decision.<sup>9</sup> EMU claims to be “involved in proceedings against the licensee of the primary (parent) station” which is to be rebroadcast by W218BZ,<sup>10</sup> but how that is relevant or why that should afford it standing in *this* matter is entirely unclear. In fact, EMU can point to no actual harm it will experience as a result of the Media

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<sup>6</sup> See, e.g., *Belo Broadcasting Corp.*, 39 RR 2d 899 (ALJ 1977); *Canton, Farmington, Elmwood*, 3 FCC Rcd 5824 (PRD 1988); *Cape Girardeau, Missouri*, 51 FCC 2d 492 (1975).

<sup>7</sup> *Belo Broadcasting Corp.*, 39 RR 2d 899 (ALJ 1977) at ¶ 5.

<sup>8</sup> Included among the attachments to the pleading is a declaration from an engineer in support of the technical exhibits. The declaration, however, is not from an authorized officer or director of EMU, fails to cover the requisite elements (including the fact that the Petition has not been interposed for the purpose of delay), and does not appear to be signed.

<sup>9</sup> 47 C.F.R. §1.106(b)(1). Specifically, the Rules requires that if a petition for reconsideration is filed by a person other than a party to the proceeding “it shall state with particularity the manner in which the person’s interests are adversely affected by the action taken, and shall show good reason why it was not possible for him it participate in the earlier stages of the proceeding.” See also 47 USC §405(a).

<sup>10</sup> Petition at 2.

Bureau's action in this case, and its filing is at best an attempt to rehash an old argument that it has already made in a different proceeding.

Moreover, EMU has failed to demonstrate that it was unable to participate earlier in this proceeding, which is a prerequisite to the Commission's consideration of the substantive issues raised by the Petition. Although a formal Petition to Deny would not lie against a minor modification application for an FM translator, pursuant to Section 73.3587 of the Commission's Rules, EMU had the opportunity to file an informal objection against the pending application at any point prior to the Media Bureau's action on the application. EMU failed to file an informal objection or comments of any kind, and thus it lacks standing to now seek reconsideration of the Media Bureau's decision. As the Commission has clarified:

The Commission has previously determined that, where a petitioner is precluded from filing a petition to deny, its submission of an informal objection is sufficient to confer standing to file a reconsideration petition. **Where, however, such a potential participant could have, but did not, file an informal objection, the Commission has found that it lacks standing to then file a reconsideration petition.** Accordingly, [petitioner] has not met the burden imposed by Section 1.106(b)(1) of the Commission's rules of demonstrating why he could not have participated earlier by means of filing an informal objection.<sup>11</sup>

The W218BZ minor modification application was accepted for filing on August 20, 2009, giving EMU at least fourteen days in which to file an objection to the application before the application was granted on September 4, 2009. It failed to do so, and its assertion that it was unable to file an informal objection before the Media Bureau acted because EMU erroneously believed the change sought by the application to be a major modification is unavailing. The application clearly indicated at all times that it was a minor modification of the licensed facilities of

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<sup>11</sup> Letter from Peter H. Doyle, Chief, Audio Division, Media Bureau to David D. Oxenford, Esq., et al., 22 FCC Rcd 5635, rel. March 29, 2007 (emphasis added)(citations omitted); see also, *Davidson County Broadcasting Co., Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 1689, 1690 (1993)).

W218BZ. Thus, it could come as no surprise that it was processed as such. The fact that EMU was unfamiliar with the Media Bureau's policy for processing displacement applications<sup>12</sup> is no justification for its failure to file an appropriate informal objection in this matter.<sup>13</sup> Just as in the earlier case cited above, EMU's failure to file an informal objection to the W218BZ application precludes it from now seeking reconsideration of the grant of the application, and its Petition must be dismissed.

Although the Petition should be dismissed without consideration, Stu-Comm takes the opportunity to address briefly one point raised by the Petition, namely compliance with Section 74.1204(d). This issue has been well covered by the Commission and is an area of settled law. The Commission has clarified previously how applicants may show that no population is present

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<sup>12</sup> Despite the fact that the application sought to change the operating channel of W218BZ Channel 218 to Channel 266, the application was properly filed and processed as a minor change in licensed facility consistent with the Media Bureau's displacement policy. In circumstances where a translator station is effectively displaced from operating on any first, second, or third adjacent channel or any intermediate frequency channel, such as with W218BZ, it has been the established policy of the Media Bureau to permit such displaced translators to seek relocation to a non-adjacent channel as a minor modification. This policy is consistent with the Commission's treatment of low power television stations and television translator stations, which are permitted to seek a displacement channel as a minor change, rather than waiting for a major change window. *See, e.g.*, 47 C.F.R. § 73.3572(a)(4).

The Media Bureau's action in this case is not unique, and it is believed that the Bureau has previously granted numerous other similarly situated applications pursuant to this policy. To the extent that EMU was previously unaware of this policy or takes issue with the Media Bureau's practice, the proper avenue is to file a Petition for Rule Making or a Request for Declaratory Ruling regarding the policy and not to file a Petition for Reconsideration against this particular application. The Commission cannot single out this application for treatment different from that which it has afforded to other similarly situated applicants.

<sup>13</sup> Furthermore, although the Petition states – just as the JMU Petition did – that EMU was undertaking “field work” to support a Petition to Deny and was about to file when the FCC granted the application (Petition at 4), there is no evidence of, or documentation from, such field work. Thus, even with additional time to prepare an objection it appears that EMU would not have been able to articulate any specific harm or further basis for objection. Accordingly, EMU has not been prejudiced by the Media Bureau's timely action in this case.

for purposes of Section 74.1204(d).<sup>14</sup> Here, Stu-Comm's consulting engineer made an appropriate showing that there are no persons that live, work, or drive through the narrow area of potential interference created by the W218BZ application.<sup>15</sup> Thus, the fact that a hiking path goes past the existing transmitter site proposed to be used by W218BZ, as EMU contends, is irrelevant, and does not violate Section 74.1204(d). More to the point, as EMU is not the licensee of WQPO(FM), Harrisonburg, Virginia, the second-adjacent channel to which any possible interference would be caused, it is unclear what exactly EMU's basis is for raising this objection. EMU has previously made similar arguments against other translator applications filed by Stu-Comm and the Virginia Tech Foundation, Inc. (the licensee of the primary station to be rebroadcast by W218BZ),<sup>16</sup> and apparently it refuses to accept the FCC's guidance on the issue of population for purposes of 74.1204(d). EMU's insistence on continuing to raise the same tenuous issue appears to simply be an attempt to delay an otherwise acceptable application. The fact that this issue is the only new substantive issue raised by EMU's Petition is emblematic of the true nature of the filing.

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<sup>14</sup> *Living Way Ministries, Inc.*, 17 FCC Rcd 17054 (2002), *recon denied*, FCC 08-242, rel. Oct. 10, 2008 (setting forth standard for determining a lack of population under Section 74.1204(d)).


<sup>15</sup> Under the Commission's translator interference rules, an application is acceptable pursuant to Section 74.1204(d) if the applicant is able to demonstrate that no actual interference will occur due to a lack of population. 47 C.F.R. § 74.1204(d). Such is the case here, as there is no population inside the overlap area caused with second-adjacent channel WQPO(FM), Harrisonburg, Virginia. *See* Engineering Exhibit to FCC File BPFT-20090819AHH at 1-2.

<sup>16</sup> *See, e.g.*, FCC File No. BPFT-20090508ABT; FCC File No. BNPFT-20080612ABJ.

## CONCLUSION

In sum, EMU has no standing to seek reconsideration, has failed to comply with the Commission's subscription and verification rules, and has raised an issue of settled law that it knows to be a nonstarter. EMU's Petition is a waste of both the Commission's time and resources and Stu-Comm's, and should be dismissed expeditiously. Ultimately, the Media Bureau's decision must be upheld as the grant of the Stu-Comm application was wholly consistent with FCC policy and procedure. There is no legitimate reason as to why the minor modification approved for W218BZ is not in the public interest, and thus grant of the above-captioned construction permit must be affirmed.

**STU-COMM, INC.**

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Dated: October 21, 2009

**CERTIFICATE OF SERVICE**

I, Rhea Lytle, a secretary with the law firm of Davis Wright Tremaine LLP, do hereby certify that I have this 21<sup>st</sup> day of October 2009, mailed by first-class United States mail, postage prepaid, copies of the foregoing **“OPPOSITION TO PETITION FOR RECONSIDERATION”** to the following:

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