

DOCKET FILE COPY ORIGINAL

ORIGINAL  
RECEIVED

DOCKET FILE COPY ORIGINAL

DEC 22 1992

BEFORE THE

**FEDERAL COMMUNICATIONS COMMISSION**  
FEDERAL COMMUNICATIONS COMMISSION  
SECRETARY

**Washington, D.C.**

93-52

In re Application of )  
 )  
 COMMUNITY EDUCATIONAL ) File No. BPED-920511MB  
 SERVICE COUNCIL, INC. )  
 )  
 For Construction Permit for )  
 A New Noncommercial )  
 Educational FM Radio Station )  
 on Channel 278A at Crozet, )  
 Virginia )

TO: Chief, Audio Services Division  
STOP CODE 1800B

DEC 23 3 16 PM '92  
 AUDIO SERVICES DIVISION  
 RECEIVED

REPLY

The Board of Visitors of James Madison University ("JMU"), by its attorneys and pursuant to Section 309(d)(1) of the Communications Act of 1934, as amended (the "Communications Act") and Section 73.3584 of the Commission's Rules, replies to the "Opposition to Petition to Deny" ("Opposition") and "Motion for Acceptance of Untimely Filing" ("Motion") filed by Community Educational Service Council, Inc. ("CESCI") on December 11, 1992. CESCI's Opposition is

~~...and its Motion for acceptance of the~~

## 1. CESCO's Opposition is Procedurally Defective

CESCI's Opposition is late without good cause. CESCO admits its tardiness in a separate pleading styled "Motion for Acceptance of Untimely Filing." JMU filed its petition to deny CESCO's application on October 21, 1992. Pursuant to Sections 73.3587(b) and 1.45(a) of the Commission's Rules, any opposition to JMU's petition was due at the Commission on November 4, 1992. CESCO's pleading was over one month late.<sup>1/</sup>

In its Motion, CESCO claims that the Opposition is late because CESCO is proceeding without the benefit of counsel and was ill-informed about Commission rules. This is unavailing. CESCO choose not to retain counsel--its choice does not render the rules inapplicable. Indeed, as an applicant for an FCC license, CESCO must be responsible for informing itself of Commission rules. Item B to the Instructions for FCC Form 340 bids an applicant to become familiar with Commission rules, including those in Parts 1 (Practice and Procedure) and 73 (Radio Broadcast Services) before filling out an application. CESCO's failure to do so only reinforces JMU's contentions that CESCO is not qualified to be a Commission license and that the site assurance given in its application is fatally defective and violates proper Commission procedures.

---

<sup>1/</sup> CESCO's pleading also fails to comply with the Commission's specifications for pleading in Section 1.49 of the Commission's rules.

Furthermore, receipt of an opposition should hardly come as a surprise to a competing applicant whose application appears on an FCC cut-off list. See Report No. B-149 (released September 22, 1992). The cut-off list explicitly notified CESCO and other interested parties that any petitions to deny the CESCO application would be due at the Commission by October 23, 1992. CESCO was well-informed enough to file its own application on the cut-off date for applications mutually exclusive with JMU's application; it cannot credibly claim ignorance of Commission rules and policies concerning cut-off lists.

For these reasons, CESCO's motion for acceptance of its late-filed Opposition should be denied and its Opposition rejected.

**2. CESCO Never Had Reasonable Assurance of Site Availability and Does Not Have Reasonable Assurance Now.**

CESCO claims that "it made a good faith effort to secure a reasonable assurance of site availability, by way of telephonic conversation, and an informal agreement." The attached Declaration of Henry Chiles, the site owner, rebuts this claim. Mr. Chiles does not recall ever speaking with Karl Johnson, let alone agreeing to allow CESCO use of the Castle Rock Site. Mr. Chiles's business records do not reflect that reasonable assurance was given to CESCO through Karl Johnson. CESCO cannot rely on reasonable assurance of site availability from a site owner who does not recall the conversation or the agreement.

Also, the Declaration of Karl Johnson is devoid of any details lending credence to his assertions. Mr. Johnson does not specify whether he telephoned Mr. Chiles' home or office; he does not state whether he ever spoke with or left messages with Mr. Chiles' secretary or a Chiles family member; he does not list the dates and times he tried to reach Mr. Chiles in April 1992; he does not flesh out the topics or substance of the "brief conversation" that he allegedly had with Mr. Chiles on May 6, 1992; he does not state whether he told Mr. Chiles that the planned facility was a noncommercial educational broadcast station; he does not indicate that price terms were discussed or that CESCO's planned height above ground level was discussed; he does not state whether he informed Mr Chiles that CESCO's application was mutually exclusive with, and specifying the exact same antenna height as, JMU's application; and he does not indicate that he ever left a name, number or mailing address with Mr. Chiles so that Mr. Chiles' knew how, or where, to contact CESCO should the site become unavailable.<sup>2/</sup>

Noticeably, CESCO did not provide any evidence that it had discussed with Mr. Chiles the cost of leasing the Castle Rock Site. Without inquiring of Mr. Chiles about the cost of leasing his site, CESCO could not reasonably certify that

---

<sup>2/</sup> The case CESCO cites as governing its reasonable assurance of site availability, Elijah Broadcasting Corp., 5 FCC Rcd 5350, 5351 (1990), is inapposite and proves the inadequacy of CESCO's claimed assurance. In Elijah, the applicant had reasonable assurance, but lost the site and, therefore, amended its application to specify a new site. Yet the site owners in Elijah certified that the applicant had reasonable assurance. In fact, the Commission found that the site owners kept the applicant fully informed of the site owners' intentions with respect to the land and "had no intention of making changes which would make the land unavailable without discussing the situation with him." CESCO has not, and cannot, say the same. For that reason, CESCO cannot rely on Elijah.

it had the funds to construct and operate the station for three months. (TRAV)

[REDACTED]

site. South Florida Broadcasting Co., Inc., 99 F.C.C.2d 840, 845 n. 12 (Rev. Bd. 1984) (long-standing FCC policy bars an applicant from amending its application to specify a new site where it lacked reasonable assurance of its original site.)

For all of these reasons, CESCO's application must be denied for failure to obtain reasonable assurance of site availability.

**3. CESCO Misrepresented Itself or Lacked Candor When Certifying Reasonable Assurance of Site Availability.**

The site owner has no recollection of ever speaking with CESCO's representative, Karl Johnson, about use of the Castle Rock site. Thus, CESCO's site certification on its application was false. Assuming, *arguendo*, that Mr. Johnson did talk with Mr. Chiles, there is no indication that the two parties had a meeting of the minds about the availability of the site for CESCO--Mr. Johnson's Declaration is far too vague to prove that point. Price terms, antenna placement, type of broadcast service, telephone number and mailing address of the applicant are all gaps in the purported Johnson-Chiles conversation. For the reasons set forth in its Petition to Deny CESCO's application, dated October 21, 1992, JMU respectfully submits that CESCO lacks the character qualifications to become a Commission licensee.

**CONCLUSION**

CESCO's motion for acceptance of its late-filed Opposition should be denied and its pleading rejected. The Opposition was late without good cause. The excuses offered by CESCO are meritless.

CESCI never had reasonable assurance of site availability and now has no site. The attached Declaration of the site owner repudiates CESCO's claim that Karl Johnson contacted Mr. Chiles regarding use of the site and disavows CESCO's claim to reasonable assurance at this time. CESCO's application was defective and remains defective. No question of fact exists because the site owner says that the site is not and was not reasonably available to CESCO.<sup>4/</sup> CESCO's application should be dismissed by the Commission now, without designation for hearing.<sup>5/</sup>

---

<sup>4/</sup> Astroline Communications Co., 857 F.2d 1556, 1561 (D.C. Cir. 1988) (where no question of fact exists, a hearing need not be designated); South Florida Broadcasting Co., Inc., 99 F.C.C.2d 840, 842 (Rev. Bd. 1984) (a construction permittee must have an antenna site, a technical keystone of broadcast operation).

<sup>5/</sup> JMU submits that CESCO should withdraw its application of its own accord, before the Commission wastes valuable resources processing CESCO's defective application.

For all of these reasons, JMU respectfully requests that the Commission reject CESCO's late-filed opposition and deny CESCO's application.

Respectfully submitted,

**THE BOARD OF VISITORS OF JAMES  
MADISON UNIVERSITY**

By: 

Richard D. Marks  
Margaret L. Miller

Its Attorneys

**DOW, LOHNES & ALBERTSON**  
1255 Twenty-third Street, N.W.  
Suite 500  
Washington, D.C. 20037  
(202) 857-2500

December 22, 1992



**CERTIFICATE OF SERVICE**

I, Christine D. Harris, hereby certify that I have this 22nd day of December, 1992 caused a copy of the foregoing "Reply" to be delivered via first-class United States mail, postage paid, or hand delivery to the following:

W. Jan Gay, Esquire\*  
Assistant Chief  
Audio Services Division  
Mass Media Bureau  
Federal Communications Commission  
Room 302  
1919 M Street, N.W.  
Washington, D.C. 20554

Community Educational Service Council, Inc.  
c/o Mr. Peter Robinson  
Rte. 2, Box 344  
Afton, Virginia 22920

  
\_\_\_\_\_  
Christine D. Harris

\* Denotes hand delivery.