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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of:)	MM Docket No. <u>93-52</u>
BOARD OF VISITORS OF JAMES)	File No. BPED-911101MA
MADISON UNIVERSITY)	
and)	
COMMUNITY EDUCATIONAL)	File No. BPED-920511MB
SERVICE COUNCIL, INC.)	
For a Construction Permit for)	
a New FM Noncommercial Educational)	
Station on Channel 278A)	
in Crozet, Virginia)	

To: Administrative Law Judge Edward Luton

MOTION TO DISMISS

The Board of Visitors of James Madison University ("JMU"), by its attorneys and pursuant to Section 73.3568(b) of the Commission's Rules, moves to dismiss the captioned application of Community Educational Service Council, Inc. ("CESCI") for failure to prosecute. CESCI failed to comply with the Communications Act and the Commission's rules by failing to specify an available site, by failing to file a notice of appearance in this proceeding and by failing to publish local notice of this hearing. Moreover, CESCI has

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no transmitter site and has failed to amend its application to report that fact.^{1/}

Paragraph 13 of the Hearing Designation Order in this proceeding, DA 93-240, released March 15, 1993 (the "HDO") requires the applicants to file written notice of intention to appear for hearing and to present evidence on the specified issues within 20 days of the mailing of the Order, or by April 5, 1993, pursuant to Section 1.221(c) of the Commission's rules. Any notice of an intention to appear should have been served on JMU pursuant to Sections 1.221(c) and 1.47 of the Commission's rules. Applicants failing to file a timely written notice of appearance will be dismissed for failure to prosecute under Section 1.221(c).

The Commission's record in MM Docket 93-52 does not reflect any notice of CESCO's intention to appear. As of the date of this pleading, JMU has not been served with any Notice of Appearance or other written statement of intention to appear by CESCO. CESCO's application therefore should be dismissed. See, e.g., CSJ Investments, Inc., 5 FCC Rcd 7653, 7654 (1990) (affirming ALJ's dismissal of applicant that failed to file timely notice of appearance); LRB Broadcasting, 7 FCC Rcd 6459 (Rev. Bd. 1992); John Jones, 3

^{1/} For the reasons given in JMU's Motion to Enlarge Issues against CESCO, filed April 14, 1993, CESCO could not have amended its site-defective application in any event.

FCC Rcd 2446 (Rev. Bd. 1988); Turquesa Enterprises, 3 FCC Rcd 1070 (Rev. Bd. 1988).

Paragraph 14 of the HDO requires the applicants to give public notice of the hearing pursuant to Section 311(a)(2) of the Communications Act and Section 73.3594 of the Commission's rules. Applicants are to advise the Commission of publication of the required notice pursuant to Section 73.3594(g) of the rules. As the attached Declaration of Brenda Hankey demonstrates, CESCO has not published the required hearing notice. CESCO has not complied with Section 311(a)(2) of the Communications Act. For this reason as well, CESCO's application should be dismissed. See Reliable Broadcasting Co., 25 R.R. 93 (Rev. Bd. 1963).

In light of the Commission's express desire to expedite new service to the public and the strict and specific deadlines established in Reform the Commission's Comparative Hearing Process to Expedite Resolution of Cases, 5 FCC Rcd 157 (1990), modified on reconsideration, 6 FCC Rcd 3401 (1991), CESCO's application also should be dismissed for noncompliance with the public notice statute.^{2/}

^{2/} But see Coast TV, 102 F.C.C.2d 7181 (Rev. Bd. 1985). Coast TV was decided prior to the Commission's 1986 reaffirmance of the ALJ's broad discretion to regulate the course of comparative hearings. Subsequent Commission cases show that "applicant's temporalizing activities" will no longer be "indulged." See LRB, 7 FCC Rcd at 6459 and cases cited therein.

Additionally, on April 15, 1993, JMU filed a motion to enlarge issues against CESCO. JMU's motion demonstrated that CESCO knew, or should have known, that it had no reasonable assurance of the availability of its original

For these reasons, JMU requests that CESCO's application be dismissed with prejudice for failure to prosecute.

Respectfully submitted,

THE BOARD OF VISITORS OF JAMES
MADISON UNIVERSITY

By: 

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April 26, 1993

EXHIBIT 1

Declaration of Brenda Hankey



YOUR NPR STATION

90.7 FM

WMRL 89.9 FM

DECLARATION OF BRENDA HANKEY

I, Brenda Hankey, declare as follows:

1. I am an employee of James Madison University and the manager of broadcast operations for Station WMRA, Harrisonburg, Virginia licensed to the Board of Visitors of James Madison University (JMU).

2. My responsibilities include prosecution of JMU's application for a new noncommercial educational station on Channel 278A, Crozet, Virginia.

3. The community of Crozet, Virginia publishes no daily newspaper of general circulation. There is only one weekly newspaper of general circulation in Crozet, Virginia, The Bulletin.

4. I have reviewed every weekly publication of The Bulletin since March 18, 1993 (the release date of the FCC's Order specifying the time and place of the commencement of the hearing on the applications of JMU and Community Educational Service Council, Inc. (CESCI) in MM Docket 93-52) to the date of this Declaration. JMU's local public notice of the designation of the applications for hearing appeared in The Bulletin on the following dates:

Week of March 31-April 5, 1993

Week of April 7-13, 1993

Week of April 14-20, 1993

No local public notice by CESCI appeared in The Bulletin from March 18, 1993 to the date of this Declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 20, 1993.



Brenda Hankey
General Manager

CERTIFICATE OF SERVICE

I, Jo Ellen Walker, a secretary at Dow, Lohnes &