

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

In the Matter of)	
)	
COLUMBIA UNION COLLEGE)	
BROADCASTING, INC.)	
)	
Application for License)	File No. BLED-20040210AAU
)	
and)	
)	
Request for Program Test Authority)	File No. 20040210AAX
)	
For Modification of Facilities of)	
Station WGTS(FM), Takoma Park,)	
Maryland)	

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 2006

Released: January 20, 2006

By the Associate General Counsel, Administrative Law Division:

1. This memorandum opinion and order grants in part and denies in part a Petition for Relief and Sanction (the “Petition”), filed June 18, 2004, by Columbia Union College Broadcasting, Inc. (CUCB), which alleges that Stu-Comm, Inc. (Stu-Comm) violated the Commission’s ex parte rules.¹ CUCB alleges that Stu-Comm improperly solicited ex parte presentations by a member of Congress and by members of the public.² As discussed below, we conclude that Stu-Comm did violate the ex parte rules.

Background

2. In 2004, CUCB filed an application for a license to cover a construction permit to modify the facilities of station WGTS(FM), Takoma Park, Maryland, while Stu-Comm filed a mutually exclusive application for a construction permit to modify the facilities of

¹ 47 C.F.R. §§ 1.1200-16.

² Stu-Comm filed an opposition (the “Opposition”) on June 28, 2004 to which CUCB replied (the “Reply”) on July 9, 2004. CUCB filed a supplement (the “Supplement”) on May 18, 2005.

station WNRN, Charlottesville, Virginia, which operates on the same channel as WGTS(FM).³ CUCB and Stu-Comm then filed petitions to deny each other's applications.⁴ In particular, Stu-Comm alleged that CUCB illegally constructed the modified facilities specified in CUCB's above-referenced license application, thereby causing excessive interference to WNRN.⁵ Because the alleged interference related to the modified facilities specified in the pending application, complaints about such interference addressed the merits of the application and constituted presentations for purposes of the Commission's ex parte rules.⁶

3. In the Petition, CUCB contends that Stu-Comm has violated section 1.1210 of the Commission's rules in an effort to pressure the Commission into taking action against CUCB.⁷ Section 1.1210 states: "No person shall solicit or encourage others to make any improper presentation under the provisions of this section." CUCB observes that, on March 9, 2004, Congressman Virgil H. Goode, Jr. sent a letter to the Commission "On behalf of WNRN (91.9 FM in Charlottesville, Virginia)."⁸ The Congressman stated that, "According to WNRN," CUCB had constructed an antenna after the expiration of its construction permit. The Congressman wrote: "I would be grateful if you would comment on the veracity of such a claim and the legitimacy of such construction without a permit." The letter further stated:

The broadcast of WGTS from this antenna impinges on the broadcast radius of WNRN. I am very interested to know whether the FCC has determined this to be legitimate. If the FCC has not yet made such a determination, I would be grateful to learn when such [determination] would be made. Thank you for your consideration.⁹

³ Stu-Comm's application has since been dismissed, and CUCB's application has been granted. Public Notice, Rep. No. 45999 (Jun. 6, 2005) at 15; Public Notice, Rep. No. 46106 (Nov. 7, 2005) at 4, 6, (dismissing the above-captioned CUCB application, BLED-20040210AAU, and granting instead an alternative application of CUCB's designated BLED-20040206ADQ, which provided for equivalent relief) (application for review pending).

⁴ See Petition at 3.

⁵ See Petition at 5-6.

⁶ See 47 C.F.R. §§ 1.1202(a) and (d)(1).

⁷ See Petition at 3-5, citing 47 C.F.R. § 1.1210.

⁸ See Petition at 4; see also Exhibit B to Petition, Letter from [Congressman] Virgil H. Goode, Jr. to Ms. Diane Atkinson, Congressional Liaison Specialist, Federal Communications Commission (Mar. 9, 2004).

⁹ See Exhibit B to Petition.

Because the WGTS(FM) application proceeding is restricted under the Commission's ex parte rules, and the Congressman's letter was not served on CUCB, the Office of General Counsel (OGC) determined that the letter was a prohibited ex parte presentation.¹⁰ CUCB now asserts that Stu-Comm violated the Commission's ex parte rules in soliciting the prohibited ex parte from the Congressman.¹¹

4. CUCB further asserts that Stu-Comm improperly solicited communications from members of the public to the Commission.¹² CUCB quotes statements from a web site maintained by Stu-Comm that indicate:

If you would like to complain about this problem [of WGTS(FM)'s alleged interference to WNRN] you can call 1-888-CALLFCC (1-888-225-5322) or log on to fcc.gov. Perhaps the most effective way to register your displeasure is to contact Rep. Virgil Goode in Washington. His office is vigorously pursuing this issue.¹³

According to CUCB, such public appeals violate 47 C.F.R. § 1.1210, since the web site does not tell members of the public to serve their communications on CUCB.¹⁴

5. In the Petition, CUCB asks the Commission to dismiss Stu-Comm's application and bar it from further participation in the proceeding on CUCB's application. CUCB also suggests that a forfeiture could be imposed against Stu-Comm.¹⁵

6. Stu-Comm denies that it violated the Commission's ex parte rules. Stu-Comm states that it did not solicit an ex parte contact and asserts that "there is no evidence that Stu-Comm solicited or encouraged an ex parte contact."¹⁶ It further maintains that the Commission should not speculate that this was its purpose in discussing matters with the Congressman.¹⁷ Stu-Comm also asserts that the Congressman did not intend to make an

¹⁰ Letter from Joel Kaufman, Deputy Associate, General Counsel to the Honorable Virgil H. Goode, Jr. (Mar. 31, 2004). See 47 C.F.R. § 1.1208 (prohibiting ex parte presentations in restricted proceedings).

¹¹ See Petition at 3-5.

¹² See Petition at 5-7.

¹³ See Petition at 6.

¹⁴ See Petition at 7.

¹⁵ See Petition at 7-8.

¹⁶ Opposition at 2.

¹⁷ See Opposition at 2-3.

ex parte presentation.¹⁸ Stu-Comm contends that the Congressman's letter does not express an opinion as to the merits of the case and notes that it was addressed to the Commission's Office of Legislative Affairs (OLA), which Stu-Comm does not consider be "decision-making personnel" within the meaning of the ex parte rules.¹⁹ Stu-Comm also notes that once the Congressman was informed by OGC that the ex parte rules applied, the Congressman served a subsequent letter on CUCB.²⁰ Finally, Stu-Comm denies that there is any prohibition on soliciting public contacts with the Commission since viewers and listeners of a station are exempt from the prohibitions of the ex parte rules when they comment on license applications.²¹

7. CUCB replies that the language of the Congressman's letter implies that it was solicited by Stu-Comm.²² In any event, CUCB suggest that Stu-Comm has the responsibility to explain its intentions in dealing with the Congressman and faults Stu-Comm for not submitting a statement containing such an explanation.²³ CUCB also argues that OLA should be deemed "decision-making personnel" for the purposes of this case²⁴ and that the viewer/listener exemption from the ex parte rules does not apply under the circumstances of this case because Stu-Comm was not seeking public comment on its own application.²⁵

8. In its supplement, CUCB alleges that Stu-Comm continues to violate the ex parte rules. CUCB asserts that Stu-Comm's web site continues to indicate that members of the public should contact Congressman Goode and that the Congressman's office continues to work on an ex parte basis on Stu-Comm's behalf.²⁶ CUCB quotes Stu-Comm's web site as saying: "Even [Congressman Goode's] attempts to get some kind of FCC [sic] enforcement action have been (intentionally) misconstrued by WGTS to be an attempt at impermissible influence (in legal terms an 'ex parte' violation)."²⁷ CUCB considers this to be a further admission that Stu-Comm solicited the Congressman's

¹⁸ See Opposition at 3.

¹⁹ See Opposition at 3-4. Section 1.1208 prohibits ex parte communications in restricted proceedings to "decision-making personnel."

²⁰ See Opposition at 4-5.

²¹ See Opposition at 5-6.

²² See Reply at 2-3.

²³ See Reply at 4.

²⁴ See Reply at 3-4.

²⁵ See Reply at 6.

²⁶ See Supplement at 2-4.

²⁷ Supplement at 3.

letter.²⁸ CUCB also complains that it has received no notice of the scope of the activities undertaken by the Congressman's office.²⁹

Discussion

9. We find that Stu-Comm violated section 1.1210 by soliciting the Congressman's impermissible ex parte letter. Initially, we reject Stu-Comm's assertion that a presentation directed to OLA is not directed to "decision-making personnel." OLA functions to "[c]oordinate Commission and staff responses to inquiries by individual members of Congress, congressional committees and staffs."³⁰ It is therefore entirely foreseeable that an inquiry directed to OLA will be forwarded to the decision-making personnel responsible for the relevant proceeding. Indeed, the information requested by the Congressman here could only be provided by the relevant decision-making personnel.³¹

10. We further find that the record warrants a finding that Stu-Comm intended to solicit the improper ex parte presentation. The Congressman's letter indicated on its face that the Congressman was acting "on behalf of" Stu-Comm and that he sought a response to allegations reported to him by Stu-Comm. While we agree with Stu-Comm that the record does not clearly indicate that Stu-Comm requested the Congressman to contact the Commission, without advising the congressman that it was necessary to serve CUCB if he did so, this situation exists because knowledge of this matter is peculiarly within the knowledge of Stu-Comm and the Congressman, and Stu-Comm has failed to provide a statement either from its own personnel or the Congressman as to what transpired other than its bare statement that it did not solicit an ex parte contact. Under these circumstances, we are justified in drawing an inference adverse to Stu-Comm.³²

11. We also find that Stu-Comm violated section 1.1210 with respect to its solicitation of public comment with respect to CUCB's application. In this regard, we find that the public comment solicited by Stu-Comm did not fall within the

²⁸ See Supplement at 3.

²⁹ See Supplement at 4-5.

³⁰ 47 C.F.R. § 0.17(f).

³¹ Moreover, Stu-Comm incorrectly characterizes OGC as "a non-decision-maker." Opposition at 4. OGC is deemed a decision-maker for purposes of the ex parte rules under virtually all circumstances. See 47 C.F.R. § 1.1204(a)(2) (recognizing an ex parte exemption for contacts with OGC only in the case of certain litigation matters).

³² See Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976) (permitting adverse inferences against parties to civil actions when they do not testify in response to probative evidence). In Portland Cellular Partnership, 11 FCC Rcd 19997, 20008-09, 20011 (1996), the Commission declined to draw an adverse conclusion where a party sent a letter to a Senator requesting a meeting with the Senator and enclosing a "fact sheet," without indicating that the fact sheet should be sent to the Commission by the Senator, as it subsequently was. Here, Stu-Comm has given us no evidence as to what it asked of the Congressman.

viewer/listener exemption set forth in section 1.1204(a)(8) of the Commission's rules. Section 1.1204(a)(8) classifies as exempt a presentation that:

is a written presentation made by a listener or viewer of a broadcast station who is not a party . . . and the presentation relates to a pending application that has not been designated for hearing for a new or modified broadcast station or license, for renewal of a broadcast station license or for assignment or transfer of control of a broadcast permit or license. . . .

The viewer/listener exemption is designed to encourage viewers and listeners to submit informal comments when the Commission is considering new or modified station license applications or applications for renewal or transfer of such licenses.³³ It was adopted in recognition of the fact that broadcasters are required by 47 C.F.R. § 73.3580 to publish a public notice seeking comments with respect to their pending applications.³⁴ The exemption applies to "individual members of the viewing and listening public in a facility's service area."³⁵

12. Here, however, Stu-Comm asked listeners in the WNRN service area to comment not on WNRN's pending application but on matters involving alleged interference related to the application of WGTS(FM), a station in a different, non-overlapping service area. Accordingly, the viewer/listener exemption in 47 C.F.R. § 1.1204(a)(8) does not apply.

13. We therefore admonish Stu-Comm to comply with the Commission's ex parte rules. We do not, however, see the need for further action against Stu-Comm. There have been no further ex parte letters from the Congressman. As Stu-Comm observes, the Congressman's most recent letter was served on CUCB. The Commission's staff also indicates that there have been no contacts by the Congressman's staff other than permissible status inquiries.³⁶ Moreover, Stu-Comm's application has been dismissed on the merits, and its web site no longer solicits contacts by members of the public. By contrast, in Desert Empire Television Corp., 88 FCC 2d 1413 (1982), cited by CUCB,³⁷

³³ See Amendment of 47 C.F.R. § 1.1200 et seq., 12 FCC Rcd 7348, 7354 ¶ 19 (1997).

³⁴ See Id.

³⁵ Amendment of 47 C.F.R. § 1.1200 et seq., 14 FCC Rcd 18831, 18836 ¶ 21 (1999). See also Paxson Communications, 12 FCC Rcd 19583, 19583 n.3 (Media Bureau 1997) (exemption did not apply when commenter did not live in community where station was located).

³⁶ See 47 C.F.R. § 1.1202(a) (excluded from the term ex parte "presentation" are inquiries relating solely to the status of a proceeding). CUCB errs in relying on Fine Music, Inc., 8 FCC 2d 529 (1967), for the proposition that parties to a proceeding may not solicit even status inquiries concerning proceedings in which they are interested. Fine Music applied a section of the ex parte rules that has since been repealed. As indicated, under the current rules, ex parte status inquiries are permissible and may therefore be solicited.

³⁷ See Petition at 8.

the Commission imposed a forfeiture against a party that repeatedly violated the rules despite being admonished to comply with the rules and promising compliance. Elkhart Telephone Co., 11 FCC Rcd 1165 (1995), cited by CUCB,³⁸ involved an especially blatant violation in which a party sent a senator a draft letter to be sent to the Commission which did not indicate it was to be served on the parties. In addition, while we reject Stu-Comm's arguments that the viewer/listener exception applied and that an ex parte letter to the Commission's OLA was permissible, the record is not clear as to whether Stu-Comm acted pursuant to a good faith misreading of our rules. In view of the factors noted above, we do not believe that further proceedings are warranted.

Ordering Clause

14. ACCORDINGLY, IT IS ORDERED, Pursuant to the authority delegated under 47 C.F.R. § 0.251(g), that the Petition for Relief and Sanctions, filed June 18, 2004, by Columbia Union College Broadcasting, Inc. IS GRANTED in part and DENIED in part.

FEDERAL COMMUNICATIONS COMMISSION

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³⁸ See Petition at 4.