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In Reply Refer to:  
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**In re: NEW(Ed. FM), Decatur, Illinois**  
R B Schools  
Facility ID No. 164015  
File No. BNPED-20041101AHW

**WJMU(FM), Decatur, Illinois**  
Millikin University  
Facility ID No. 42654  
File No. BRED-20040602AAT

Dear Counsel:

We have before us: (1) the captioned application of Millikin University ("MU") for renewal of the license of noncommercial educational FM ("NCE FM") radio station WJMU(FM), Decatur, Illinois; (2) the captioned application of R B Schools ("RB") proposing a time-share arrangement for the same frequency pursuant to Section 73.561 of the Commission's rules (the "Rules");<sup>1</sup> and (3) a Petition for Relief and Sanctions ("Petition") filed October 20, 2005, by RB which alleges that MU violated the *ex parte* provisions of the Rules in the prosecution of its renewal application.<sup>2</sup> For the reasons set forth below, we dismiss RB's time-share application, grant the Petition to the extent indicated, admonish MU for its violation of the *ex parte* provisions of the Rules, and grant the WJMU(FM) license renewal application.

**Time-Share Application.** NCE FM radio stations, such as WJMU(FM), are licensed to operate for an unlimited number of hours each day, unless they operate pursuant to a time-sharing arrangement

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<sup>1</sup> 47 C.F.R. § 73.561.

<sup>2</sup> See 47 C.F.R. §§ 1.1200-16. RB also filed an "Opposition to Objection to [its] Application" on October 20, 2005, in response to a letter MU filed with the Commission on April 13, 2005; RB filed a "Petition to Dismiss" the captioned MU application on November 1, 2005; and MU filed a "Consolidated Response" on December 22, 2005, to which RB replied on January 9, 2006.

with another qualified noncommercial broadcaster.<sup>3</sup> Section 73.561(b) of the Rules outlines the requirements for proposing such an arrangement, including as in this case, non-consensual proposals for time-sharing. Specifically, the Commission will consider non-consensual proposals for time-sharing only in connection with renewal of the NCE FM station's license and only if the station operates less than 12 hours per day.<sup>4</sup> In addition, the party seeking to share time must file its application no later than the deadline for filing petitions to deny the renewal application of the existing NCE FM licensee, and only after first seeking to reach a voluntary time-sharing agreement with that licensee.<sup>5</sup>

The Commission will not entertain proposals that do not conform to these requirements.<sup>6</sup> RB's does not. We find that the record establishes that RB did not attempt to reach an agreement with MU prior to filing its time-share application, as required by the Rules. Thus, RB's application is subject to dismissal.

In its January 9, 2006, Reply, RB disagrees with MU's contention that RB had an obligation to initiate time-sharing negotiations with MU prior to RB's filing of its time-share application. RB contends that this reading of Section 73.561 is directly contrary to the Commission's instructions for scenarios involving time-share applicants. RB cites the *Report & Order* in which Section 73.561 was adopted<sup>7</sup> as requiring only that an application be filed "as a reasonable first step of the process," and "if the agreement (or status report about it) is not available at the time of the original filing of the application, it can easily be submitted as an amendment."<sup>8</sup> We reject RB's argument, as the Commission has spoken directly to this issue in *Westchester*,<sup>9</sup> and it clearly requires a putative time-share applicant to attempt to negotiate an agreement with the incumbent licensee prior to filing a time-share application. The staff, of course, is bound by Commission precedent.<sup>10</sup>

**WJMU(FM) Renewal Application. Signature Requirement.** RB argues in its November 1, 2005, "Petition to Dismiss" that MU's renewal application is defective and should be dismissed because it was not signed in accordance with Section 73.3513 of the Rules.<sup>11</sup> Section 73.3513(a)(4) of the Rules

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<sup>3</sup> 47 C.F.R. § 73.561(a).

<sup>4</sup> 47 C.F.R. § 73.561(b); *Nassau Community College*, Memorandum Opinion and Order, 12 FCC Rcd 12234 (1997).

<sup>5</sup> 47 C.F.R. § 73.561(b); *Westchester Council for Public Broadcasting*, Memorandum Opinion and Order, 8 FCC Rcd 2213, 2214 (1993) ("*Westchester*") ("[E]fforts to negotiate [must be] initiated prior to the filing of the application, so that either a share-time agreement, or a statement that no agreement could be reached, [may be] filed with [the] application").

<sup>6</sup> *Nassau Community College*, 12 FCC Rcd at 12238 (citing *Westchester*, 8 FCC Rcd at 2214).

<sup>7</sup> *Changes in the Rules Relating to Noncommercial Educational FM Broadcast Stations*, Second Report and Order, 69 FCC 2d 240, 256 (1978).

<sup>8</sup> See Reply to Consolidated Response at 2.

<sup>9</sup> See note 5 *supra*.

<sup>10</sup> See 47 C.F.R. § 0.283(c); *WLDI, Inc.*, 17 FCC Rcd 14750, 14752 (EB 2002) ("the Bureau has no authority to alter or depart from Commission precedent").

<sup>11</sup> See MU Petition to Dismiss (filed Nov. 1, 2005) at 1-2.

requires that an application of an unincorporated association, such as MU, “must be signed . . . [by] a member who is an officer. . . .”<sup>12</sup>

A review of the record indicates that MU’s captioned application was signed by “Christopher S. Bullock,” who identifies himself as “General Manager.”<sup>13</sup> Further review of the record indicates that Mr. Bullock is not listed as an officer, director, or board member of MU.<sup>14</sup> RB cites a number of cases in which the Commission has held that applications -- and amendments to applications which are subject to the same signature requirements -- not properly signed must be returned.<sup>15</sup> The Commission, however, has also held that, as long as an application is “substantially complete,” curative amendments to correct signature deficiencies will be accepted.<sup>16</sup> Specifically in the renewal context, the Commission has allowed an applicant to cure a signature defect.<sup>17</sup> On December 20, 2005, MU acknowledged its error and amended its “substantially complete” application to substitute Douglas E. Zemke, President of MU, as the signatory.<sup>18</sup> We will accept MU’s curative amendment in accordance with this Commission precedent.<sup>19</sup> Accordingly, because the amended application now complies with Section 73.3513 of the Rules, no further action is warranted regarding this allegation.

*Ex Parte Rule Violations.* RB also contends that MU has violated the *ex parte* provisions of the Rules by participating “in a deliberate and repetitive pattern of unfair behavior in submitting *ex parte*

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<sup>12</sup> See 47 C.F.R. § 73.3513; see also *Mary Ann Salvatoriello*, Memorandum Opinion and Order, 6 FCC Rcd 4705 (1991) and *Central Florida Communications Group, Inc.*, Hearing Designation Order, 6 FCC Rcd 522, 523 (ASD 1991).

<sup>13</sup> See File No. BNPED-20041101AHW at 6.

<sup>14</sup> See *id.* at 2-3.

<sup>15</sup> See *id.* at 2.

<sup>16</sup> See, e.g., *Communications of Gaithersburg, Inc.*, Memorandum Opinion and Order, 60 FCC 2d 537 (1976) (permitting applicant to amend an AM application signed by person not qualified to sign under the Commission’s rules and submit a correct signature); *Santa Monica Community College District*, Hearing Designation Order, 9 FCC Rcd 3134 (ASD 1994) (allowing applicant to amend an NCE-FM application to include a signature that complies with Section 73.3513 of the Commission’s rules); and *Jane A. Roberts*, Decision, 29 FCC 141, 149-150 (1960) (allowing *nunc pro tunc* amendment of signature, thus conforming application with the requirements of the Commission’s rules).

<sup>17</sup> See *KQED, Inc.*, Decision, 3 FCC Rcd 2821, 2831-32 (Rev. Bd. 1988) (subsequent history omitted); *Santa Monica Community College*, 9 FCC Rcd at 3134.

<sup>18</sup> See December 20, 2005, Amendment to BNPED-20041101AHW at Exhibit 1 (disclosing that “the application is being amended to ratify the certification in Section II by an officer of the licensee”).

<sup>19</sup> We note that dismissing the WJMU(FM) license renewal application because the initially-filed application failed to comply with Section 73.3513 would have little practical effect. MU could simply sign the application properly and refile it; the signature defect would not cause WJMU(FM)’s frequency to be declared vacant and opened for competing applications.

argumentative communications to FCC decision-makers, and in soliciting<sup>20</sup> third parties to transmit *ex parte* communications to FCC decision-makers concerning the merits of the applications under consideration in these pleadings.”<sup>21</sup> RB notes that, on April 13, 2005, MU filed a letter with the Chief of the Media Bureau’s Audio Division requesting that the Commission “release and reauthorize our applications for renewal at this time.” MU did not serve RB with a copy of this letter.<sup>22</sup> RB also observes that MU asked certain Members of Congress to “intercede on our behalf and encourage the FCC to reject R B Schools’ application. . . .”<sup>23</sup> RB states that, on April 27, 2005, one Member sent a letter to the Commission stating, “I would appreciate the FCC’s consideration of Millikin University’s comments on the renewal and use of its license for WJMU.” Further, RB states that on July 8, 2005, another Member sent a letter to the Commission attaching and requesting attention to a letter from “my constituent, [Millikin University’s] Dr. Mary Rivers.” Because the WJMU(FM) renewal application proceeding is restricted under the *ex parte* provisions of the Rules, and because the Members’ letters were not served on RB, the Commission’s Office of General Counsel has determined that the letters were prohibited *ex parte* presentations and notified the Members of that determination.

RB contends that it is “wrong for a party in a restricted proceeding to solicit members of Congress or other government officials to contact the FCC on its behalf.”<sup>24</sup> RB further contends that MU “knowingly and deliberately” disregarded the Rules which, RB maintains, “abuses the Commission’s entire process for resolving disputes.”<sup>25</sup> RB therefore asks the Commission to dismiss MU’s application. In the alternative, RB requests that the Commission impose a time-sharing agreement upon MU, dividing the time between WJMU(FM) and RB’s proposed station. In either case, states RB, MU should be barred from further participation in the processing of RB’s application. Additionally, RB suggests that a forfeiture could be imposed on MU.<sup>26</sup>

MU responds that, because it was not represented by communications counsel and was not accustomed to being a party to contested Commission proceedings, it did not comprehend the Commission’s *ex parte* restrictions.<sup>27</sup> MU admits that it did not send a copy of its April 13, 2005, letter to RB but contends that no injury occurred because MU subsequently sent a substantially similar letter to RB’s former counsel, and the Commission subsequently sent a copy of the April 13 letter to RB, which

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<sup>20</sup> Section 1.1210 of the Rules states: “No person shall solicit or encourage others to make any improper presentation under the provisions of this section.” 47 C.F.R. § 1.1210.

<sup>21</sup> See Petition at 1.

<sup>22</sup> See Petition at Exhibit B. Note that this letter, which is dated April 5, 2005, is referred to as “the April 5 letter” in the pleadings, but the Commission’s date-stamp for this filing is “April 13, 2005.”

<sup>23</sup> See Petition at 6, quoting *id.* at Exhibit C.

<sup>24</sup> See Petition at 3-4.

<sup>25</sup> See Petition at 8.

<sup>26</sup> See *id.*

<sup>27</sup> See Consolidated Response at 7.

responded to the letter in its “Opposition.”<sup>28</sup> MU also maintains that, since April 5, 2005, it has copied RB with all filings to the Commission, and that, since April 22, 2005, it has not solicited any further assistance from members of Congress.<sup>29</sup> RB acknowledges that, on January 13, 2005, an official of the Media Bureau informed one of the Members who wrote the Commission about MU’s application, in response to his status inquiry on behalf of MU, that “the Commission’s *ex parte* rules require that any comments and petitions submitted to the Commission concerning this matter also must be served on RB.”<sup>30</sup> MU however, indicates that, to an inexperienced licensee, “it was not obvious” that the April 13 letter qualified as a comment or petition and that the January 13 letter did not say that it was impermissible to seek congressional assistance.<sup>31</sup> Finally, MU states that:

Due to the fact that any violations of the Commission’s *ex parte* rules that may have occurred were not deliberate or calculated, but rather due to a lack of understanding of the scope and requirements of such rules, and the fact that such transgressions have not been repeated, the University respectfully requests that no sanctions be imposed.<sup>32</sup>

RB replies that MU’s claim of ignorance of the Rules is irrelevant. RB notes that the Communications Act of 1934, as amended (the “Act”), defines a willful violation as “the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission . . . .”<sup>33</sup> RB further notes that recent Commission interpretations of “willful” do not require intent to engage in a violation.<sup>34</sup> RB further argues that MU’s claim that it did not know its actions were improper “ring hollow.”<sup>35</sup> RB states that MU administrators repeatedly contacted the Commission or asked their representatives in Congress to do so after being warned by a Commission official not to advocate their case further without also serving RB.<sup>36</sup> RB argues, therefore, that MU willfully, deliberately and repeatedly violated the *ex parte* provisions of the Rules.

The purpose of the Commission's *ex parte* requirements is to ensure that the agency's decisions are fair and impartial and based on a public record free of influence from non-record communications between decision-makers and outside persons.<sup>37</sup> To this end, the Rules prohibit *ex parte* presentations –

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<sup>28</sup> *See id.*

<sup>29</sup> *See id.* at 9.

<sup>30</sup> *See Consolidated Response* at 8. *See also note 23 supra.*

<sup>31</sup> *Id.*

<sup>32</sup> *See Consolidated Response* at 9.

<sup>33</sup> *See Reply to Consolidated Response* at 4; *see also* 47 U.S.C. § 312(f).

<sup>34</sup> *See Reply to Consolidated Response* at 4 (*citing Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991)).

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 5; *see also note 23 supra.* RB states that it “strains credulity” to suggest that MU’s officials did not realize that they were violating at least the spirit of the official’s warning.

<sup>37</sup> *See Ex Parte Communications*, Report and Order, 2 FCC Rcd 3011, 3012 (1987).

in the case of written presentations, those not served on the parties -- made to or from decision-making personnel in restricted proceedings.<sup>38</sup> This prohibition applies to "[a]ny communication directed to the merits or outcome of a proceeding."<sup>39</sup>

We conclude that MU's April 13, 2005, letter did not comport with the *ex parte* requirements applicable to this restricted proceeding. MU's letter, which was not served on RB, was addressed to the Chief, Audio Services Division, the staff official with the delegated authority to rule on the captioned applications, and the letter specifically addressed the merits of RB's time-share proposal.

Regarding the letters written by MU on April 22, 2005, soliciting the assistance of Members of Congress with MU's renewal application and their subsequent impermissible *ex parte* letters, we find that MU violated Section 1.1210. Specifically, the record indicates that MU intended to solicit the improper *ex parte* presentations. In their letters to certain Members, officials of MU specifically requested such presentations: "We are asking that your office intercede on our behalf and encourage the FCC to reject RB School's application . . . ."<sup>40</sup> As noted above, in response, two Members sent *ex parte* letters to the Commission. The record indicates that MU unambiguously requested them to contact the Commission without advising them that it was necessary to serve RB if they did so.

We therefore will admonish MU for its apparent willful and repeated violation of the *ex parte* Rules. We do not, however, see the need for further action against MU. Although even small noncommercial educational licensees, not represented by FCC counsel, are responsible for compliance with our Rules, the record indicates that MU appears to have violated the Rules in this case out of ignorance. In this regard, the record indicates that MU may have acted pursuant to an unfamiliarity with the Commission's *ex parte* restrictions. While such misunderstanding suggests a lack of diligence on MU's part, it does not suggest any intent to subvert the Rules. Moreover, it does not appear that RB was prejudiced by MU's violations. Moreover, as MU observes, following the April 13 letter, MU has copied RB on all filings submitted to the Commission. There have been no further attempts by MU to solicit letters from any Members of Congress nor other contacts, permissible or impermissible, by their respective staffs.<sup>41</sup> For these reasons, we find that MU's apparent *ex parte* violations do not warrant a forfeiture or designation of the WJMU(FM) license renewal application for an evidentiary hearing.<sup>42</sup> In

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<sup>38</sup> 47 C.F.R. §§1.1202(b), 1.1208.

<sup>39</sup> 47 C.F.R. §1.1202(a).

<sup>40</sup> See Petition at Exhibits C and D. The letter to Representative Evans asked that he "again intercede."

<sup>41</sup> See, e.g., 47 C.F.R. § 1.1202(a) (excluded from the term *ex parte* "presentation" are inquiries relating solely to the status of a proceeding). RB errs in relying on *Fine Music, Inc.*, Memorandum Opinion and Order, 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. Petition at 4. *Fine Music* applied a section of the Rules that has since been repealed. Under the current Rules, *ex parte* status inquiries are permissible and may therefore be solicited.

<sup>42</sup> See *Centel Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 6162 (1993), *aff'd mem. sub nom. American Message Centers v. FCC*, No. 93-1550 (D. C. Cir. Feb. 28, 1994), *rehearing denied* (May 25, 1994) (carrier not disqualified, despite multiple *ex parte* violations, where two of the violations were inadvertent and unintentional, and others involved reasonable belief contacts were permissible). Cf. *Desert Empire Television Corporation*, Memorandum Opinion and Order, 88 FCC 2d 1413 (1982) (Commission imposed a forfeiture against a party that repeatedly violated the *ex parte* rules despite being admonished to comply with the rules and promising compliance); see also *Elkhart Telephone Co.*, Notice of Apparent Liability for Forfeiture, 11 FCC Rcd 1165 (1995)



view of the factors noted above, we do not believe that further inquiry is warranted with respect to this issue.

**Conclusion/Actions.** In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act. That section provides that we are to grant the renewal application if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and necessity; (2) there have been no serious violations of the Act or the Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.<sup>43</sup> If, however, the licensee fails to meet that standard, the Commission may deny the application – after notice and opportunity for a hearing under Section 309(e) of the Act – or grant the application “on terms and conditions that are appropriate, including a renewal for a term less than the maximum otherwise permitted.”<sup>44</sup>

On balance, we find that MU's apparent violations of the *ex parte* provisions of the Rules do not constitute a “serious violation” of the Rules warranting designation for evidentiary hearing. Moreover, we find no evidence of violations that, when considered together, evidence a pattern of abuse.<sup>45</sup> Further, we find that WJMU(FM) served the public interest, convenience, and necessity during the subject license term. We will therefore grant MU's license renewal application for the station.<sup>46</sup>

Accordingly, in light of the above discussion, IT IS ORDERED, pursuant to the authority delegated under 47 C.F.R. § 0.283, that the Petition for Relief and Sanctions filed October 20, 2005, by R B Schools IS GRANTED in part and DENIED in part, and all related pleadings ARE DISMISSED.

IT IS FURTHER ORDERED that Millikin University IS HEREBY ADMONISHED for its apparent willful and repeated violations of 47 C.F.R. §§ 1.1208 and 1.1210. We caution Millikin University to be and remain more diligent in the future regarding compliance with the Rules.

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(notice of apparent liability for forfeiture for 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).

<sup>43</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by Section 204(a) of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). *See Implementation of Sections 204(a) and 204(c) of the Telecommunications Act of 1996 (Broadcast License Renewal Procedures)*, Order, 11 FCC Rcd 6363 (1996).

<sup>44</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>45</sup> For example, we do not find here that the licensee's station operation "was conducted in an exceedingly careless, inept and negligent manner and that the licensee is either incapable of correcting or unwilling to correct the operating deficiencies." *See Heart of the Black Hills Stations*, Decision, 32 FCC 2d 196, 198 (1971). Nor do we find on the record here that "the number, nature and extent" of the violations indicate that "the licensee cannot be relied upon to operate [the station] in the future in accordance with the requirements of its licenses and the Commission's Rules." *Heart of the Black Hills Stations*, 32 FCC 2d at 200. *See also Calvary Educational Broadcasting Network, Inc.*, Hearing Designation Order, 7 FCC Rcd 4037 (1992); *Center for Study and Application of Black Economic Development*, Hearing Designation Order, 6 FCC Rcd 4622 (1991).

<sup>46</sup> *See* 47 U.S.C. § 309(k).

IT IS FURTHER ORDERED that that the application (File No. BNPED-20041101AHW) of R B Schools for a construction permit for a new time-sharing NCE-FM station at Decatur, Illinois, IS DISMISSED.

IT IS FURTHER ORDERED that that the application (File No. BRED-20040602AAT) of Millikin University for renewal of license for station WJMU(FM), Decatur, Illinois, IS GRANTED.

Sincerely,

Peter H. Doyle  
Chief, Audio Division  
Media Bureau

cc: Millikin University  
R B Schools