

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of	)	
	)	
Apple 107.1, Inc.	)	NAL/Acct. No. MB-201341410017
	)	FRN: 0019619089
Licensee of FM Translator Station W292DV	)	Facility ID No. 155888
New York, New York	)	
	)	
Applications for Licenses to Cover	)	File Nos. BLFT-20110503AEA,
	)	BLFT-20120405AAK
	)	
Application for Construction Permits	)	File Nos. BPFT-20111018ABX,
	)	BPFT-20120425ABS
and	)	
	)	
Request for Special Temporary Authority	)	File No. BSTA-20130320ABV

**MEMORANDUM OPINION AND ORDER
AND
NOTICE OF APPARENT LIABILITY FOR FORFEITURE**

Adopted: November 14, 2013

Released: November 14, 2013

By the Chief, Media Bureau:

I. INTRODUCTION

1. The Media Bureau (“Bureau”) has before it: 1) a Petition for Reconsideration (“Manhattan License Petition”) filed by Press Communications, LLC (“Press”),¹ seeking reconsideration of the grant of a covering license application (“Manhattan License Application”)² of Apple 107.1, Inc. (“Apple”) for FM Translator Station W292DV, New York, New York (“Station”); 2) an “Emergency Petition for Immediate Rescission of Construction Permit and Dismissal of License Application” (“Emergency Petition”) filed by Press,³ seeking rescission of Apple’s modification application for the Station (“Sunnyside Modification Application”)⁴ and dismissal of the associated covering license application (“Sunnyside License Application”),⁵ and a Petition for Reconsideration (“Sunnyside Petition”),⁶ also filed by Press, seeking reconsideration of the grant the Sunnyside Modification

¹ Press filed the Manhattan License Petition on June 21, 2011. On July 2, 2011, Apple filed an Opposition. On July 12, 2011, Press filed a Reply.

² File No. BLFT-20110503AEA.

³ Press filed the Emergency Petition on April 11, 2012. On April 12, 2012, Apple filed an Opposition to the Emergency Petition. On April 13, 2012, Press filed a Reply (“Reply to Opposition to Emergency Petition”).

⁴ File No. BPFT-20111018ABX.

⁵ File No. BLFT-20120405AAK.

⁶ Press filed the Sunnyside Petition on April 27, 2012.

Application; 3) Apple's subsequent modification application to relocate the Station's transmitter to a site in Glen Oaks ("Glen Oaks Modification Application")⁷ and Press' Petition to Deny the Glen Oaks Modification Application ("Glen Oaks Petition");⁸ 4) Apple's request for special temporary authority ("STA")⁹ to operate the Station at temporary facilities in Long Island City pending staff action on the Glen Oaks Modification Application ("Long Island City STA Request") and Press' "Petition to Deny or, in the Alternative, Informal Objection" ("STA Petition") filed against the Long Island City STA Request;¹⁰ and finally, 5) Press' "Petition for Determination of License Expiration Pursuant to 47 U.S.C. § 312(g)" ("Expiration Petition").¹¹

2. In this *Memorandum Opinion and Order and Notice of Apparent Liability for Forfeiture* ("NAL"), we find that Apple apparently willfully and repeatedly violated Section 74.1234(a)(1) of the Commission's Rules ("Rules") by failing to comply with the translator transmitter accessibility rule.¹² Based upon our review of the record before us, we conclude that Apple is apparently liable for a monetary forfeiture in the amount of three thousand dollars (\$3,000). We will also deny the Expiration Petition, deny the STA Petition, grant the Long Island City STA Request, dismiss the Glen Oaks Modification Application, and dismiss as moot the Glen Oaks Modification Petition, the Sunnyside License Application, the Emergency Petition, the Manhattan License Petition, and the Sunnyside Petition.

II. BACKGROUND

3. Manhattan Site. The Station's transmitter was previously located in Union City, New Jersey, operating on Channel 293.¹³ On February 25, 2011, Apple filed a modification application to: a) relocate the Station's transmitter site from Union City to an antenna situated on the 4 Times Square building in Manhattan; and b) change the Station's operations from Channel 293 to Channel 292.¹⁴ No challenge to the application was filed, and the staff granted the application on April 13, 2011.

4. Apple filed the Manhattan License Application on May 3, 2011. During program test operations, which commenced on May 6, 2011, it was determined that the Station would cause interference to Station WKMK(FM), Eatontown, New Jersey, which also operates on Channel 292 and is

⁷ File No. BPFT-20120425ABS. Apple amended the original April 25, 2012 application on July 8, 2013; July 14, 2013; and lastly on July 22, 2013.

⁸ Press filed the Glen Oaks Petition on May 11, 2012. On May 12, 2012, Apple filed an Opposition. On May 31, 2012, Press filed a Reply.

⁹ File No. BSTA-20130320ABV.

¹⁰ Apple filed the Long Island City STA Request on March 20, 2012. Press filed the STA Petition on April 4, 2013. On May 6, 2013, Apple filed a "Motion to Accept Late-Filed Opposition to Petition to Deny, or in the Alternative, Informal Objection" and an "Opposition to Petition to Deny, or in the Alternative, Informal Objection." On May 13, 2013, Press filed an "Opposition to 'Motion to Accept Late-Filed Opposition'" and a "Contingent Reply to Opposition." On May 28, 2013, Apple filed a "Reply to Opposition to Motion to Accept Late-Filed Opposition" and an "Opposition to Contingent Reply." On June 3, 2013, Press filed a "Consolidated Response of Press Communications, LLC" responding to Apple's "Reply to Opposition to Motion to Accept Late-Filed Opposition" and "Opposition to Contingent Reply."

¹¹ The Expiration Petition was filed on May 13, 2013. On May 28, 2013, Apple filed an "Opposition to Petition for Determination of License Expiration Pursuant to 47 U.S.C. § 312(g)." Press's June 3, 2013 "Consolidated Response" also addressed Apple's opposition to the Expiration Petition.

¹² See 47 C.F.R. § 74.1234(a)(1).

¹³ See File Nos. BMPFT-20100812ACG (granted Feb. 25, 2011); BLFT-20110225ABU (granted Mar. 22, 2011).

¹⁴ File No. BPFT-20110225ABV.

licensed to Press. The Bureau ordered the Station to go silent on May 12, 2011, pending a resolution of the interference issue.¹⁵ The Bureau also informed Apple that if it “wants to resume operations on channel 292, it must first submit a request for resumption of operations to the Commission that includes an ‘on-off’ test plan to be performed in conjunction with a representative from WKMK.”¹⁶ The staff subsequently granted the Manhattan License Application on May 18, 2011.¹⁷ Apple filed a silent STA request on June 1, 2011, indicating that it had “suspended operation following complaints of interference.”¹⁸

5. Press filed the Manhattan License Petition on June 21, 2011, arguing that it was error to grant the Manhattan License Application because, prior to its grant, it had been established that the Station would cause interference to WKMK.¹⁹ Apple argues in opposition that, because the Station had already gone silent, there was no reason to rescind the Station’s license for the Manhattan site.²⁰

6. Sunnyside Site. Apple filed the Sunnyside Modification Application on October 18, 2011. On February 23, 2012, Apple filed an amendment to the application in which it proposed: a) to operate on Channel 292, and b) relocate the Station’s transmitter from its location in Manhattan to the Royal Kent, a residential building in Sunnyside in Queens. The staff granted the amended application on March 23, 2012.²¹ Apple filed the Sunnyside License Application on April 5, 2012, which remains pending, and resumed Station operations at the Sunnyside site on April 6, 2012.

7. Press filed the Emergency Petition on April 11, 2012, seeking rescission of the Sunnyside Modification Application and dismissal of the Sunnyside License Application. Press argues that the Apple’s proposed resumption of operations on Channel 292 would cause further interference to WKMK, and that Apple failed to comply with the May 2011 Order because it did not conduct “on-off” testing prior to resuming operations on Channel 292.²² In its Opposition, Apple argues that the grant of the Sunnyside Modification Application superseded the May 2011 Order and that it was thus not required to consult with Press and conduct the “on-off” testing required by the order.²³ In reply, Press argues that the May 2011 Order still applies because Apple is attempting to operate the Station on Channel 292,

¹⁵ See *Email from James Bradshaw*, May 12, 2011 (“Due to significant continuing interference complaints . . . being received by WKMK, we are ordering W292DV to immediately CEASE OPERATION.”) (“May 2011 Order”) (capitalization in original).

¹⁶ See *id.*

¹⁷ *Broadcast Actions*, Public Notice, Report No. 47492 (MB May 23, 2011).

¹⁸ See also File No. BLSTA-20110601AAX. The staff granted this STA request on August 29, 2011, and it was to expire on February 25, 2012. Apple filed an STA extension request on February 15, 2012. See File No. BLESTA-20120215ABF. The staff granted the extension request, which was to expire on May 13, 2012. See *Letter to Lauren A. Colby from Lisa A. Scanlan*, Ref 1800B3-VM (MB Mar. 8, 2012).

¹⁹ Manhattan License Petition at 1-2.

²⁰ Opposition to Manhattan License Petition at 1-2.

²¹ *Broadcast Actions*, Public Notice, Report No. 47704 (MB Mar. 28, 2012). The original Sunnyside Modification Application proposed to change the Station’s channel to Channel 284. 6 Johnson Road Licenses, Inc., filed an Informal Objection to the application, arguing that the Station’s operations on Channel 284 would cause interference to its own Station WSPK(FM), which also operates on Channel 284. The amended Sunnyside Modification Application proposed serving on Channel 292. The staff dismissed the Informal Objection as moot when it granted the Sunnyside Modification Application.

²² Emergency Petition at 5-6.

²³ Opposition to Emergency Petition at 2.

even at the new Sunnyside site.²⁴ Press additionally states that it had received several hundred interference complaints from listeners in the week that the Station had resumed operations.²⁵

8. Press and Apple conducted a series of “on-off” tests on April 18, 2012, during which their representatives drove to various locations on Staten Island served by WKMK. The limited tests revealed that the Station’s signal was causing interference to WKMK at locations near to certain of the submitted listener addresses. Additionally, in preparation for the testing Apple’s principal, Michael Celenza (“Celenza”) indicated to Press that Apple could only access the transmitter site at the Royal Kent after 9:00 am.²⁶ Accordingly, on April 18, 2012, the Bureau ordered Apple to operate the Station at reduced power or cease operations.²⁷ The Bureau reminded Apple that Section 74.1234 of the Rules “requires Apple to either have direct access to the transmitter site at all times or to have the ability turn the transmitter off remotely ‘at all hours.’”²⁸ Celenza responded to that order the next day, April 19, 2012, stating that Apple had complied with the April 2012 Order and reduced power to 5 watts ERP.²⁹

9. Press filed the Sunnyside Modification Petition on April 27, 2012. Press argues that the interference caused by the Station to WKMK warranted rescission of the construction permit authorizing operations at the Sunnyside location.³⁰ Press also argues that the construction permit should be rescinded because Apple failed to comply with the “on-off” testing required by the May 2011 Order, and also because Apple was operating the Station in violation of Section 74.1234.³¹ Press also notes that the April 2012 Order was sent at 5:58 p.m. on April 18, 2012, and required Apple to reduce power or cease operations “immediately.” At 10:33 a.m. on April 19, 2012, Apple informed Press that it would reduce power “within 30 minutes,” suggesting that the Station operated for 16 hours after the issuance of the April 2012 Order.³² Press also argues that Apple’s candor is in question because Celenza’s April 19, 2012, email to the Bureau – in which he confirmed compliance with the April 2012 Order – did not state that he had not reduced power until that morning, rather than “immediately.”³³

10. Glen Oaks. Apple filed the Glen Oaks Modification Application on April 25, 2012, proposing to relocate its transmitter to an antenna located on North Shores Towers in Glen Oaks, also in

²⁴ Reply to Opposition to Emergency Petition at 2.

²⁵ *Id.*

²⁶ See Email from Harry Cole to James Bradshaw, Lauren Colby, Peter Doyle, Michael Celenza, and Richard Morena (Apr. 18, 2012, 4:50 p.m. EST).

²⁷ See Email from James Bradshaw to Harry Cole, Lauren Colby, Peter Doyle, Michael Celenza, Richard Morena, and Robert Gates (Apr. 18, 2012, 5:57 p.m. EST) (“April 2012 Order”).

²⁸ *Id.*, citing 47 C.F.R. § 74.1234(a)(1) (“If the transmitter site cannot be reached promptly at all hours and in all seasons, means shall be provided so that the transmitting apparatus can be turned on and off at will from a point which is readily accessible at all hours and in all seasons.”).

²⁹ See Email from Michael Celenza to James Bradshaw and Dan Huber (Apr. 19, 2012, 10:36 a.m. EST) (“Reduced Power Email”).

³⁰ Sunnyside Modification Petition at 6.

³¹ *Id.* at 6-7.

³² *Id.* at 7-9.

³³ *Id.*

Queens. In the application, Apple requests a waiver of Section 74.1233(a) of the Rules, which requires that the 60 dBμ contours of the existing and proposed FM translator facilities overlap.³⁴

11. On May 15, 2012, Apple filed another request for silent STA (“May 2012 Silent STA Request”), indicating that the station had been silent since May 7, 2012, “pending action on the the [sic] minor modification application for Glen Oaks, NY application.”³⁵

12. Long Island City. On March 20, 2013, Apple filed the Long Island City STA Request, seeking authority to operate the Station from a temporary site within the Station’s current 60 dBμ contour. Apple stated that it was “currently awaiting FCC approval to relocate [the Station] to a new location” and that “[t]he Station has been silent since May 7, 2012, as a result of an on-going dispute with the current transmitter site landlord. The licensed site is not useable at this time.”³⁶

13. Press filed the STA Request Petition on April 4, 2013. Press argues that the Long Island City STA Request would violate Section 74.1204(f) of the Rules because WKMK has three identified listeners within the Station’s proposed 60 dBμ contour.³⁷ Press also argues that STA request should be denied because Apple demonstrated a lack candor with the Commission when dealing with Press’ interference complaint.³⁸

14. Apple resumed operations at the Sunnyside site on April 11, 2013.³⁹ On April 16, 2013, the Station again went silent. Apple explained that its “limited use agreement” to operate the station at the Sunnyside site had expired at noon on April 16.⁴⁰ Apple further stated that it hoped to resume broadcasting at the site specified in the Long Island City STA Request.

15. Expiration Petition. On May 13, 2013, Press filed the Expiration Petition in which it contends that the Station might not have actually resumed operations from April 11 to April 16, and thus the Station’s license might have expired pursuant to Section 312(g) of Communications Act of 1934, as amended (“Act”).⁴¹ At that time, Apple’s transmitter was still located atop the Royal Kent building in Sunnyside. Apple stated that, sometime around May 2012, the Fire Marshall of the New York City Fire Department would not allow Apple’s equipment in the building’s elevator room, and the building’s Board of Directors informed Apple that it could no longer use the building for its transmitter.⁴² Press therefore questions how Apple was able to operate the transmitter between April 11 and April 16 if it did

³⁴ Glen Oaks Modification Application at Attachment 17, Technical Statement, citing *The Cromwell Group, Inc. of Illinois*, 26 FCC Rcd 12685 (MB 2011) (“*Mattoon*”).

³⁵ See File No. BLSTA-20120516AAT, Exhibit 1. The staff granted this STA request on July 27, 2012, and it was to expire on January 23, 2013. See *Letter to John C. Trent from Lisa A. Scanlan* (MB Jul. 27, 2012). Apple filed an STA extension request on January 11, 2013, which again indicated the Station was silent while awaiting action on the Glen Oaks Modification Application. See File No. BLESTA-20130111AAD, Exhibit 2. The staff granted the extension request, which was to expire on May 7, 2013. (*Letter to John C. Trent from Lisa Scanlan*, Ref 1800B3-FMH (MB Mar. 20, 2013).

³⁶ Long Island City STA Request at Exhibit 12.

³⁷ STA Petition at 4.

³⁸ *Id.* at 7-9.

³⁹ See *Resumption of Operations*, filed April 11, 2013.

⁴⁰ File No. BLSTA-20130417AAO. The staff granted this STA request on July 11, 2013. It is scheduled to expire on January 7, 2014. See *Letter to John C. Trent from Lisa A. Scanlan*, Ref 1800B3-VM (MB Jul. 11, 2013).

⁴¹ 47 U.S.C. § 312(g).

⁴² Expiration Petition at 4; Opposition to STA Petition at 5.

not have access to the building, and asks the Commission to issue Apple an Order to Show Cause why its translator license should not be declared to have expired.⁴³

16. In the Opposition to the Expiration Petition, Apple responds that it obtained permission from the Royal Kent's building supervisor, Kristin Maslowski ("Maslowski"), to temporarily use the building for its transmitter on April 11, and that the transmitter was shut down on April 16.⁴⁴ Apple provides a declaration signed by Maslowski under penalty of perjury in support of its Opposition.⁴⁵ Apple also provided photographs of transmitter equipment with a copy of the April 11, 2013 edition of *Newsday*, a newspaper based in Long Island.⁴⁶ In its Consolidated Response, Press argues that the declarations provided by Apple do not provide sufficient detail to determine that the Station in fact operated between April 11 and April 16.⁴⁷

III. DISCUSSION

17. Expiration Petition. Section 312(g) of the Act provides that "if a broadcasting station fails to transmit broadcast signals for any consecutive 12-month period, then the station license granted for the operation of that broadcast station expires at the end of that period, notwithstanding any provision, term, or condition of the license to the contrary."⁴⁸ According to Apple's silent STA requests, the Station was initially silent from May 12, 2011, until April 6, 2012, then was silent from May 7, 2012, until April 11, 2013, and went silent again on April 16, 2013.

18. Press has not provided any documentation to support its speculation that the Station did not in fact resume operations. Rather, the entire basis for Press' argument is that Apple apparently had limited access to the transmitter site and therefore could not have operated the Station. However, Apple provides Maslowski's sworn declaration, which states that she allowed Apple to reinstall the equipment for the Station, and that the Station did in fact operate from April 11 until April 16.⁴⁹ We thus find that the Station was operating during that period and its license did not expire pursuant to Section 312(g).

19. Long Island City STA Petition. Pursuant to Sections 309(d) and (e) of the Act,⁵⁰ petitions to deny and informal objections must provide properly supported allegations of fact that, if true, would

⁴³ Expiration Petition at 6.

⁴⁴ Opposition to Expiration Petition at 3.

⁴⁵ *Id.* at Exhibit 1, Declaration of Kristin Maslowski. Apple also provided a declaration signed, under penalty of perjury, by Scott Hamill, who states that he assisted Apple in reinstalling the equipment at the Royal Kent and that Station did operate. *Id.* at Exhibit 1, Declaration of Scott Hartill. It is unclear, however, what relation, if any, Hartill has to Apple.

⁴⁶ *Id.* at Exhibit 2.

⁴⁷ Consolidated Response at 4-6.

⁴⁸ 47 U.S.C. § 312(g). *See also Implementation of Section 403(l) of the Telecommunications Act of 1996*, Order, 11 FCC Rcd 16599 (1996); 47 C.F.R. § 73.1740(c).

⁴⁹ Opposition to Expiration Petition at Exhibit 1, Declaration of Kristin Maslowski. Maslowski is not an agent of Apple and therefore is a disinterested witness. Because Apple has not explained Hartill's relation to the company, we give his declaration no consideration. *See Iglesia Jesucristo Es Mi Refugio, Inc.*, Memorandum Opinion Order and Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 16310, 16319 (MB 2010) (petitioner's engineering consultant's hearsay statement, uncorroborated by independent documentation, should be given little weight because he was not a disinterested witness); *Second Samoan Congregation Church*, Letter, 23 FCC Rcd 16630, 16636 (MB 2008) (applicant's counsel's statements should be given little weight because he is not a disinterested witness).

⁵⁰ 47 U.S.C. § 309(d), (e).

establish a substantial and material question of fact calling for further inquiry regarding whether grant of the Assignment Application would be *prima facie* inconsistent with Section 309(a) of the Act.⁵¹ This section provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant 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.

20. Press opposes the Long Island City STA Request on the grounds that the Station has caused interference to WKMK at its Manhattan and Sunnyside locations, and will likely continue to cause interference at the proposed site. Section 74.1204(a)(3) of the Rules provides that the 40 dBμ contour of a translator station shall not overlap with the 60 dBμ contour of a full service co-channel FM station.⁵² We have reviewed the Long Island City STA Request and find that the facilities proposed in the Long Island City STA request would not result in prohibited overlap with WKMK.

21. Additionally, we find Press has not demonstrated that the Long Island City STA Request fails to comply with Section 74.1204(f) of the Rules.⁵³ In promulgating Section 74.1204(f), the Commission stated that it “will not grant an application if an objecting party provides convincing evidence that the proposed translator station would be likely to interfere with the reception of a regularly received off-the-air existing service, even if there is no predicted overlap.”⁵⁴ In order to demonstrate that grant of an FM translator construction permit application “will result in interference to the reception” of an existing full-service station, an opponent must provide, at a minimum: (1) the name and specific address of each potentially affected listener; (2) some demonstration that the address of each such listener falls within the 60 dBμ service contour of the proposed translator station;⁵⁵ (3) a declaration from each such listener that he or she listens to the full-service station at the specified location; and (4) some evidence that grant of the authorization would result in interference to the reception of the “desired” full-service station at that location.⁵⁶

22. Press has failed to satisfy the Section 74.1204(f) requirement to provide declarations from specific listeners within the Long Island City STA Request’s predicted 60 dBμ service contour. Instead, Press has merely provided a spreadsheet listing names and addresses of claimed listeners that

⁵¹ *Id.* § 309(a). See, e.g., *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broadcasting L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), *rehearing denied* (Sept. 10, 1993); *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

⁵² 47 C.F.R. § 74.1204(a)(3).

⁵³ 47 C.F.R. § 74.1204(f).

⁵⁴ See *The Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12685-6 (2004), citing *Amendment of Part 74 of the Commission’s Rules Concerning FM Translator Stations*, Report and Order, 5 FCC Rcd 7212, 7230 (1990), *modified*, 6 FCC Rcd 2334 (1991), *recon. denied*, 8 FCC Rcd 5093 (1993).

⁵⁵ The staff generally requires demonstrations of actual or potential interference from listeners within the translator station’s proposed 60 dBμ contour who are unconnected with the full-service station whose service allegedly will be disrupted. See *Association for Community Education, Inc.*, 19 FCC Rcd at 12688 n.37 (approving staff practice requiring that the complainant be “disinterested,” i.e., a person or entity without a legal stake in the outcome of the translator station licensing proceeding).

⁵⁶ *Id.*, 19 FCC Rcd at 12687.

allegedly filed interference complaints at the Station's Sunnyside location. Accordingly we find Press' proposed interference argument unsubstantiated.⁵⁷

23. **Character Questions.** Press also argues that the Long Island City STA Request should be denied because Apple has allegedly shown a lack of candor in its dealings with the Commission. Specifically, Press argues that because Apple indicated in the May 2012 Silent STA Request, and the subsequent January 11, 2013 STA extension request, that the Station was silent pending action on the Glen Oaks Modification Application, rather than as a result of a dispute with the Royal Kent management.⁵⁸ Press also argues that Apple showed a lack of candor because it did not reveal that it did not have access to the transmitter site "at all times" as required by Section 74.1234.

24. The trait of truthfulness is a key element of character qualifications necessary to operate a broadcast station in the public interest.⁵⁹ Misrepresentation and lack of candor raise immediate concerns as to whether a licensee will be truthful in future dealings with the Commission.⁶⁰ Misrepresentation is a false statement of fact made with intent to deceive.⁶¹ Lack of candor is concealment, evasion, or other failure to be fully informative, accompanied by intent to deceive.⁶² Intent can be shown in many ways. If a licensee knowingly makes a false statement, that is sufficient proof of intent to deceive.⁶³ Intent to deceive can also be inferred when one has a clear motive to deceive.⁶⁴ Moreover, intent can be found when the surrounding circumstances clearly show the existence of intent to deceive, even if there is no direct evidence of a motive.⁶⁵

25. We find that Press has not proved the requisite intent necessary to establish misrepresentation or lack of candor. The party alleging misrepresentation or lack of candor has the burden of proof to make a *prima facie* showing of intent to deceive.⁶⁶ By the time Apple had filed the May 2012 Silent STA Request, testing had already determined that the Sunnyside site was not suitable for the Station's transmitter because of the interference it caused WKMK.⁶⁷ Moreover, the staff had

⁵⁷ See *Red Wolf Broadcasting Corporation*, Letter, 27 FCC Rcd 4870, 4873 (MB 2012) (denying objection to a new translator station application where objector failed to provide any declarations from specific listeners falling within the Application's predicted 60 dBμ service contour).

⁵⁸ STA Petition at 7.

⁵⁹ See *Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 FCC 2d 1179, 1210-11 (1986), *recon. denied*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. Jun. 11, 1987).

⁶⁰ *Id.*

⁶¹ See *Fox River Broadcasting, Inc.*, Order, 93 FCC 2d 127, 129 (1983).

⁶² *Id.*

⁶³ See *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 462 (D.C. Cir. 1980) ("[T]he fact of misrepresentation coupled with proof that the party making it had knowledge of its falsity [is] enough to justify a conclusion that there was fraudulent intent").

⁶⁴ See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684 (Rev. Bd. 1989).

⁶⁵ See *American International Development, Inc.*, Memorandum Opinion and Order, 86 FCC 2d 808, 816 n. 39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983) (stating that "the absence of direct evidence of motive is not significant where the record otherwise clearly establishes that deceptive conduct has occurred").

⁶⁶ See, e.g., *Merrimack Valley Broadcasting, Inc.*, Memorandum Opinion and Order, 99 FCC 2d 680 n.9 (1984).

⁶⁷ See April 2012 Order.

already ordered Apple either to operate at reduced power or to cease operations entirely.⁶⁸ Additionally, Apple reported the dispute with its landlord in the Long Island City STA Request. Thus, we do not find an “intent to deceive” where Apple stated it was silent because of the interference caused by the Station. Moreover, to the extent that Apple violated Section 74.1234 of the Rules by lacking access to its transmitter site, we are notifying Apple of its apparent liability for forfeiture, as discussed below.⁶⁹

26. Long Island City STA Request. Under Section 309(f) of the Act,⁷⁰ when an appropriate application has been filed, the Commission may grant an STA if it finds that there are extraordinary circumstances requiring temporary operations in the public interest and that delay in the institution of such temporary operations would seriously prejudice the public interest. In this case, we believe that the public interest in continuing the Station’s broadcast service to residents of New York, New York, while ending interference to WKMK, warrants resumed operation of the Station at a new site and with new technical parameters.

27. STA requests which involve a change in transmitter site must include four critical elements: (1) loss of the licensed site must be beyond the licensee’s control; (2) STA facilities must continue to provide service to the licensed community; (3) STA facilities must maintain, as closely as practicable, the licensed service area without extending it; and (4) STA facilities cannot involve the construction of towers intended for permanent use by the station requesting the STA. Our review indicates that the proposed STA operation complies with these criteria and we will therefore grant the Long Island City STA Request.⁷¹

28. Glen Oaks Modification Application. The Glen Oaks Modification Application requests a waiver of Section 74.1233(a) of the Rules, which requires that the 60 dBμ contours of the existing and proposed FM translator facilities overlap.⁷² We have granted such waivers where: (1) the translator station does not have a history of filing “serial” minor modification applications; (2) the proposed facility is mutually exclusive to its licensed facility; (3) the proposed move does not implicate the concerns raised by the Commission in the recent orders in the low power FM . . . docket,⁷³ and (4) while not alone dispositive, the translator will rebroadcast an AM station.⁷⁴ While we find the Glen Oaks Modification Application will satisfy the first three of these criteria, Apple has indicated that the Station will not be rebroadcasting an AM station. Apple has not explained why grant of its waiver request is warranted in this situation. We therefore deny Apple’s waiver request and will dismiss the Glen Oaks Modification Application.⁷⁵

⁶⁸ *Id.*

⁶⁹ See *infra* ¶ 29.

⁷⁰ 47 U.S.C. § 309(f).

⁷¹ Because we are granting the Long Island City STA Request, we will dismiss as moot the Manhattan License Petition, the Emergency Petition, the Sunnyside Petition, and the Sunnyside License Application.

⁷² Glen Oaks Modification Application at Attachment 17, Technical Statement, citing *Mattoon*, 26 FCC Rcd at 12686.

⁷³ *Creation of a Low Power Radio Service*, Third Further Notice of Proposed Rulemaking, 26 FCC Rcd 9986 (2011); Fourth Report and Order and Third Order on Reconsideration, 27 FCC Rcd 3365 (2012) (subsequent history omitted).

⁷⁴ *Mattoon*, 26 FCC Rcd at 12686.

⁷⁵ See *Educational Media Foundation*, Letter, DA 13-2108 (MB Oct. 31, 2013) (denying waiver of Section 74.1233(a) because translator station would not rebroadcast an AM station). Press states that “[i]n view of the Commission’s expressed concerns about serial modification application by translator licensees . . . Apple’s tendency

29. Proposed Forfeiture. This *NAL* is issued pursuant to Sections 309(k) and 503(b) of the Act, and Section 1.80 of the Rules.⁷⁶ Under Section 503(b)(1)(B) of the Act, any person who is found to have willfully or repeatedly failed to comply with any provision of the Act or any rule, regulation, or order issued by the Commission shall be liable to the United States for a forfeiture penalty.⁷⁷ Section 312(f)(1) of the Act defines willful as “the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate” the law.⁷⁸ The legislative history to Section 312(f)(1) of the Act clarifies that this definition of willful applies to both Sections 312 and 503(b) of the Act,⁷⁹ and the Commission has so interpreted the term in the Section 503(b) context.⁸⁰ Section 312(f)(2) of the Act provides that “[t]he term ‘repeated,’ when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”⁸¹

30. The Commission’s *Forfeiture Policy Statement* and Section 1.80 of the Rules establish a base forfeiture amount of \$3,000 for violation of transmitter control requirements.⁸² In determining the appropriate forfeiture amount, we may adjust the amount upward or downward by considering the factors enumerated in Section 503(b)(2)(D) of the Act, including “the nature, circumstances, extent and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.”⁸³

31. Apple has indicated that it was unable to access the Sunnyside transmitter site outside the hours of 9:00 a.m. to 5:00 p.m., in violation of Section 74.1234(a)(1). This lasted throughout the month-long period from April 6, 2012, to May 7, 2012. This lack of access impaired Apple’s ability to comply with Commission orders. The record shows that – although it was ordered to “immediately” reduce the transmitter’s power the evening of April 18, 2012⁸⁴ – Apple concedes that it did not do so until the morning of April 19, 2012,⁸⁵ apparently because it lacked access to the transmitter site and did not have

to gad about the FM spectrum may warrant further investigation.” Sunnyside Modification Petition at 3 n.1 and Glen Oak Modification Petition at 3 n.1, *citing Mattoon* (internal citation omitted). In *Mattoon*, we noted that some translator licensees were attempting to effectuate impermissible major changes by filing serial minor modification application to “hop” to new locations that were sometimes over 100 miles away. Here, Apple’s modification applications have been filed in response to the continued interference caused to Station WKMK. Additionally, because we are dismissing this application, we will dismiss the Glen Oaks Petition as moot.

⁷⁶ See 47 U.S.C. §§ 309(k), 503(b); 47 C.F.R. § 1.80. The Bureau has delegated authority to issue the *NAL* under Section 0.283 of the Rules. See 47 C.F.R. § 0.283.

⁷⁷ 47 U.S.C. § 503(b)(1)(B). See also 47 C.F.R. 1.80(a)(1).

⁷⁸ 47 U.S.C. § 312(f)(1).

⁷⁹ See H.R. Rep. No. 97-765, 97th Cong. 2d Sess. 51 (1982).

⁸⁰ See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4388 (1991).

⁸¹ 47 U.S.C. § 312(f)(2).

⁸² See *Forfeiture Policy Statement and Amendment of Section 1.80(b) of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113-15 (1997) (“*Forfeiture Policy Statement*”), *recon. denied*, 15 FCC Rcd 303 (1999); 47 C.F.R. § 1.80(b)(4), note to paragraph (b)(4), Section I.

⁸³ 47 U.S.C. § 503(b)(2)(D); see also *Forfeiture Policy Statement*, 12 FCC Rcd at 17100; 47 C.F.R. § 1.80(b)(4).

⁸⁴ See May 2012 Order.

⁸⁵ See Reduced Power Email.

an ability to control the transmitter remotely. Considering the record as a whole, we believe that the full \$3,000 base forfeiture is appropriate for Apple's apparent violation.⁸⁶

IV. ORDERING CLAUSES

32. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's Rules, that Apple 107.1, Inc., is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of three thousand dollars (\$3,000) for its apparent willful and repeated violations of Section 74.1234(a)(1) of the Commission's Rules.

33. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's Rules, that, within thirty (30) days of the release date of this *NAL*, Apple 107.1, Inc., SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

34. Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the *NAL*/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the *NAL*/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code). Licensee will also send electronic notification on the date said payment is made to Tom.Hutton@fcc.gov and Alexander.Sanjenis@fcc.gov.

35. The response, if any, must be mailed to Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington DC 20554, ATTN: Peter H. Doyle, Chief, Audio Division, Media Bureau, and MUST INCLUDE the *NAL*/Acct. No. referenced above.

36. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the respondent submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the respondent's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

37. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director-Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.⁸⁷

38. IT IS FURTHER ORDERED that the May 13, 2013, "Petition for Determination of License Expiration Pursuant to 47 U.S.C. § 312(g)" filed by Press Communications, Inc., IS DENIED.

⁸⁶ See, e.g., *Rego, Inc.*, Forfeiture Order, 16 FCC Rcd 16795 (EB 2001) (affirmed proposed \$3,000 forfeiture where licensee lacked remote control system to control transmitter).

⁸⁷ See 47 C.F.R. § 1.1914.

39. IT IS FURTHER ORDERED that the April 4, 2013, "Petition to Deny or, in the Alternative, Informal Objection" filed by Press Communications, Inc., IS DENIED.

40. IT IS FURTHER ORDERED that the March 20, 2013, request for special temporary authorization (File No. BSTA-20130320ABV) filed by Apple 107.1, Inc., IS GRANTED.

41. IT IS FURTHER ORDERED that the April 25, 2012, construction permit application (BPFT-20120425ABS) filed by Apple 107.1, Inc., IS DISMISSED.

42. IT IS FURTHER ORDERED that the May 11, 2012, Petition to Deny filed by Press Communications, Inc., IS DISMISSED AS MOOT.

43. IT IS FURTHER ORDERED that the April 5, 2012, covering license application (File No. BLFT-20120405AAK) filed by Apple 107.1 IS DISMISSED AS MOOT.

44. IT IS FURTHER ORDERED that the April 11, 2012, "Emergency Petition for Immediate Rescission of Construction Permit and Dismissal of License Application" filed by Press Communications, Inc., IS DISMISSED AS MOOT.

45. IT IS FURTHER ORDERED that the June 21, 2011 and April 27, 2012, Petitions for Reconsideration filed by Press Communications, Inc., ARE DISMISSED AS MOOT.

46. IT IS FURTHER ORDERED that copies of this *NAL* shall be sent, by First Class and Certified Mail, Return Receipt Requested, to Apple 107.1, Inc., 41 Kathleen Crescent, Coram, NY 11727, to its counsel, John C. Trent, Esq., Putbrese Hunsaker & Trent, P.C., 200 South Church Street, Woodstock, VA 22664, and Daniel A. Huber, Esq., Law Office of Daniel A. Huber, Esq., 118 Michigan Avenue, N.E., Unit J-32, Washington, DC 20017, and to Harry F. Cole, Esq., Fletcher Heald & Hildreth, P.L.C., 1300 North 17th Street, 11th Floor, Arlington, VA 22209.

FEDERAL COMMUNICATIONS COMMISSION

Peter H. Doyle
Chief, Audio Division
Media Bureau