

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

In the Matter of)	
)	
Emmanuel Communications, Inc.)	
)	
Application for a Construction Permit for)	Facility ID No. 200924
W256DN, Worcester, Massachusetts)	File No. BNPFT-20171220AAW

MEMORANDUM OPINION AND ORDER

Adopted: October 2, 2019**Released: October 2, 2019**

By the Commission:

I. INTRODUCTION

1. Before the Commission is an Application for Review (AFR) filed by Emmanuel Communications, Inc. (Emmanuel), on October 29, 2018. Emmanuel seeks review of a Media Bureau (Bureau) decision affirming the dismissal of the captioned application (Permit Application) for a construction permit for FM translator station W256DN, Worcester, Massachusetts (Translator). For the reasons set forth below, we dismiss the AFR in part and otherwise deny it.

II. BACKGROUND

2. Emmanuel filed the Permit Application on December 20, 2017, seeking authorization to construct a cross-service FM translator station to rebroadcast Station WNEB(AM), Worcester, Massachusetts. The Bureau accepted the Permit Application for filing on January 29, 2018. Through a public notice dated February 1, 2018, the Bureau announced that petitions to deny were due on February 16, 2018.¹ The Bureau erroneously granted the Permit Application prior to that date,² but rescinded the grant.³ Plymouth Rock then filed a Petition to Deny the Permit Application, in which it argued that the Translator would cause interference to listeners of one of its stations, WPLM-FM, Plymouth, Massachusetts, in violation of section 74.1204(f) of the Commission's rules (Rules).⁴ Emmanuel opposed the Petition to Deny, arguing that the Permit Application complied with "all applicable FCC technical requirements," the anticipated interference was *de minimis*, and displacement relief was "the appropriate remedy most consistent with the Commission's intent to revitalize the AM radio service."⁵ In response,

¹ *Broadcast Applications*, Public Notice, Report No. 29164 (MB Feb. 1, 2018) (specifying that petitions to deny the Permit Application "must be on file no later than 15 days from the date of the notice accepting [it] for filing").

² *Broadcast Actions*, Public Notice, Report No. 49175 (MB Feb. 16, 2018).

³ *Broadcast Applications*, Public Notice, Report No. 29177 (MB Feb. 21, 2018).

⁴ See Petition to Deny of Plymouth Rock Broad. Co., Inc. (Plymouth Rock), File No. BNPFT-20171220AAW (filed Feb. 16, 2018) (citing 47 CFR § 74.1204(f)).

⁵ See Opposition to Petition to Deny of Emmanuel Comm., Inc., File No. BNPFT-20171220AAW (filed Mar. 7, 2018).

Plymouth Rock again stated that the Translator would cause interference to WPLM-FM in violation of section 74.1204(f). It also noted that section 74.1204(f) did not include a *de minimis* exception.⁶

3. On June 26, 2018, the Bureau held that Plymouth Rock had demonstrated that the Translator would cause interference to listeners of WPLM-FM in violation of section 74.1204(f) of the Rules and dismissed the Permit Application.⁷

4. Emmanuel filed a Petition for Reconsideration (Petition) of the *Staff Decision*. The Petition did not assert that the Bureau erred in concluding that the application was subject to dismissal under section 74.1204(f), which was the basis of the *Staff Decision*. Instead, Emmanuel proposed two alternatives to dismissal and argued the Bureau should have addressed them: (1) waiving section 74.1204(f) in order to grant the Permit Application “contingent on Emmanuel’s immediate submission of a modification application proposing . . . displacement relief” “should any actual interference occur,” and (2) allowing the Permit Application to remain pending while Emmanuel negotiated an agreement with Plymouth Rock by which Plymouth Rock would withdraw its Petition to Deny and Emmanuel would amend the Permit Application to seek “displacement relief” to move to a channel Plymouth Rock found acceptable.⁸ On September 28, 2018, the Bureau denied the Petition.⁹ The Bureau found that section 73.3517 of the Rules “expressly prohibits the filing of contingent applications for new stations”¹⁰ and that Emmanuel had not demonstrated that waiver of section 74.1204(f) of the Rules was justified.¹¹ The Bureau went on to reject Emmanuel’s argument that it should reinstate the Permit Application to allow it to attempt to negotiate an agreement with Plymouth Rock.¹² Finally, the Bureau noted that Emmanuel could have amended the Permit Application while it was pending to correct the section 74.1204(f) violation, or it could have filed a corrective amendment after the dismissal of the Permit Application pursuant to the Commission’s *Nunc Pro Tunc* policy.¹³

5. Emmanuel then filed the AFR.¹⁴ Therein, it argues that the Bureau erred in dismissing the Permit Application as defective. Specifically, Emmanuel argues that a section 74.1204(f) issue is “a processing obstacle,” not “a true technical defect.”¹⁵ It also maintains that, because the Bureau previously granted the Permit Application, it already determined that the application was “acceptable and grantable

⁶ See Reply to Opposition to Petition to Deny of Plymouth Rock Broad. Co., Inc., File No. BNPFT-20171220AAW (Mar. 14, 2018).

⁷ *Emmanuel Communications, Inc.*, File No. BNPFT-20171220AAW, Letter Order, at 3-4 (MB June 26, 2018) (*Staff Decision*).

⁸ Petition for Reconsideration of Emmanuel Communications. Inc., File No. BNPFT-20171220AAW, at 2-3 (filed July 26, 2018).

⁹ *Emmanuel Communications, Inc.*, File No. BNPFT-20171220AAW, Letter Order (MB Sept. 28, 2018) (*Reconsideration Decision*).

¹⁰ *Id.* at 2 (citing 47 CFR §73.3517). Section 73.3517 states: “Contingent applications for stations and for changes in facilities of existing stations are not acceptable for filing.”

¹¹ *Reconsideration Decision* at 3 (finding “Emmanuel has not presented any special circumstances that warrant a waiver, nor has it explained how the public interest will be served by such waiver”). See also *NetworkIP, LLC v. FCC* 548 F.3d 116, 125-128 (D.C. Cir. 2008); *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹² *Reconsideration Decision* at 3.

¹³ *Id.* at 3 (citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331 (Dec. 3, 1984)).

¹⁴ Plymouth Rock opposed the AFR. Opposition to Application for Review of Plymouth Rock Broad. Co., Inc., File No. BNPFT-20171220AAW (filed Nov. 13, 2013).

¹⁵ AFR at 5.

without technical defects.”¹⁶ It further asserts that, contrary to the Bureau’s findings, it could not have amended the Permit Application to eliminate the section 74.1204(f) issue because one of the two affidavits relied on by the Bureau was “unacceptably ambiguous.”¹⁷ In addition, Emmanuel claims section 73.3517 of the Rules did not prohibit the contingent grant of the Permit Application proposed in the Petition.¹⁸ Finally, Emmanuel argues that the Bureau erred in finding that waiver of section 74.1204(f) was not justified, the Bureau failed to recognize the “policy ramifications of failing to exercise its waiver authority” in this case, and the Bureau’s decision subverts the policy objectives that informed the AM revitalization proceeding.¹⁹

6. Concurrent with its filing of the AFR, Emmanuel also filed an amendment to the Permit Application.²⁰ The amendment proposes operation of the Translator at minimal power and indicates Emmanuel will seek “displacement relief” upon grant of the Permit Application. Emmanuel indicates that it filed the amendment “[p]ursuant to the suggestion” in the *Reconsideration Decision*.²¹

III. DISCUSSION

A. Procedural Issues

7. Emmanuel’s arguments in this proceeding have evolved over time. At the outset, we find that its arguments regarding contingent grant of the Permit Application and waiver of section 74.1204(f)—made for the first time in the Petition—were untimely. Emmanuel could have presented them in its Opposition to the Plymouth Rock Petition to Deny.²² Therefore, those portions of the Petition setting forth these new arguments did not satisfy the requirements of section 1.106(c) of the Rules.²³ The

¹⁶ *Id.* at 6.

¹⁷ *Id.*

¹⁸ *Id.* at 7.

¹⁹ *Id.* at 8-10.

²⁰ See *Broadcast Applications*, Public Notice, Report No. 29354 (MB Nov. 1, 2018).

²¹ AFR at n.15.

²² Emmanuel argued in its Opposition to the Petition to Deny that Plymouth Rock had misconstrued section 74.1204(f). Subsequently, Emmanuel sought a contingent grant of the Permit Application and/or a waiver of section 74.1204(f) for the first time in the Petition—after the Bureau rejected its incorrect view of the rule’s applicability. Normally, such waiver requests must be included in the application. See 47 CFR § 73.3566(a) (applications “determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.”). Here, Emmanuel was not aware of the predicted interference claims until they were submitted in the Petition to Deny. The interference claims included evidence of the type required by the Commission to support a claim of predicted interference. See *Staff Decision* at 3-4 (Plymouth Rock had submitted required documentation to support claim of potential interference); see also *Association for Community Education, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 12682, 12685-6, paras. 7-9 (2004) (listing documentation required to satisfy section 74.1204(f) claim)). The Opposition to Petition to Deny therefore represented Emmanuel’s first opportunity to address the rule violation and seek a waiver. Because it failed to request a waiver at that time, Emmanuel was not able to request it for the first time in the Petition. Cf. *Colorado Radio Corp. v. F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941) (“Now that the decision has gone against it, the appellant wants a chance to persuade the Commission with a supplemental record. We cannot allow the appellant to [sit] back and hope that a decision will be in its favor and then, when it isn’t, to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.”).

²³ 47 CFR § 1.106(c). Section 1.106(c)(1) provides that a petition for reconsideration that relies on “facts or arguments not previously presented” may be granted only if the facts or arguments (1) “relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters,” or (2) were unknown to petitioner until after his last opportunity to present such matters and could not, through the exercise of

(continued....)

Bureau could have dismissed the new arguments as procedurally defective if it determined that the public interest did not require their consideration. The Bureau made no such finding, and we conclude that consideration of the untimely arguments is not required in the public interest. Accordingly, we reverse the Bureau's decision to the extent that it addressed the merits of these new arguments and dismiss those portions of the AFR which challenge the Bureau's findings regarding them.²⁴

8. We further dismiss those portions of the AFR which present material upon which the Bureau has been afforded no opportunity to pass. Specifically, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended, and section 1.115(c) of the Rules, we dismiss Emmanuel's assertion that one of the listener affidavits that accompanied the Petition to Deny "was unacceptably ambiguous,"²⁵ its claim that, under section 74.1204(f), predicted interference creates a "processing

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ordinary diligence, have been learned prior to such opportunity. 47 CFR §§ 1.106(c); 1.106(b)(2). Section 1.106(c)(2) allows consideration of facts or arguments not previously presented if consideration of them "is required in the public interest." 47 CFR § 1.106(c)(2). Because the waiver request was untimely, and because we alternatively affirm the Bureau's denial of the waiver request on the merits, *see infra* n.24, it is not necessary to address Emmanuel's claim that its proposal was not barred by the contingent application rule, 47 CFR §73.3517. *See AFR* at 7.

²⁴ As an alternative and independent reason for our decision, we affirm the Bureau's finding that Emmanuel had not "presented any special circumstances that warrant a waiver, nor ha[d] it explained how the public interest will be served by such a waiver." *Id.* at 3. An applicant for waiver "faces a high hurdle even at the starting gate." *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (*WAIT Radio*). A waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest." *Northwest Cellular Tel. Co., L.P. v. F.C.C.*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (*Northeast Cellular*). To satisfy this public interest requirement, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule. *See, e.g., WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule); *Northeast Cellular*, 897 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule). As the Bureau noted, Emmanuel failed to explain how its circumstances were unique. Further, Emmanuel failed to establish that grant of the waiver would serve the public interest. Indeed, waiver would undermine the policies underlying section 74.1204(f). That provision is designed to identify potential interference issues and prevent them. It is intended to incentivize FM translator applicants to propose viable facilities, ensure such applicants do not invest in facilities that are not viable, and protect existing stations from the loss of listeners due to actual interference. While we believe AM revitalization is an important public interest goal, we do not believe it should be achieved in a manner that undermines the incentives of FM translator applicants to propose viable facilities from the start or puts existing stations at risk of losing listeners. This is especially so, here, where Emmanuel could have submitted a curative amendment to the Permit Application. Moreover, the Commission has repeatedly held that the *Revitalization of AM Radio Service* proceeding did not supersede existing Commission rules and precedent and that the public interest is best served by adherence to established processing guidelines. *See e.g., WJBW, LLC*, Memorandum Opinion and Order, 32 FCC Rcd 2301, 2304, para. 8 (2017) (AM Revitalization does not provide reason to exercise discretion under Section 312(g) of the Communications Act); *Pillar of Fire*, Memorandum Opinion and Order, 32 FCC Rcd 9633, n.24 (2017) (same); *Guam Power II*, Memorandum Opinion and Order, 33 FCC Rcd 11273 (2018) (declining to waive filing deadlines for new FM translator applications proposing to rebroadcast AM stations because of administrative costs). Finally, we note the Commission has recognized that even a proposed translator that does not trigger any complaints of predicted interference under section 74.1204(f) may cause actual interference, and addressing even a small number of valid complaints of predicted interference can save a full power station from actual interference affecting even more listeners, who may simply stop listening to the station when they experience interference. *See Amendment of Part 74 of the Commission's Rules Regarding FM Translator Interference*, MB Docket No. 18-119, Report and Order, FCC 19-40, para. 48 (May 9, 2019) (*Translator Interference Order*).

²⁵ *AFR* at 6. Even if one of the two listener complaints cited by the Audio Division was defective, Emmanuel could have addressed the predicted interference alleged in the other listener complaint through a corrective amendment to the Permit Application filed pursuant to the *Nunc Pro Tunc* policy.

obstacle” not a “technical defect,”²⁶ and its argument that a refusal to grant a waiver of section 74.1204(f) here will “erode confidence in the broad discretion that agencies enjoy in interpreting statutory mandates and in promulgating regulations that reasonably reflect what Congress, or the Commission itself, intended.”²⁷

B. Substantive Issues

9. We reject Emmanuel’s argument that the Bureau erred in dismissing the Permit Application as defective.²⁸ We are not persuaded by Emmanuel’s assertion that the Bureau’s grant of the Permit Application—which was later rescinded²⁹—somehow barred the Bureau from later dismissing the application as defective.³⁰ The Commission’s rules clearly permit the Bureau to, on its own motion, modify or set aside any action made or taken by it within 30 days from the date of public notice of such action.³¹ Here, the Bureau erroneously granted the Permit Application prior to the deadline it had set for filing of petitions to deny.³² Thus, rescission of the grant was both necessary and appropriate. We also note that, had the Bureau not prematurely granted the Permit Application, its decision to accept it for filing would not have prevented the Bureau from later determining that the application was defective and dismissing it.³³

10. We also note that the amendment filed by Emmanuel on October 29, 2018, will be dismissed. The *Nunc Pro Tunc* policy referenced in the *Reconsideration Decision* permits “reconsideration of an action dismissing or returning an application as unacceptable for filing when an applicant submits a relatively minor curative amendment within 30 days” of the dismissal or return of the application.³⁴ Because the amendment was not submitted within 30 days of the dismissal of the Permit Application, the policy does not apply. Moreover, to the extent that Emmanuel characterizes the *Reconsideration Decision* as suggesting it still could file an amendment and request reinstatement of the Permit Application *nunc pro tunc*, we reject that interpretation.

11. Finally, we note that the Commission recently took steps to standardize the information that must support claims of predicted interference caused by an FM translator, and established an outer limit beyond which a listener complaint regarding predicted interference to reception of a station’s signal will not be considered actionable.³⁵ These changes, however, only apply to “applications or complaints that have not been acted upon” as of the effective date of that Report and Order.³⁶ Accordingly, these rule changes do not impact our review of the *Reconsideration Decision*.

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 9-10.

²⁸ *Id.* at 5-6.

²⁹ *See, supra*, para. 2.

³⁰ AFR at 6.

³¹ 47 CFR § 1.113.

³² *See, supra*, para. 2.

³³ *See* 47 CFR § 73.3566(a) (“Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed.”).

³⁴ *Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, 49 Fed Reg 47331 (Dec. 3, 1984).

³⁵ *Translator Interference Order*, FCC 19-40, paras. 16-20, 36-48.

³⁶ *Id.* at para. 49.

IV. ORDERING CLAUSES

12. For the reasons set forth above, **IT IS ORDERED** that, pursuant to section 5(c)(5) of the Communications Act of 1934, as amended,³⁷ and sections 1.115(c) and (g) of the Commission's Rules,³⁸ the Application for Review filed by Emmanuel Communications, Inc., on October 29, 2018, **IS DISMISSED IN PART, DENIED IN PART IN THE ALTERNATIVE, AND OTHERWISE DENIED.**

13. **IT IS FURTHER ORDERED** that the amendment to the Permit Application (File No. BNPFT-20171220AAW) filed by Emmanuel Communications, Inc. on October 29, 2018, **IS DISMISSED.**

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ 47 U.S.C. § 155(c).

³⁸ 47 CFR § 1.115(c), (g).