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In re: Clear Communications, Inc.  
New FM Translator, Vineland, NJ  
Facility ID No. 202064  
File No. BNPFT-20180502ABQ

**Petition for Reconsideration**

Dear Counsel:

We have before us a Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Petition) filed by Clear Communications, Inc. (Clear) on October 14, 2020 and related pleadings.<sup>1</sup> Clear challenges a Media Bureau (Bureau) letter dated September 14, 2020 (*Letter Order*).<sup>2</sup> The *Letter Order* granted a Petition to Deny filed by Press Communications, LLC (Press) on May 23, 2018, and dismissed Clear's application (Application) for a construction permit for a new cross-service FM translator station at Vineland, New Jersey (Translator).<sup>3</sup> For the reasons discussed below, we grant the Petition, and reinstate

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<sup>1</sup> Press Communications, LLC (Press) filed an Opposition to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Opposition) on October 26, 2020. Clear Communications, Inc. (Clear) then filed a Reply to Opposition to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Reply) on November 10, 2020. Press later filed a Second Supplement and Interference Package in Response to Amendment (Second Interference Package) on December 21, 2020, and Clear responded by filing a Supplement and Amendment to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Supplement) on December 31, 2020, which was accompanied by a Motion for Leave to File (Motion).

<sup>2</sup> *Clear Commc'ns, Inc.*, File No. BNPFT-20180502ABQ, Letter Order (MB Sept. 14, 2020) (*Letter Order*).

and grant the amended Application that accompanied a Supplement and Amendment to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Supplement) filed by Clear on December 31, 2020.

**Background.** On May 2, 2018, Clear filed the Application, which sought a construction permit for a new FM Translator on Channel 293 at Vineland, New Jersey. Press then filed its Petition to Deny. Press alleged the Translator would cause interference to listeners of its co-channel station—WTHJ(FM), Bass River Township, New Jersey—in violation of section 74.1204(f) of the Commission’s rules (Rules).<sup>4</sup> Clear opposed the Petition to Deny,<sup>5</sup> and Press replied.<sup>6</sup>

The Petition to Deny was still pending on August 13, 2019, when changes the Commission had made to section 74.1204(f) became effective.<sup>7</sup> Thus, on September 9, 2019, we notified Press that it had 30 days to bring the Petition to Deny into compliance with the updated translator interference complaint requirements.<sup>8</sup> On October 9, 2019, Press filed a Supplement to Petition to Deny.<sup>9</sup>

After reviewing the Supplement to Petition to Deny, we concluded Press had adequately substantiated its claims of predicted interference to WTHJ(FM) listeners. Accordingly, on September 14, 2020, we granted the Petition to Deny and dismissed the Application.

Clear then filed the Petition, which was accompanied by a minor curative amendment to the Application. The curative amendment sought to modify the Translator’s directional antenna pattern to eliminate predicted interference to the WTHJ(FM) listeners identified by Press in the Supplement to Petition to Deny. Clear urged us to grant reconsideration, and reinstate the Application, as amended, pursuant to the Commission’s *Nunc Pro Tunc* policy.<sup>10</sup> Clear also argued that reconsideration was justified because we failed to follow the notification procedures established in the *FM Translator Interference Order*.<sup>11</sup>

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<sup>3</sup> Clear proposes to use the Translator to rebroadcast the signal of its AM station, WMIZ(AM), Vineland, New Jersey.

<sup>4</sup> See 47 CFR § 74.1204(f) (2018).

<sup>5</sup> Opposition to Petition to Deny of Clear Commc’ns, Inc., File No. BNPFT-20180502ABQ (filed June 13, 2018).

<sup>6</sup> Reply to Opposition to Petition to Deny of Press Commc’ns, LLC, File No. BNPFT-20180502ABQ (filed June 20, 2018).

<sup>7</sup> See *Amendment of Part 74 of the Commission’s Rules Regarding Translator Interference*, Report and Order, 34 FCC Rcd 3457 (2019) (*FM Translator Interference Order*), recon. denied, 35 FCC Rcd 11561 (2020). See also *Media Bureau Announces August 13, 2019, Effective Date of Amended Rules for FM Translator Interference*, Public Notice, 34 FCC Rcd 7004 (MB 2019).

<sup>8</sup> Letter from James D. Bradshaw, Senior Deputy Chief, Audio Division, Media Bureau, FCC, to John F. Garziglia, Esq., Counsel for Press Commc’ns, LLC, File No. BNPFT-20180502ABQ (dated Sept. 9, 2019).

<sup>9</sup> Supplement to Petition to Deny of Press Commc’ns, LLC, File No. BNPFT-20180502ABQ (filed Oct. 9, 2019).

<sup>10</sup> Petition at 3, citing Statement of Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications, 49 Fed. Reg. 47331 (Dec. 3, 1984) (*Nunc Pro Tunc Policy*).

<sup>11</sup> Petition at 4-5, citing *FM Translator Interference Order*, 34 FCC Rcd at 3468, para. 21, and 3475, para. 35. Clear states that it was waiting for a letter from the Commission notifying it that Press’ interference package satisfied the Commission’s requirements, and setting a deadline for Clear to resolve the complaints. *Id.* at 4. Clear also indicates that it “confirmed” its understanding of the *FM Translator Interference Order* with Bureau staff. *Id.* at 4, and Attach. 4.

Press opposed the Petition, arguing the *Nunc Pro Tunc* policy did not apply because the Commission “changed the procedures for remedying a defective unacceptable for filing FM translator application” in the *FM Translator Interference Order*.<sup>12</sup> Press further argued that the procedures Clear claimed the Bureau failed to follow were inapplicable.<sup>13</sup> Finally, Press argued that, even as amended, the Application was unacceptable for filing due to predicted interference to WTHJ(FM) listeners.<sup>14</sup>

On reply, Clear again asserted that the *Nunc Pro Tunc Policy* applied, and argued nothing in the *FM Translator Interference Order* suggested otherwise.<sup>15</sup>

Press then filed a Second Supplement and Interference Package in Response to Amendment (Second Interference Package). Therein, Press alleges listeners within WTHJ(FM)’s 45 dB $\mu$  contour would experience interference from the facilities proposed in the curative amendment.<sup>16</sup> Press characterizes the curative amendment that accompanied the Petition as the one bite at the apple that Clear claims it is allowed under the *Nunc Pro Tunc Policy*.<sup>17</sup> Press argues that we must deny reconsideration because the amendment is unacceptable under section 74.1204(f).<sup>18</sup>

In response, Clear filed a Supplement and Amendment to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Supplement), an amendment to the curative amendment, and the Motion. Clear argues that we should grant it leave to file the Supplement and amend the curative amendment because Press submitted new evidence of predicted interference to additional listeners.<sup>19</sup> Clear states that it was not aware of those listeners when it “redesigned its proposal to protect the previously identified listeners.”<sup>20</sup> Clear argues that the amendment to the curative amendment is permitted under the *Nunc Pro Tunc Policy* because the Petition remains pending, and the Application has been dismissed only once.<sup>21</sup> Clear notes that, given the limited nature of the cross-service FM translator filing windows, it would be precluded

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<sup>12</sup> Opposition at 1-2.

<sup>13</sup> *Id.* at 4-5. Press argues that Clear has confused the procedures related to complaints that an FM translator is causing actual interference with those related to complaints that an FM translator is predicted to cause interference. *Id.* at 4

<sup>14</sup> *Id.* at 7.

<sup>15</sup> Reply at 1-2.

<sup>16</sup> Second Interference Package at 2-4, and Attach. A. Press also submits a showing that WTHJ(FM) has a “sizable community of [ ] radio listeners outside of its 45 dB $\mu$  contour in the direction of the FM translator Application transmitter site” and requests a “preemptive waiver” of the 45 dB $\mu$  contour limit. *Id.* at 7-12, and Attachs. A and B. Press makes these claims in relation to the curative amendment that accompanied the Petition, which revised the Translator’s directional antenna contour but continued to propose operations on Channel 293. Given our decision herein to accept the amendment to the curative amendment for filing and grant a construction permit for operation of the Translator on Channel 225, we do not address Press’ request herein.

<sup>17</sup> *Id.* at 6-7.

<sup>18</sup> *Id.* at 13.

<sup>19</sup> Motion at 2.

<sup>20</sup> Supplement at 3.

<sup>21</sup> *Id.* at 3-4.

from “an opportunity to obtain a fill-in AM translator absent reinstatement and the ability to amend” the amendment.<sup>22</sup>

**Discussion. Procedural Issues.** Under Section 1.106(f) of the Rules, petitions for reconsideration of the *Letter Order* and any supplements thereto were required to be filed within 30 days of public notice of the actions taken therein.<sup>23</sup> Clear timely filed the Petition. However, the Supplement was filed after the 30-day deadline had passed. Accordingly, Clear separately requested leave to file the Supplement as required by section 1.106(f).<sup>24</sup> Clear argues that we should accept the late-filed Supplement because it responds to new evidence submitted by Press after the 30-day deadline for filing and supplementing the Petition had passed.<sup>25</sup> We agree and will consider the Supplement below.<sup>26</sup>

*Substantive Issues.* At the outset, we find that the Commission’s *Nunc Pro Tunc Policy* applies here,<sup>27</sup> and that it does not prevent us from accepting the amendment to the curative amendment that accompanied the Supplement. Under the *Nunc Pro Tunc Policy*, the Commission will grant “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.”<sup>28</sup> Clear complied with these requirements, timely filing the Petition and the curative amendment, which, at the time it was filed, remedied all application defects. This is not a case of an applicant filing an “incomplete or poorly prepared application[ ].”<sup>29</sup> Rather, this is a case of new evidence that was submitted after the time to file a curative amendment period had run, and rendered an otherwise acceptable application unacceptable.<sup>30</sup> Further, as Clear notes, given the limited nature of the cross-service FM translator filing window in which the Application was originally filed, it would be precluded from “an opportunity to obtain a fill-in AM translator absent reinstatement and the ability to amend” the amendment.<sup>31</sup> We believe that this case falls

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<sup>22</sup> *Id.* at 5.

<sup>23</sup> 47 CFR § 1.106(f).

<sup>24</sup> *Id.* (“No supplement or addition to a petition for reconsideration which has not been acted upon by the Commission or by the designated authority, filed after expiration of the 30 day period, will be considered except upon leave granted upon a separate pleading for leave to file, which shall state the grounds therefor.”).

<sup>25</sup> Motion at 2-3.

<sup>26</sup> See, e.g., *Maritime Commc’ns/Land Mobile, LLC, Debtor-in-Possession*, WT Docket No. 13-85, Order on Reconsideration and Memorandum Opinion and Order, 31 FCC Rcd 13729, 13734, n.37 (2016) (stating that the supplemental filings contained “important new information that could not have been provided before the deadline for filing petitions for reconsideration,” noting the information was related to “a critical question,” and therefore finding “good cause to accept the supplemental filings in the interest of having as complete a record as possible”).

<sup>27</sup> In making this finding, we reject Press’ argument that the *FM Translator Interference Order* somehow rendered the *Nunc Pro Tunc Policy* inapplicable to section 74.1204(f) cases. Opposition at 1-2. That order expressed no such intent on the part of the Commission.

<sup>28</sup> *Nunc Pro Tunc Policy*, 49 Fed. Reg. at 47331.

<sup>29</sup> *Id.*

<sup>30</sup> We note that we do not expect these unique circumstances to present themselves outside of the section 74.1204(f) predicted interference context, because most application defects arise at the moment the application is filed, not when evidence is submitted by another party.

<sup>31</sup> Supplement at 5. See also *Nunc Pro Tunc Policy*, 49 Fed. Reg. at 47331 (recognizing that dismissing a construction permit application “can result in severe consequences to the applicant” such as preclusion from refiling

within the scope of the *Nunc Pro Tunc Policy* and we accordingly find Clear’s curative amendment is acceptable.

We acknowledge that there are two Commission decisions suggesting that an applicant may file only one curative amendment, which must remedy all defects. However, we believe those cases are distinguishable.<sup>32</sup> The *NCE FM Order* involved dismissal of an application as originally filed, then dismissal of a petition for reconsideration and curative amendment, and the filing of a second petition for reconsideration and a second curative amendment.<sup>33</sup> The Commission rejected the applicant’s attempt to file a second petition for reconsideration and second curative amendment based on the Commission’s statement in the *Nunc Pro Tunc Policy* that: “If the same application is returned or dismissed a second time, it will not be afforded *nunc pro tunc* reconsideration rights.”<sup>34</sup> Here, as Clear points out, there has been only one dismissal of the Application.<sup>35</sup> *Saddleback* also is distinguishable because it involved a curative amendment that failed to cure the defect that resulted in an application’s initial dismissal.<sup>36</sup> In contrast, in this case, Press submitted new information after the 30-day deadline had passed, which rendered the curative amendment defective. Finally, it is worth noting that, unlike this case, both the *NCE FM Order* and *Saddleback* involved applications that were mutually exclusive with applications filed by other parties and thus implicated the Commission’s concern—enunciated in the *Nunc Pro Tunc Policy*—regarding fairness to other applicants who had “prepared properly executed application[s]” and undue delays to the processing of other applications.<sup>37</sup>

Having determined that we can and should accept the amendment to the curative amendment, we have reviewed the facilities proposed therein and determined that the amended Application that accompanied the Supplement is acceptable for filing, and that grant of the amended Application would serve the public interest, convenience, and necessity. Accordingly, we will grant the amended Application.

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the application, and explaining that the Commission has chosen not to “institute[ ] draconian procedures with respect to incomplete or defective applications”).

<sup>32</sup> *Comparative Consideration of 32 Groups of Mutually Exclusive Applications for Permits to Construct New or Modified Noncommercial Educ. FM Stations filed in the October 2007 Filing Window*, Memorandum Opinion and Order, 25 FCC Rcd 5013, 5022, para. 24 (2010) (*NCE FM Order*) (explaining that “Public Notice of the dismissal of an application triggers a 30-day period in which the applicant has one opportunity to perfect its application, including any errors not specifically identified by the staff.”); *Saddleback Cmty. Coll.*, Memorandum Opinion and Order, 11 FCC Rcd 11938, 11941, para. 9 (1996) (*Saddleback*) (stating that the *Nunc Pro Tunc Policy* “allows for a one-time only amendment” and that “[b]y submitting data crucial to evaluation of the waiver request in a reply pleading, [applicant] was inappropriately attempting to amend the application a second time”).

<sup>33</sup> *NCE FM Order*, 25 FCC Rcd at 5022, para. 24.

<sup>34</sup> *Id.* See also *Nunc Pro Tunc Policy*, 49 Fed. Reg. at 47331.

<sup>35</sup> We had not acted on the Petition or the curative amendment at the time Press filed the Second Interference Package, or at the time Clear filed its Supplement and the amendment to the curative amendment. If we had denied reconsideration based on the Second Interference Package filed by Press, and Clear then had filed the amendment to the curative amendment, the outcome here would be different. See *Nunc Pro Tunc Policy*, 49 Fed. Reg. at 47331 (“If the same application is returned or dismissed a second time, it will not be afforded *nunc pro tunc* reconsideration rights.”). See also *Levine/Schwab Partnership*, Letter Order, 35 FCC Rcd 13036 (MB 2020) (finding *Nunc Pro Tunc Policy* did not permit filing of second petition for reconsideration and request for reinstatement, and second curative amendment).

<sup>36</sup> *Saddleback*, 11 FCC Rcd at 11941, para. 9.

<sup>37</sup> See *Nunc Pro Tunc Policy*, 49 Fed. Reg. at 47331.

In response to Clear's assertion that it was waiting to receive a letter notifying it of Press' interference claim and setting a deadline Clear to respond,<sup>38</sup> we take this opportunity to clarify that the 90-day clock and notice letters referenced in the *FM Translator Interference Order* apply only with respect to actual interference claims made pursuant to section 74.1203(b). Our finding is based on the fact that (1) where a particular requirement adopted in the *FM Translator Interference Order* applies both to actual and predicted interference claims, the Commission indicated that this is the case,<sup>39</sup> and (2) in discussing the 90-day clock and notice letters, the Commission mentions only section 74.1203(b), not section 74.1204(f).<sup>40</sup> We note that it makes sense that the 90-day clock and notice letters would not apply to predicted interference claims. Under section 74.1204(f), if predicted interference is demonstrated, an application is unacceptable for filing and must be dismissed. Remediation does not come into play.

**Ordering Clauses.** For the reasons set forth above, IT IS ORDERED that, pursuant to section 1.106(f) of the Commission's rules,<sup>41</sup> the Motion for Leave to File Supplement and Amendment to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Clear Communications, Inc. on December 31, 2020, IS GRANTED.

IT IS FURTHER ORDERED that, pursuant to section 405(a) of the Communications Act of 1934, as amended, and section 1.106(j) of the Commission's rules,<sup>42</sup> the Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* filed by Clear Communications, Inc. on October 14, 2020, and supplemented by Clear Communications, Inc. on December 31, 2020, IS GRANTED.

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<sup>38</sup> Petition at 4.

<sup>39</sup> *FM Translator Interference Order*, 34 FCC Rcd at 3465, n.56 (explaining that "[t]he requirement that complaining stations submit a minimum number of listener complaints applies to both claims of actual interference from existing stations under section 74.1203(a)(3) and predicted interference claims for pending applications under section 74.1204(f)"), 3469, para. 23 (setting forth additional interference claim requirements applicable to interference claims made pursuant to either section 74.1203(a)(3) or 74.1204(f)), 3477-78, para. 40, and 3481-82, para. 48 (adopting the 45 dB $\mu$  contour as "the outer limit beyond which a listener complaint will not be considered actionable," and stating that "Sections 74.1203(a)(3) and 74.1204(f)" would be amended to reflect this).

<sup>40</sup> The *FM Translator Interference Order* states that, "[i]f all interference complaints have not been resolved by the remediation deadline, the Commission may order the immediate suspension of translator operations or reduction of power pursuant to section 74.1203(b)." *Id.* at 3475, para. 35. Likewise, in the introduction to the section on "Remediation Procedures" (which includes the discussion of remediation deadlines), it states "[w]hatever approach(es) [to remediating interference a translator operator] chooses, the translator operator must submit data demonstrating that the interference has been resolved by the relevant deadline or be subject to suspension of operations or reduction of power pursuant to section 74.1203(b)." *Id.* at 3471, para. 27.

<sup>41</sup> 47 CFR § 1.106(f).

<sup>42</sup> 47 U.S.C. § 405(a); 47 CFR § 1.106(j).

Finally, IT IS FURTHER ORDERED that, pursuant to section 309(a) of the Communications Act of 1934, as amended,<sup>43</sup> the amended application (File No. BNPFT-20180502ABQ) for a new FM translator station at Vineland, New Jersey, that accompanied the Supplement and Amendment to Petition for Reconsideration and Reinstatement *Nunc Pro Tunc* (Supplement) filed by Clear Communications, Inc. on December 31, 2020, IS ACCEPTED FOR FILING AND GRANTED.

Sincerely,

Albert Shuldiner  
Chief, Audio Division  
Media Bureau

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<sup>43</sup> 47 U.S.C. § 309(a).