



Federal Communications Commission
Washington, D.C. 20554

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DA 05-2022
In Reply Refer to:
1800B3-NS

Mr. Gerald R. Proctor
c/o Dan J. Alpert, Esq.
The Law Office of Dan J. Alpert
2120 N. 21st Road
Arlington, VA 22201

In re: NEW FM Translator, Corrigan, TX
Facility ID No. 155682
File No. BNPFT-20030812AAV

Petition for Reconsideration

Dear Mr. Alpert:

We have before us the “Petition for Reconsideration and Request for Reinstatement of Application *Nunc Pro Tunc*” (“2004 Petition”) filed April 1, 2004, by Mr. Gerald R. Proctor (“Proctor”). Proctor appeals the staff’s denial, issued March 3, 2004,¹ of an earlier Petition for Reconsideration filed by Proctor on October 1, 2003 (“2003 Petition”). For the second time, Proctor requests reinstatement of its application for a construction permit for a new FM translator station on Channel 266 to serve Corrigan, Texas, which the staff dismissed by letter dated September 4, 2003 (“Staff Decision”).² For the reasons set forth below, we deny the 2004 Petition.

Background

The staff dismissed Proctor’s construction permit application because an engineering analysis revealed that the application violated Section 74.1204(a) of the Commission’s rules.³ Specifically, the proposed 100 dBu interference contour of the new FM translator would have overlapped the 60 dBu protected contour of KOBT(FM), Winnie, Texas – overlap that is prohibited under Section 74.1204(a). When Proctor submitted its 2003 Petition within 30 days of the Staff Decision, it included an amendment to the application that Proctor characterized as a “minor modification” of the construction permit. The amendment proposed to move the transmitter site and claimed to eliminate the prohibited overlap. According to Proctor, this rendered the application acceptable for filing.

¹ See *Letter to Gerald Proctor* (MB Mar. 3, 2004) (“Reconsideration Decision”).

² See *Letter to Gerald Proctor* (MB Sept. 4, 2003).

³ 47 C.F.R. § 74.1204(a).

Staff analysis determined that the amendment constituted a major change application pursuant to Section 74.1233(a)(1) of the Commission's rules.⁴ As the staff explained in its Reconsideration Decision, the rule defines as a major change "any change in antenna location [of an FM translator] where the station would not continue to provide 1 mV/m service to some portion of its previously authorized 1 mV/m service area."⁵ Having found that Proctor's proposed service from the new antenna site would not continue to provide service to some portion of the service area originally proposed, the staff declined to reinstate the application.

In its 2004 Petition, Proctor does not challenge the staff's Reconsideration Decision. Rather, it submits yet another amendment that specifies different station tower coordinates for the proposed new translator. In light of this "minor curative amendment," Proctor contends, the "problem which resulted in the original dismissal of the . . . application has been rectified."⁶ According to Proctor, the staff should find the resubmitted application in compliance with Commission rules and reinstate it *nunc pro tunc*.

Discussion

There is no basis on which to grant Proctor's 2004 Petition. Proctor's latest "curative amendment" may be treated as a "new fact" forming the basis for its Petition. Under Section 1.106(c), however, a "petition for reconsideration which relies on facts not previously presented to the . . . designated authority may be granted only under [certain] circumstances."⁷ Proctor does not address the procedural restrictions of Section 1.106 at all: it does not attempt to justify its 2004 Petition on public interest or any other grounds.⁸ We find that Proctor has not presented any of the circumstances set forth in Section 1.106(c) to support granting its 2004 Petition.

Moreover, on August 2, 1984, the Commission issued a public notice entitled "*Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*" ("*Public Notice*").⁹ Following an explanation of the Commission's concerns about the burdens on staff and the processing delays caused by incomplete and patently defective applications, the *Public Notice* included a discussion of reconsideration and reinstatement of dismissed or returned applications. The Commission stated that it would continue to grant petitions for reconsideration "after an initial dismissal or return of an application" when an applicant submits "a relatively minor curative amendment within 30 days," reinstating such an application *nunc pro tunc*.¹⁰ Proctor cites to this pronouncement as if its latest amendment were being submitted within 30 days of dismissal of the

⁴ 47 C.F.R. § 74.1233(a)(1).

⁵ *Id.*

⁶ 2004 Petition at 2.

⁷ 47 C.F.R. § 1.106(c) (referencing also the criteria set forth in 47 C.F.R. § 1.106(b)(2)).

⁸ *See id.*

⁹ 56 R.R.2d 776 (1984) (as subsequently published in the *Federal Register*, 49 Fed. Reg. 47331 (Dec. 3, 1984)).

¹⁰ *Public Notice*, 49 Fed. Reg. at 47332.

application.¹¹ That is clearly not the case: nearly seven months elapsed between the Staff Decision in 2003 and Proctor's amendment submitted with the 2004 Petition.

Proctor ignores the fact that the Commission's policy of acting favorably on requests for reconsideration and reinstatement is limited to such requests filed "after an *initial* dismissal or return"¹² The Commission explicitly stated in the *Public Notice* that "if the same application is returned or dismissed a second time, it will not be afforded *nunc pro tunc* reconsideration rights."¹³ The restriction is based on the Commission's determination that the "process of repeatedly affording *nunc pro tunc* reconsideration rights leads to delay and tends to encourage the filing of incomplete and poorly prepared applications."¹⁴ The staff cautioned Proctor about this in the Reconsideration Decision.¹⁵ In sum, Proctor had already exhausted its *nunc pro tunc* reconsideration rights upon filing its 2003 Petition with a defective amendment.

Accordingly, the Petition for Reconsideration and Request for Reinstatement of Application *Nunc Pro Tunc*, filed by Gerald R. Proctor on April 1, 2004, is DENIED.

Sincerely,

Peter H. Doyle
Chief, Audio Division
Media Bureau

¹¹ See 2004 Petition at 2, n.2.

¹² *Public Notice*, 49 Fed. Reg. at 47332 (emphasis added) (*see supra* note 10 and accompanying text).

¹³ *Public Notice*, 49 Fed. Reg. at 47332.

¹⁴ *Id.*

¹⁵ Reconsideration Letter at 2, n.1 (citing to the *Public Notice* and warning that an application returned a second time may not be reinstated *nunc pro tunc*).