



Federal Communications Commission  
Washington, D.C. 20554

February 20, 2014

Budd Broadcasting Co., Inc.  
4150 NW 93<sup>rd</sup> Avenue  
Gainesville, Florida 32653

Re: WFXU(DT), Live Oak, Florida  
Facility ID No. 22245  
File No. BRC DT-20120925ACP

Dear Licensee:

This is in regard to the above-captioned license renewal application. Pursuant to Section 1.88 of the Commission's Rules,<sup>1</sup> we write to update you on our pending investigation of the station and to invite you to submit a statement to the staff setting forth the Licensee's views regarding the investigation.

*Background.* On January 25, 2007, Budd Broadcasting acquired WFXU from WFXU License Corporation.<sup>2</sup> In the assignment application, Budd Broadcasting certified that "it is cognizant of and will comply with its obligations as a Commission licensee to present a program service responsive to the issues of public concern facing the station's community of license and service area."<sup>3</sup> Shortly after its acquisition of WFXU,<sup>4</sup> Budd Broadcasting made the first of numerous requests for Special Temporary Authorizations ("STA") to remain silent, citing technical or equipment issues as the justification for the requests.<sup>5</sup> Only one such request was granted. According to representations made by Budd Broadcasting in the STA requests, WFXU was silent from:

- August 22, 2007 through August 1, 2008
- August 4, 2008 through an undetermined date
- November 22, 2009 through October 17, 2010
- November 14, 2010 through November 12, 2011
- December 1, 2011 through November 12, 2012

Thus, during the relevant renewal term during which Budd Broadcasting was the licensee of WFXU-- January 19, 2007 through February 1, 2013--the station was off the air for at least 45 months and almost certainly many more, as described in further detail below. These extensive

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<sup>1</sup> 47 C.F.R. § 1.88

<sup>2</sup> File No. BALCT-20061121AIV.

<sup>3</sup> *Id.*

<sup>4</sup> Budd Broadcasting's acquisition of WFXU was consummated on January 19, 2007. Prior to the acquisition, WFXU operated as a satellite of WTLH-TV, Bainbridge, Georgia, a Fox network affiliate, but once Budd Broadcasting acquired the license, WFXU ceased operating as a satellite.

<sup>5</sup> *See, e.g.*, File No. BLSTA-20070829AAH (citing transmitter malfunction); File No. BLSTA-20080226AAN (citing problems with decoder that "will take approximately 3 weeks to correct"); File No. BLSTA-20080812AAR (citing issues with transmitter); File No. BLSTA-20090113ACH (citing equipment problems); File No. BLSTA-20090128AFW (citing transmitter issues); File No. BLSTA-20091130ALJ (citing equipment issues); File No. BLSTA-20101118AJD (citing technical difficulties).

periods of silence occurred without Commission authorization. Budd Broadcasting frequently notified the Commission that it had resumed operations just before the automatic cancellation provision of Section 312(g) of the Communications Act would go into effect.<sup>6</sup>

Indeed, the record of when WFXU was on and off the air is incomplete and potentially raises issues under Section 312(g). For example, the Licensee filed a request for authority to take the station silent on January 13, 2009 which stated the station was off the air beginning on November 17, 2008.<sup>7</sup> On January 28, 2009, the Licensee filed another request for silent authority which stated the station was off the air beginning on August 12, 2008.<sup>8</sup> The Commission has no record of the station filing the required "Resumption of Operations" form before its next request for silent authority, which stated that the Station was off the air beginning on November 22, 2009.

Not only has the station been silent during most of its ownership period, Budd Broadcasting has characterized the service provided by WFXU during the times that it was on the air as not "meaningful." In 2008, Budd Broadcasting filed an application requesting a modification of its DTV facility to move to a location approximately 40 miles from its authorized site.<sup>9</sup> The Video Division denied the application, which would have resulted in loss of service to approximately three quarters of the geographic area within its protected contour, concluding that Budd Broadcasting had failed to show that the public interest would be served by its grant because providing additional service to already well-served existing viewers did not justify withdrawing existing service from others.<sup>10</sup>

Budd Broadcasting filed a Petition for Reconsideration on January 29, 2009, arguing that the Video Division incorrectly concluded that loss of service prevented grant of its modification application because WFXU had not in fact been providing "meaningful service" to viewers in its coverage area.<sup>11</sup> According to the Petition, any loss of service was "hypothetical" in that:

Budd has operated WFXU legally since becoming the licensee of the station. However, the station has not provided meaningful service. In this regard, due to financial difficulties, *the programming it has broadcast consists of only two (2) half-hour public affairs programs.* These programs are repeated over and over when the station is on the air. Because of technical difficulties stemming from Budd's financial plight, *the station has been barely operating* and, as previously stated, *the programming provided could hardly be characterized as meaningful.* In this regard, through a series of notifications, the

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<sup>6</sup> 47 U.S.C. 312(g), as amended, provides that "[i]f 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."

<sup>7</sup> File No. BLSTA-20090113ACH.

<sup>8</sup> File No. BLSTA\_20090128AFW.

<sup>9</sup> File No. BPCDT-20080617ABP.

<sup>10</sup> Letter to Aaron Shainis, Esq. from Barbara A. Kreisman, Chief, Video Division (Dec. 30, 2008) ("Providing additional service to new viewers does not justify withdrawing existing service from 138,200 people who already rely on this service.").

<sup>11</sup> Budd Broadcasting, Inc., Petition for Reconsideration (Jan. 29, 2009) at 3.

station has suspended operations and then resumed operations for brief periods of time.<sup>12</sup>

Each of the STA requests filed by Budd Broadcasting with the Commission cited technical or equipment issues that prevented the station from broadcasting. Nonetheless, Budd Broadcasting represented to the Commission that it resumed operations on numerous occasions during the years in which it purportedly faced technical or equipment issues that prevented the station from broadcasting. Moreover, as described above, Budd Broadcasting later represented to the Commission that it suspended broadcast for financial reasons.

Budd Broadcasting has also apparently committed numerous other violations of the Commission's rules during the license period. Commission rules require commercial broadcast stations to file "every three months a list of programs that have provided the station's most significant treatment of community issues during the preceding three month period," to be filed by the tenth day of the succeeding calendar quarter.<sup>13</sup> The station's online public file shows no evidence of any such filings since Budd Broadcasting has held the license.

Commission rules further require that commercial stations file a completed Children's Television Programming Report "reflecting efforts made by the licensee during the preceding quarter, and efforts planned for the next quarter, to serve the educational and information needs of children."<sup>14</sup> The report is to be placed in the public inspection file by the tenth day of the succeeding calendar quarter.<sup>15</sup> Commission records show that Budd Broadcasting failed to file this for the third quarter of 2009. Budd Broadcasting filed late reports for all four quarters in 2007, all four quarters in 2008, the first, second, and fourth quarter of 2009, all four quarters in 2010, all four quarters in 2011, all four quarters of 2012, and the first two quarters of 2013, and further indicated in those late-filed reports that no children's programming was aired due to the fact that the "station has been silent pursuant to STA request."<sup>16</sup>

Moreover, the Children's Television Programming Report should detail the licensee's fulfillment of its obligation to serve the educational and informational needs of children through CORE programming, as defined in 47 C.F.R. 73.671(c). Budd Broadcasting's license renewal application selected "N/A" in response to the application form's request that it certify that "the average number of hours of CORE programming per week broadcast by the station totaled 3 hours or more. . . ."<sup>17</sup>

*Discussion.* The Commission evaluates an application for license renewal pursuant to the standards set forth in 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

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<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> 47 CFR § 73.3526(11)(i).

<sup>14</sup> 47 CFR § 73.3526(11)(iii).

<sup>15</sup> *Id.*

<sup>16</sup> WFXU FCC 398 Children's Television Programming Report for Quarter 2, 2011 (filed July 18, 2012). In all but one case, the requested STA was not granted.

<sup>17</sup> File No. BRC DT-20120925ACP, Section IV, Question 7. Budd Broadcasting also answered "N/A" to several other required certifications in the renewal application related to compliance with Children's Television Programming Requirements.

violations of the Communications Act or the Commission's Rules; and (3) there have been no other violations which, taken together, constitute a pattern of abuse.<sup>18</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>19</sup>

Serious questions exist as to whether Budd Broadcasting has met the needs and interests of the community during its license term and, therefore, whether WFXU has served the public interest. As described above, during Budd Broadcasting's period as licensee of WFXU, the station was off the air for 45 months on record and almost certainly many more. Indeed, as further described above, the incomplete record regarding the station's history of operations potentially implicates the provisions of Section 312(g) of the Communications Act.

The Commission has previously addressed the issue of whether a broadcast station license should be renewed when the station was silent during much of the preceding license term. In *Birach Broadcasting*,<sup>20</sup> the staff granted a license renewal application when the licensee of a long-silent station initiated broadcasts for the first time after the renewal application had been filed. The Commission affirmed that action on the unique facts of the case, indicating that non-renewal is a harsh consequence and that the licensee in that case did not have “full and explicit notice” that the station's prolonged silence would jeopardize its renewal application.<sup>21</sup> However, the Commission further stated that, in the future, “a licensee will face a very heavy burden in demonstrating that it has served the public interest where it has remained silent for most or all of the prior license term.”<sup>22</sup> In *Birach Broadcasting*, the station was off the air for three and a half of the four years that Birach Broadcasting served as licensee.<sup>23</sup> We believe that there is a substantial and material question as to whether Budd Broadcasting, which has been off the air for even longer, has met that burden here.

Moreover, despite certifying that it would “present a program service responsive to the issues of public concern facing the station's community of license and service area,” Budd Broadcasting has by its own admission not provided “meaningful” service to the community in its time as a licensee. For example, the “issues/programs list is a significant and representative indication that a licensee is providing substantial service to meet the needs and interests of its community. . . .”<sup>24</sup> Budd Broadcasting's apparent failure to prepare and place such lists in its public file means it has provided no such indication of substantial service.

We are also concerned about whether Budd Broadcasting has intentionally misrepresented facts to the Commission, thus calling into question whether the licensee possesses the requisite

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<sup>18</sup> 47 U.S.C. § 309(k)(1). The renewal standard was amended pursuant to 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)*, 11 FCC Rcd 6363 (1996).

<sup>19</sup> 47 U.S.C. §§ 309(k)(2), 309(k)(3).

<sup>20</sup> *Birach Broadcasting Corporation*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020 (2001)

<sup>21</sup> *Id.*

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

<sup>23</sup> *Id.* at 5021.

<sup>24</sup> *Normandy Broadcasting Corp.*, Order, 8 FCC Rcd. 1, ¶ 74 (1992).

character necessary to grant a license renewal. Section 1.17 of the Commission's Rules prohibits misrepresentation or willful material omission in any application, pleading, or any other written submission to the Commission.<sup>25</sup> Moreover, the duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications.<sup>26</sup> The requirement for absolute truth and candor from those appearing before the Commission is fundamental because the Commission must rely heavily on the completeness and accuracy of the submissions made to it by applicants.<sup>27</sup> If a licensee is found to have misrepresented itself to the Commission, it would be disqualified from grant of a renewal application on the grounds of character.<sup>28</sup> The Commission "find[s] it appropriate and sufficient to treat any violation of any provision of the Act, or of our Rules or policies, as possibly predictive of future conduct and, thus, as possibly raising concerns over the licensee's future truthfulness and reliability, without further differentiation."<sup>29</sup> The "ultimate inquiry . . . is whether . . . the Licensee can be trusted to be reliable and truthful and to conduct itself in compliance with the Commission's rules in its future dealings with the Commission. . . ."<sup>30</sup>

Serious questions exist as to whether Budd Broadcasting may have intentionally abused the Commission's STA process to avoid compliance with its broadcasting obligations and to evade the automatic cancellation provision of Section 312(g). Specifically, questions exist as to whether Budd Broadcasting accurately and fully represented its true justifications for seeking silent authority, given the apparent disparity between the justifications listed in its STA requests and the explanation provided in its petition for reconsideration.<sup>31</sup> Moreover, we question whether Budd Broadcasting's certification that it had not committed any violations of the Communications Act of 1934 or the Commission's rules during the previous term was truthful and accurate.

Finally, serious questions also exist as to whether Budd Broadcasting's apparent numerous violations of the Commission's rules during its license term together constitute a pattern of abuse that would warrant denial of the license renewal application.<sup>32</sup> We have discussed above Budd Broadcasting's apparent failure to comply with our requirement that issues/programs lists be prepared and placed in the station's public file each quarter. Budd Broadcasting has also apparently committed numerous violations of our Children's Television Programming rules. Budd Broadcasting also apparently has not met its obligation to air at least three hours per week of CORE Children's Television Programming. "Licensees that do not meet these processing

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<sup>25</sup> 47 C.F.R. § 1.17.

<sup>26</sup> *Liberty Cable Co.*, 15 FCC Rcd 25050, 25071 (2000).

<sup>27</sup> *Swan Creek Communications v. FCC*, 39 F.3d 1217, 1222 (D.C. Cir. 1994); *Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir.), cert. denied, 449 U.S. 834 (1980).

<sup>28</sup> *Normandy Broadcasting Corp.*, 8 FCC Rcd 1, at ¶ 51.

<sup>29</sup> *Character Qualifications in Broadcast Licensee*, Report, Order, and Policy Statement, 102 FCC Rcd 1179, 1209-19 (1985).

<sup>30</sup> *Normandy Broadcasting Corp.*, 8 FCC Rcd 1, at ¶ 52.

<sup>31</sup> *KQED, Inc.*, Order, 5 FCC Rcd 1784, 1785 (1990) (the failure to "accurately represent the reasons the station was off the air . . . violates the fundamental duty of a licensee to deal honestly with the Commission . . . [and] thus fully justifies the denial of [a license renewal application].").

<sup>32</sup> *Normandy Broadcasting Corp.*, 8 FCC Rcd 1, at ¶ 54 (quoting *Character Qualifications in Broadcast Licensee*, 102 FCC Rcd at 1232) ("A 'licensee's record of compliance provides direct evidence of an applicant's future behavior' and that 'direct evidence of an applicant's behavior outweighs predictive judgments based on extrinsic evidence of an applicant's character.'").

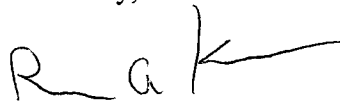
guidelines [are] referred to the Commission, where they [are given] a full opportunity to demonstrate compliance with the Children's Television Act . . . .<sup>33</sup>

In order for the Commission to evaluate further the license renewal applications, we request that Licensee provide the following information:

- 1) A full accounting, accompanied by a declaration from a station representative under penalty of perjury, of the station's periods of broadcast silence from January 25, 2007 through the present;
- 2) Any evidence, accompanied by declaration from a station representative under penalty of perjury, that would counter, rebut, excuse, or otherwise explain the factual findings above;
- 3) A detailed explanation, with cites to Commission rules, guidance, and case precedent, as to why, given the extensive potential violations of Commission rules identified above, renewal of the license for an additional term would serve the public interest, convenience, and necessity.
- 4) A detailed explanation, with cites to Commission rules, guidance, and case precedent, as to how WFXU(DT) met the needs and interests of the community during the previous license term, given its predominant periods of silence, its representation to the Commission that it did not provide meaningful service, and its failure to provide required documentation to the Commission that could serve as a presumption that this standard was met.

Your submission must be filed with the Office of the Secretary, Federal Communications Commission, 445 12<sup>th</sup> Street, S.W., Washington, D.C. 20554, ATTN: Peter Saharko, Attorney Advisor, Video Division, Media Bureau, within 30 days of the date of this letter. An electronic copy should also be sent to [peter.saharko@fcc.gov](mailto:peter.saharko@fcc.gov). **Failure to provide the requested information or to request a change in status within 30 days from the date of the letter will result in further action, including potential dismissal of the license renewal application.**

Sincerely,



Barbara A. Kreisman  
Chief, Video Division  
Media Bureau

cc:

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<sup>33</sup> *Id.*