



Federal Communications Commission
Washington, D.C. 20554

December 13, 2016

In Reply Refer to:
1800B3-VMM

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In re: Birach Broadcasting Corporation
WKGE(AM), Johnstown, PA
Facility ID No. 72964
File No. BR-20140319ACB

Dear Counsel:

We have before us the application (Application) of Birach Broadcasting Corporation (BBC) for renewal of the license of radio station WKGE(AM), Johnstown, Pennsylvania (Station). For the reasons set forth below, we grant the Application for a renewal period of two years from the date of this letter, instead of a full term of eight years, pursuant to Section 309(k)(2) of the Communications Act of 1934, as amended (Act).¹

Background. BBC filed the Application on March 19, 2014, seeking to renew the Station's license. In Section III of the Application, Question 4 required BBC to disclose whether or not the Station had been silent for more than 30 days at any time during the pending license term of August 1, 2006 to July 31, 2014. In response, BBC incorrectly disclosed that the Station had been silent pursuant to special temporary authority for one period in the license term, when there had actually been two, according to Commission records.² BBC stated that the silent periods were primarily due to failure of its transmitter. As a result, we calculate that the Station was silent for almost two years of the license term, has been silent for an additional two and a quarter years since filing its renewal, and is currently silent.³ BBC has filed for Commission approval to assign the Station's license to a buyer, and seeks a resolution of the pending Application in order for that transaction to proceed.

Discussion. In evaluating an application for license renewal, the Commission's decision is governed by Section 309(k) of the Act.⁴ That Section provides that if, upon consideration of the application and pleadings, we find that: (1) the station has served the public interest, convenience, and

¹ 47 U.S.C. § 309(k)(2).

² Application, Exh. 13. BBC stated that the Station had been silent since October 1, 2013, but omitted another period of silent dating from 10/6/2012 to 9/26/2013, as well. Each period of silence was authorized under special temporary authority in accordance with 47 CFR § 73.1740. *See* Requests for Special Temporary Authority (STA) to remain silent, File Nos. BLSTA-20121015AAO (granted 1/24/13) and BLSTA-20131018ACD (granted 1/23/14)

³ *See* File Nos. BLSTA-20140724AAI (granted 9/11/14), BLSTA- 0150303ABU (granted 4/2/15), BLESTA-20151019AAW (granted 11/4/15), BLSTA-20151203AAH (granted 1/28/16), BLESTA-20160722AAE (granted 8/10/16), and BLSTA-20161207AAP (pending).

⁴ 47 U.S.C. § 309(k).

other violations which, taken together, constitute a pattern of abuse, we are to grant the renewal application.⁵ 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.”⁶

Extended periods of station silence are addressed most directly in Section 312(g) of the Act, which Congress added in 1996 and amended in 2004. That Section provides in relevant part:

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, except that the Commission may extend or reinstate such station license if the holder of the station license prevails in an administrative or judicial appeal, the applicable law changes, or for any other reason to promote equity and fairness.⁷

The policy against allowing extended periods of silence by licensed stations is to ensure “that scarce broadcast spectrum does not lie fallow and unavailable to others capable of instituting and maintaining service to the public.”⁸ In addition to its enforcement of Section 312(g), the Commission has stressed its interest in promoting efficient use of radio broadcast spectrum for the benefit of the public in several different contexts since the enactment of Section 312(g).⁹

Section 312(g) has relieved the Commission from the need to conduct revocation proceedings, with their lengthy procedural requirements, including evidentiary hearings, for stations that remain silent for a consecutive 12-month period.¹⁰ However, in response to Section 312(g), some licensees of silent stations have adopted a practice of resuming operation for a short period of time, in some cases as little as a day, before the 12-month limit in Section 312(g) applies. In this case, the Station had multiple periods of silence that each lasted for several months, resulting in silence for a significant part of the license term, and has remained silent for most of the time since filing its renewal.

These practices raise a question as to whether the licenses for such stations should be renewed pursuant to Section 309(k) of the Act. Silence instead of licensed operation is a fundamental failure to

⁵ 47 U.S.C. § 309(k)(1). The renewal standard was amended to read as described by 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)*, Order, 11 FCC Rcd 6363 (1996).

⁶ 47 U.S.C. §§ 309(k)(2), 309(k)(3).

⁷ 47 U.S.C. § 312(g); *see* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), and Consolidated Appropriations Act, 1995, Pub. L. No. 108-447, 118 Stat. 2809 (2004); *see also Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d 543, 545 (D.C. Cir. 2009).

⁸ *Family Life Ministries, Inc.*, Letter, 23 FCC Rcd 15395, 15397 (MB 2008).

⁹ *See Policies to Promote Rural Radio Service and to Streamline Allotment and Assignment Procedures*, Third Report and Order, 26 FCC Rcd 17642, 17645 (2011) (citing the Commission’s “fundamental interest” in expediting new radio service and preventing “warehousing” of scarce spectrum); *1998 Biennial Regulatory Review – Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 13 FCC Rcd 23056, 23090-93 (1998), *on reconsideration*, 14 FCC Rcd 17525, 17539 (1999); *Lieberman Broad. of Dallas License LLC*, Letter, 25 FCC Rcd 4765, 4768 (MB 2010).

¹⁰ *See Eagle Broad. Group, Ltd. v. FCC*, 563 F.3d at 545.

serve station's community of license, because a silent station offers that community no public service programming such as news, public affairs, weather information, and Emergency Alert System notifications. Moreover, brief periods of station operation sandwiched between prolonged periods of silence are of little value because the local audience is not accustomed to tuning into the station's frequency.

In 2001, the Commission cautioned "all licensees that . . . 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."¹¹ The Commission acknowledged that the agency's longstanding policy had been to encourage stations to resume broadcast operations. However, the Commission noted that Section 309(k)(1) applies a "backwards-looking standard" that does not give any weight to efforts to return a station to full-time operation in the future.¹² The Commission held that denial of the renewal application of the station in question in *Birach* would be fundamentally unfair because the Commission had not provided sufficient notice of the effect the Section 309(k)(1) standard would have on silent stations.¹³ Since the issuance of the *Birach* decision in 2001, licensees have been on notice as to how Section 309(k)(1) applies to silent stations.

In this case, Licensee's conduct has fallen far short of that which would warrant routine license renewal. Licensee's stewardship of the Station fails to meet the public service commitment which licensees are expected to provide to their communities of license on a daily basis because the Station was silent for significant portions of BBC's license term.

On the facts presented here, we conclude that a short-term license renewal is the appropriate sanction. Although BBC faced a number of difficulties beyond its control and sought Commission authorization for each of the Station's periods of silence, it has remained off the air for extended periods since its renewal filing. We therefore cannot find that the Station served the public interest, convenience and necessity during the license term due to the extended periods of non-operation. Accordingly, pursuant to Section 309(k)(2) of the Act, we will grant the Station a short-term license renewal, limited to a period of two years from the date of this letter.¹⁴ This limited renewal period will afford the Commission an opportunity to review the Station's compliance with the Act and the Commission's rules and to take whatever corrective actions, if any, that may be warranted at that time.

¹¹ See *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015, 5020 (2001) ("*Birach*").

¹² *Id.* ("[C]onsideration of post-term developments is fundamentally at odds with this backwards-looking standard.").

¹³ In *Birach*, the station was silent for the entire period (approximately two and one-half years) in which the license renewal applicant (Birach) held the license. Section 312(g) of the Act took effect during that period, and Birach returned the station to operation before that provision would have applied. The Commission stated: "The fact that Birach resumed WDMV operations only when faced with the potential license cancellation is not lost on us. Although we have concluded that Birach is qualified to be a licensee and that grant of the renewal application was proper, it is equally clear to us that Birach's conduct as a licensee upon acquiring WDMV fell far short of the service commitment which most licensees fulfill to their communities of license on a daily basis." *Id.*, 16 FCC Rcd at 2021.

¹⁴ See, e.g., *South Seas Broad., Inc.*, Memorandum Opinion and Order and Notice of Apparent Liability, 24 FCC Rcd 6474 (MB 2008) (two-year renewal granted, NAL issued, for willfully and repeatedly violating 47 CFR § 73.1350 by engaging in operation of the station at an unauthorized site and willfully and repeatedly violating 47 CFR § 73.1740 by leaving the station silent without the proper authorization).

Conclusion. Accordingly, for the reasons set forth above, IT IS ORDERED THAT the license renewal application (File No. BR-20140319ACB) filed by Birach Broadcasting Corporation IS GRANTED pursuant to 47 U.S.C. § 309(k)(2) for a license term of two years from the date of this letter.

Sincerely,

A handwritten signature in blue ink that reads "Peter H. Doyle" with a stylized flourish at the end.

Peter H. Doyle
Chief, Audio Division
Media Bureau