



Federal Communications Commission
Washington, D.C. 20554

April 6, 2017

In Reply Refer to:
1800B3-KV

Birach Broadcasting Corporation
c/o John C. Trent, Esq.
Putbrese Hunsaker & Trent, P.C.
200 South Church Street
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Damascus Residents for Responsible Tower Siting, Inc.
c/o Barry A. Friedman, Esq.
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1919 M Street, N.W.
Washington, DC 20036-3537

In re: WDMV(AM), Walkersville, Maryland
Facility ID No. 19235
BP-20061114ABV
Application for Minor Modification of License

Counsel:

We have before us an application (Application), as amended,¹ filed by Birach Broadcasting Corporation (Birach) for a minor modification of the facilities for Station WDMV(AM), Walkersville, Maryland (Station). Also before us is an Informal Objection (Objection)² to the Application filed on January 19, 2007, by the Damascus Residents for Responsible Tower Siting, Inc. (DRRTS).³ For the reasons set forth below, we grant in part and deny in part the Objection, admonish Birach for violation of Section 1.65⁴ of the FCC's rules (Rules), and grant the Application.

Background. In the Application, Birach seeks to modify the Station's existing three-tower directional array with a four-tower directional array, with corresponding minor coordinate changes due to the proposed tower change, and to increase daytime power from 5kW to 50 kW. In its Objection, DRRTS

¹ Birach amended the Application on February 15, 2007, November 9, 2007, June 6, 2008, and December 31, 2008.

² On February 15, 2007, Birach filed an Opposition to Informal Objection (Opposition) to which DRRTS replied (Reply) on February 28, 2007.

³ DRRTS is an organization purportedly formed by unidentified Damascus residents for the purpose of preserving the "unique rural heritage" of Damascus. Objection at 2.

⁴ 47 CFR § 1.65.

argues that Birach violated Section 73.3518⁵ of the Rules by filing the Application while simultaneously appealing the July 18, 2004, expiration of a permit to relocate the Station to serve Poolesville, Maryland (Poolesville Permit).⁶

DRRTS also declares that Birach lacks the requisite character to be a broadcast licensee because Birach presented a false narrative to the Bureau in proceedings for a now cancelled permit modifying Birach's Station WGOP(AM),⁷ Pocomoke City, Maryland (WGOP(AM) Permit)).⁸ Specifically, DRRTS contends that the Bureau extended the construction deadline of the WGOP(AM) Permit based on Birach's purported false statement that a zoning freeze prevented construction of the WGOP(AM) Permit.⁹ DRRTS also requests that the Bureau review unspecified character allegations that it raised in pleadings against a granted 1995 WGOP(AM) renewal application.¹⁰

Finally, DRRTS claims that Birach violated Section 1.65 of the Rules by failing to amend the Application to show that as of December 14, 2006, when DRRTS filed the WGOP(AM) Reconsideration Petition, Birach was involved in a proceeding challenging its character.

⁵ 47 CFR § 73.3518.

⁶ The Poolesville Permit was granted to then-licensee Elijah Broadcasting Corporation, on July 18, 2001, with a July 18, 2004, construction deadline. See File No. BP-19960829AA. On December 6, 2002, pursuant to a granted *pro forma* assignment application, Elijah Broadcasting Corporation assigned the Station to Birach. See File No. BAL-20021118ABX.

Birach did not construct the Poolesville Permit, but instead filed two separate requests for additional time which the Media Bureau (Bureau) denied. See Letter from Peter H. Doyle, Audio Division, Media Bureau, Federal Communications Commission, to Lauren A. Colby, Esq. (May 18, 2004) and Letter from Peter H. Doyle, Audio Division, Media Bureau, Federal Communications Commission, to Lauren A. Colby, Esq. (Jun. 15, 2004). On February 20, 2008, the Commission denied Birach's request for review. See *Birach Broad. Corp.*, Memorandum Opinion and Order, 23 FCC Rcd 3141 (2008).

⁷ Previously, Station WGOP(AM), Pocomoke City, Maryland, Facility ID No. 5347, used the call sign WDMV(AM), and Station WDMV(AM), Walkersville, Facility ID No. 19235, operated under call sign WGOP(AM). On July 19, 2004, the stations swapped call signs. This letter identifies the stations by their current call signs.

⁸ See File No. BP-19960715AC. The WGOP(AM) Permit was granted on November 26, 2003, with a November 26, 2006, expiration date.

⁹ The Bureau extended the WGOP(AM) expiration to November 26, 2007. See Letter to Peter H. Doyle, Audio Division, Media Bureau, Federal Communications Commission, to Bruce A. Henoch, Esq. (Nov. 16, 2006). On November 8, 2007, pursuant to Birach's request, see Letter from Lauren A. Colby, Esq. to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 2, 2007), the Bureau cancelled the WGOP(AM) Permit. See *Broadcast Actions*, Public Notice, Rep. No. 26611 (rel. Nov. 13, 2007). On December 14, 2006, DRRTS filed a petition for reconsideration (WGOP(AM) Reconsideration Petition) of the WGOP(AM) Permit cancellation which cited these character allegations which it had previously raised against the WGOP(AM) permit. On February 28, 2017, the Bureau dismissed DRRTS's WGOP(AM) Reconsideration Petition. See Letter from Peter H. Doyle, Audio Division, Media Bureau, Federal Communications Commission, to Barry A. Friedman, Esq. (Feb. 28, 2017) (*February 2017 Reconsideration Letter*).

¹⁰ DRRTS opines that "rather than repeating the arguments made elsewhere, DRRTS is attaching hereto a copy of the Statement of Facts from a Final Brief [it] submitted United States Court of Appeals for the District of Columbia Circuit . . ." when it appealed the Commission's grant, in *Birach Broad. Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5015 (2001), of a 1995 WGOP(AM) renewal application, File No. Br-19950608YB (1995 WGOP(AM) Renewal). Objection at 8, and Exhibit C. DRRTS's litigation against the 1995 WGOP(AM) Renewal terminated when it did not appeal the federal court of appeals' decision upholding the grant of that application. See *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002).

In Opposition, Birach alleges that DRRTS no longer exists as a Maryland corporation and that counsel for the defunct organization “is regularly employed” by a competitor radio licensee. Birach also asserts that it did not violate Section 73.3518 by filing the instant Application because the WGOP(AM) Permit has expired. With respect to the character allegations, Birach argues that it has responded to the allegations in proceedings for the WGOP(AM) Permit and the 1995 WGOP(AM) Renewal. Regarding the Section 1.65 violation, Birach states that it is “technically true,” but it was caused by the prior counsel’s unfamiliarity with the Rules¹¹ and has been corrected with an amendment.¹²

In Reply, DRRTS claims that while the corporate charter for DRRTS lapsed it has been revived and DRRTS is currently a corporation in good standing under Maryland law. DRRTS also contends that while its counsel has represented a competitor licensee, among other broadcast licensees, there is no legal or ethical impediment to this representation. Regarding the alleged Section 1.65 violation, DRRTS disputes Birach’s claim that its prior counsel lacked knowledge of the Rules and, argues, even if true, this does not absolve Birach of the violation.¹³

According to the records of the Maryland Secretary of State, as of October 1, 2010, DRRTS ceased to exist as a Maryland corporation.¹⁴

Discussion. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended (the Act),¹⁵ provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that grant of the Application would be *prima facie* inconsistent with Section 309(a) of the Act,¹⁶ which governs our evaluation of minor change applications. Specifically, Section 309(a) provides that we are to grant an application if, upon consideration of the application and pleadings and other such matters of which we may officially take notice, we find that the public interest, convenience, and necessity will be served by the granting of such application. If, however, the applicant 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.

¹¹ Birach also claims without any evidential or legal support that “DRRTS created the alleged § 1.65 violation, by its own ‘entrapment tactics,’ [therefore] DRRTS should not be permitted to ‘take advantage’ of this minor technical violation” Opposition at 2. Because Birach provides no factual or legal basis to review this allegation we will not consider it.

¹² Birach amended the Application on February 15, 2007 to report the character allegations.

¹³ DRRTS also raises the unsupported claim that Birach compounded the alleged Section 1.65 violation by failing to serve DRRTS with a copy of amendment to the Application. The Rules, however, do not require that petitioners or objectors be served with amendments to applications. See 47 CFR 1.1204(a)(1). See also *Saga Commc’ns of Maryland*, Memorandum Opinion and Order, 21 FCC Rcd 2466, 2468, para. 6 (2006) (holding service of modification application to petitioner not required). Therefore, we will not further consider this unsupported claim.

¹⁴ Maryland Dep’t of Assessments and Taxation Business Services, Records for D07013881. See *February 2017 Reconsideration Decision* at 2 and n. 10.

¹⁵ 47 U.S.C. § 309(e).

¹⁶ 47 U.S.C. § 309(a). See e.g. *WWOR-TV, Inc.*, Memorandum Opinion and Order, 6 FCC Rcd 193, 197 n.10 (1990), *aff’d sub nom. Garden State Broad. L.P. v. FCC*, 996 F.2d 386 (D.C. Cir. 1993), rehearing denied (Sept. 10, 1993) *Area Christian Television, Inc.*, Memorandum Opinion and Order, 60 RR 2d 862, 864 (1986) (informal objections, like petitions to deny, must contain adequate and specific factual allegations sufficient to warrant the relief requested).

Inconsistent Applications. Section 73.3518 prohibits the filing of inconsistent applications while one application remains “pending and undecided.”¹⁷ The provisions of that rule section clearly are inapplicable here, as the appeal of the expiration of the Poolesville Permit does not involve the prosecution of an *application* at all. In fact, the Application was not filed until November 14, 2006, two years after the expiration of the Poolesville Permit. Thus, only the instant Application remains “pending and undecided.” We find, therefore, the claim that Birach has two inconsistent applications pending for the modification of the Station to be meritless.

Character Qualifications. We also reject DRRTS’ request that we review character allegations it previously raised involving Birach’s Station WGOP(AM). Those allegations have been previously considered and rejected. As DRRTS itself acknowledges, it unsuccessfully raised these character allegations in petitions against the WGOP(AM) Permit and the 1995 WGOP(AM) Renewal. Regarding the WGOP(AM) Permit, the Bureau dismissed DRRTS’ reconsideration petition which argued that Birach presented a false narrative to the Bureau concerning the cancelled permit.¹⁸ As for the 1995 WGOP(AM) Renewal, the Commission rejected DRRTS’s arguments when it granted the 1995 WGOP(AM) Renewal and that decision is now final.¹⁹ We will not revisit repetitive arguments that have been reviewed and rejected in other proceedings.²⁰

Failure to Timely Update the Application. Section 1.65 of the Rules requires applicants to maintain the accuracy of their applications.²¹ Generally, applicants must amend pending applications, within 30 days of the change, information that is no longer substantially accurate and complete.²² A Section 1.65 violation is potentially disqualifying only if an applicant has an intent to conceal information or if omissions of reportable information are so numerous and serious as to undermine the applicant’s basic qualifications.²³ Intentional deceit reflects upon an applicant’s basic qualifications, and “the fact of concealment may be more significant than the facts concealed.”²⁴ Intention can be inferred from

¹⁷ 47 CFR 73.3518 (“while an application is pending and undecided, no subsequent inconsistent or conflicting application may be filed by or on behalf of or for the benefit of the same applicant, successor or assignee”).

¹⁸ See *supra* note 9.

¹⁹ See *New World Radio, Inc. v. FCC*, 294 F.3d 164 (D.C. Cir. 2002). DRRTS improperly attempts to incorporate by reference arguments it raised in pleadings against the 1995 WGOP(AM) renewal. See *supra* note 10. In analogous circumstances, the Commission stated: “Such incorporation by reference is not allowed under our rules. Our rules do not allow for a ‘kitchen sink’ approach . . . rather the burden is on the Applicant to set forth fully its argument and all underlying relevant facts” *Red Hot Radio*, Memorandum Opinion and Order, 9 FCC Rcd 6737, 6745 n.63 (2004).

²⁰ See, e.g. *Principle Broad. Network*, Letter, 24 FCC Rcd 5743, 5745 (MB 2009) (declining to consider arguments made by the same parties and addressed by the Bureau in another proceeding) and *Richard R. Zaragoza*, Letter, 24 FCC Rcd 5743, 5744 (MB 2009).

²¹ 47 CFR 1.65.

²² *Id.*

²³ See *David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991) (citing *Valley Broad. Co.*, Decision, 4 FCC Rcd 2611, 2618, para. 36 (Rev. Bd. 1989) (violation of the reporting requirements is disqualifying only if evidence indicates that the applicant intended to conceal information from the Commission, or if the reporting violations are so numerous and serious as to undermine the applicant’s responsibility to be a licensee)).

²⁴ See 1986 Character Policy Statement, 102 FCC 2d at 1210, n.77 (quoting *FCC v. WOKO, Inc.* 329 U.S. 223, 227 (1946)).

motive.²⁵ In this regard, lack of candor, which can also be disqualifying, is the concealment, evasion, or other failure to be fully informative accompanied by intent to deceive.²⁶

It is undisputed that Birach failed to notify the Commission, within 30 days, of the December 14, 2006, WGOP(AM) Reconsideration Petition, viz., that it was a party to an application in which character issues had been raised. We find, however, that although Birach's delayed filing of the required amendment (on the same date that it filed its Opposition here) constitutes a violation of Section 1.65,²⁷ this singular violation does not rise to the level of a substantial and material question of fact that would render grant of the Application *prima facie* inconsistent with the public interest. Birach claims that its failure to timely update the Application was due to its prior counsel's lack of knowledge of the Rules. The Commission has long held that it will not impute a disqualifying lack of candor to an applicant where the record shows a good faith reliance on counsel.²⁸ Moreover, we find that DRRTS has failed to demonstrate that Birach intentionally concealed this information.²⁹

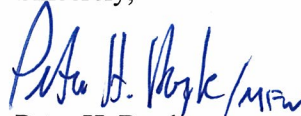
Therefore we find that DRRTS has failed to raise a substantial and material question of fact that would preclude grant of the Application. We do, however, admonish Birach for failing to timely file the required Section 1.65 amendment.

Conclusions/Actions. Accordingly, IT IS ORDERED, that the January 19, 2007, Informal Objection filed by Damascus Residents for Responsible Tower Siting, Inc., IS GRANTED to the extent indicated above AND DENIED in all other respects.

IT IS FURTHER ORDERED, that the Birach Broadcasting Corporation IS ADMONISHED for its apparent violation of Section 1.65 of the FCC's Rules.

IT IS FURTHER ORDERED, that Application BP-20061114ABV filed by Birach Broadcasting Corporation for minor modification of the license for WDMV(AM), Walkersville, Maryland IS GRANTED.

Sincerely,



Peter H. Doyle
Chief, Audio Division
Media Bureau

²⁵ See, e.g., *RKO General, Inc.*, Decision, 4 FCC Rcd 4679, 4684, para. 29 (Rev. Bd. 1989).

²⁶ See *San Francisco Unified School District*, Hearing Designation Order and Notice of Apparent Liability, 19 FCC Rcd 13326, 13334 para. 19 (2004).

²⁷ See *supra* note 12.

²⁸ *WEHR, Inc. v. FCC*, 420 F.2d 158, 167-168 (D.C. Cir. 1969) (good faith reliance on counsel is relevant to determining candor); *Prof'l Radio, Inc.*, Memorandum Opinion and Order, 2 FCC Rcd 6666 (1987) (applicant not penalized for erroneous site designation made on advice of counsel); *Broad. Ass'n of Colorado*, Memorandum Opinion and Order, 104 FCC 2d 16 (1986) (applicant improperly certifying on advice of counsel not disqualified).

²⁹ The party alleging misrepresentation has the burden of proof to make a *prima facie* showing of an intent to deceive. See e.g., *Merrimack Valley Broad., Inc.* Memorandum Opinion and Order, 99 FCC 2d 680, 683 n.9 (1984).